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THE MEDIA'S STANDING TO CHALLENGE DEPARTURES FROM OPEN JUSTICE

Abstract

Open justice is essential to the integrity of our justice system. When a court departs from open justice, it is appropriate that media organisations are able to question whether the circumstances warrant the departure. This article addresses the standing of media organisations to challenge departures from open justice. In some jurisdictions, the issue is resolved by statute. However, the position is not uniform around Australia. The article explains the position under the differing statutes and at common law. It focuses on the common law position, where the standing of media organisations is controversial. It argues that at common law, media organisations may intervene as of right, as a matter of natural justice, in any proceedings contemplating a departure from open justice.

I Introduction

The principle of open justice is an essential characteristic of courts, but it is not an absolute principle.[1] A court may depart from open justice by: closing proceedings to the public,[2] concealing information from those present in court,[3] or restricting publication of material arising from the proceedings.[4] Superior courts have the power to depart from open justice in exercise of their inherent jurisdiction.[5] Inferior courts and federal courts created by statute have the same power in

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1 *Hogan v Hinch* (2011) 243 CLR 506, 530 [20] (French CJ).

2 *John Fairfax Group Pty Ltd (recs and mgrs apptd) v Local Court of New South Wales* (1991) 26 NSWLR 131, 160 (Mahoney JA) ('*John Fairfax Group*').

3 Ibid 160–1 (Mahoney JA).

4 On the distinction between these proceedings suppression orders and more 'general' suppression orders, see *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 258–9 [34]–[36] (Wayne CJ and Byrne AJA).

5 *Hogan v Hinch* (2011) 243 CLR 506, 531 [21] (French CJ).

exercise of analogous implied powers.[6] Courts may also depart from open justice in exercise of statutory powers.[7] When these powers are exercised, it is appropriate for those with the greatest stake in open justice to question whether the circumstances warrant the departure. Journalists, and the media organisations behind them, have the greatest stake in open justice in Australia. For some, this is an obvious truism. For others, this position is contentious. This article argues that when courts are closed, the media is aggrieved in a way that the remainder of society is not. The issue is important because in some cases it will determine whether an organisation that reports the news — a 'media organisation' — has standing to challenge a departure from open justice.

To an extent, this was addressed by model legislation on suppression and non-publication orders developed by the Standing Committee of Attorneys-General[8] in 2010.[9] The model legislation was implemented by New South Wales in the *Court Suppression and Non-publication Orders Act 2010* (NSW) and in a modified form in relation to federal courts via the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth).[10] Other jurisdictions did not implement the model legislation. For much of Australia, the standing of media organisations is an issue addressed by alternative legislation, or the common law.

The common law position is contentious. In Western Australia, a majority of the Supreme Court held in *Re Bromfield; Ex parte WA Newspapers Ltd*[11] that a newspaper publisher had sufficient interest to establish standing before a magistrate to oppose the making of a suppression order. That decision is contrary to New South Wales Supreme Court decisions, including *John Fairfax Group*[12] and *Nationwide News Pty Ltd v District Court of New South Wales*.[13] This article argues that the majority in *Re Bromfield* ought to be followed, and that the weight of authority provides that at common law, media organisations may intervene as of right, as a matter of natural justice, in any proceedings contemplating a departure from open justice.

The article is structured as follows. Part II looks at legislation providing standing to challenge departures from open justice. The legislative provisions are then compared

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6 Ibid 531 [21] n 156.

7 Eg *Court Suppression and Non-publication Orders Act 2010* (NSW) s 7. See Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008-12' (2013) 35 *Sydney Law Review* 671, 676–8.

8 This Standing Committee was replaced by the Standing Council on Law and Justice, which was, in turn, replaced by the Law, Crime and Community Safety Council in December 2013.

9 Standing Committee of Attorneys-General, '*Model Court Suppression and Non-publication Orders Bill 2010*' (2010) s 9 ('Draft Model Bill').

10 Bosland and Bagnall, above n 7, 673.

11 (1991) 6 WAR 153 ('*Re Bromfield*').

12 (1991) 26 NSWLR 131, 167 (Mahoney JA).

13 (1996) 40 NSWLR 486, 489 (Mahoney P), 496 (Priestley JA), 497 (Meagher JA) ('*Nationwide*').

to the common law position. Part III explains how non-parties may become involved in adversarial proceedings, and addresses the controversy over the common law standing of media organisations in more detail. Parts IV–VI seek to resolve that controversy. Part IV is concerned with the jurisdiction of courts to permit non-parties to become involved in proceedings by way of 'intervening', and Part V explains the test for permitting intervention. Part VI applies the preceding analysis to media organisations.

II The Media's Standing Under Statute

A *The Model Legislation*

The model legislation provides courts with statutory powers to make suppression or non-publication orders.[14] A 'suppression order' is defined as one 'that prohibits or restricts the disclosure of information (by publication or otherwise)', whereas a 'non-publication order' is one 'that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information).'[15] When a court makes one of these orders, it will depart from open justice.

Section 9 of the model legislation sets out the procedure for making an order. The section provides certain persons with an entitlement to 'appear and be heard' by the court on an application for a suppression or non-publication order.[16] From the plain language of the section, the relevant persons are given rights that are less than those of the parties to the proceedings: parties can do more than 'appear and be heard'.[17]

A 'news publisher' is given that entitlement in s 9(2)(d), and is defined as 'a person engaged in the business of publishing news or a public community broadcasting service engaged in the publishing of news through a public news medium.'[18] The entitlement is also provided to 'any other person who, in the court's opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should be made.'[19]

The model legislation does not displace courts' other powers in this area. Section 4 provides that the model legislation 'does not limit or otherwise affect any inherent jurisdiction or any powers that a court has apart from this Act to regulate its proceedings or to deal with a contempt of the court.' This provision is important because, under the analysis below, those powers provide media organisations with rights that go beyond those provided by s 9 of the model legislation.

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14 Draft Model Bill s 7.

15 Ibid s 3.

16 Ibid s 9(2).

17 See *Department of Health and Community Services v Popovic* [1994] 1 VR 697, 704 (Beach J); *Herald & Weekly Times Ltd v Williams* (2003) 130 FCR 435.

18 Draft Model Bill s 3.

19 Ibid s 9(2)(e).

B *New South Wales and Federal Legislation*

The Parliament of New South Wales enacted legislation substantially identical to the draft model legislation in the *Court Suppression and Non-publication Orders Act 2010* (NSW) ('*NSW Act*'). Section 9 of the *NSW Act* reads like s 9 of the model legislation, but for one difference. Instead of 'news publisher', the *NSW Act* refers to a 'news media organisation', which is defined as 'a commercial enterprise that engages in the business of broadcasting or publishing news or a public broadcasting service that engages in the dissemination of news through a public news medium.'[20]

This distinction is probably insignificant. A 'business' may be reasonably defined as a 'commercial enterprise'. The *NSW Act* refers to 'broadcasting or publishing news', but 'broadcasting' is considered a form of 'publication' in media law jurisprudence.[21]

The only distinction to worry about is the use of 'organisation' as opposed to 'publisher'. 'Organisation', unlike 'publisher', implies that more than one person is a part of it. This might have been intended to exclude individuals working by themselves, such as bloggers or freelance journalists. If so, an individual would need to satisfy the court under s 9(2)(e) that he or she 'has a sufficient interest in the question'. Nonetheless, the definition in the *NSW Act* is broad enough to cover individuals working by themselves.

The Parliament of Australia substantially enacted the model legislation by amending Acts constituting federal courts, including the *Family Law Act 1975* (Cth), the *Federal Court of Australia Act 1976* (Cth), the *Federal Magistrates Act 1999* (Cth),[22] and the *Judiciary Act 1903* (Cth). The implementing Act, the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth), preserves the term 'news publisher' used in the model legislation.

C *Victoria*

The *Open Courts Act 2013* (Vic) is also based on the model legislation, but has several differences. In the Bill's second reading speech, it was described as 'framed having regard' to the model legislation, but applying 'a more rigorous standard for making suppression orders in Victoria'.[23]

Section 19 provides 'news media organisations' and sufficiently interested persons with the entitlement to 'appear and be heard' on an application for a 'proceeding suppression order'.[24] The term 'proceeding suppression order' denotes an order that

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20 *Court Suppression and Non-publication Orders Act 2010* (NSW) s 3.

21 See, eg, *Sands v Channel Seven Adelaide Pty Ltd* (2009) 104 SASR 452; *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183.

22 As amended by the *Federal Circuit Court of Australia (Consequential Amendments) Act 2013* (Cth).

23 Victoria, *Parliamentary Debates*, Legislative Assembly, 27 June 2013, 2418 (Robert Clark, Attorney-General).

24 *Open Courts Act 2013* (Vic) s 19(2)(e)–(f).

prohibits or restricts the disclosure by publication or otherwise of a report of the whole or any part of a proceeding, or any information derived from a proceeding.[25] By linking the relevant information to the proceeding, a proceeding suppression order is significantly narrower than the conjunction of suppression orders and non-publication orders that is addressed in the model legislation. The Victorian Act distinguishes proceeding suppression orders from 'broad suppression orders'[26] and 'closed court orders'.[27] The distinction follows the authority of the Victorian Court of Appeal in *News Digital Media Pty Ltd v Mokbel*, which held that proceeding and broad suppression orders are 'essentially different', and 'raise very different issues of policy and jurisdiction'.[28] The procedural rights afforded to non-parties in respect of proceeding suppression orders are not afforded to non-parties in respect of broad suppression orders or closed court orders.

The Victorian Act also departs from the model legislation jurisdictions by explicitly making the point that 'an applicant for a proceeding suppression order is not required to give notice of the application' to the persons entitle to appear and be heard.[29] But an applicant for a suppression order[30] is required to give the court three days' notice.[31] The court must then take reasonable steps to provide notice of the application to the media.[32] The notice mechanism provided by these sections enables media organisations to decide whether to challenge the prospective departure from open justice.

Another difference in the Victorian Act is its approach to courts' jurisdiction, apart from the Act, to regulate their proceedings. Section 29 makes the familiar reservation: 'Subject to section 28, nothing in this Part limits or affects any jurisdiction or any power that a court or tribunal has apart from this Act to regulate its proceedings.' However, the reservation is framed in relation to closed court orders only, and not in relation to proceeding or broad suppression orders. On the face of it, the provisions regulating suppression orders displace the common law principles. This is consistent with the Bill's second reading speech: 'The bill will exclude the operation of common-law or implied powers to make [suppression and closed-court] orders,

25 Ibid s 17.

26 Ibid pt 4.

27 Ibid pt 5.

28 (2010) 30 VR 248, 258 [34] (Wayne CJ and Byrne AJA).

29 *Open Courts Act 2013* (Vic) s 19(3). See further Des Butler and Sharon Rodrick, *Australian Media Law* (Lawbook, 5th ed, 2015) 297–306.

30 Which means (a) a proceeding suppression order, (b) an interim order, (c) broad suppression orders (made under ss 25 or 26 of the Act), or (d) an order made by the Supreme Court in the exercise of its inherent jurisdiction that prohibits or restricts the publication or other disclosure of information in connection with any proceeding, whether or not the information was derived from the proceeding: *Open Courts Act 2013* (Vic) s 3.

31 Ibid s 10(1).

32 Ibid s 11(1).

except for the inherent jurisdiction of the Supreme Court.'[33] It is confirmed by s 5 of the Act, which abrogates courts' common law powers in respect of certain departures from open justice.[34]

The sum of these principles is that in Victoria, media organisations will have standing to challenge departures from open justice: (1) in relation to proceeding suppression orders, under the *Open Courts Act 2013* (Vic) s 19(2)(e); and (2) in relation to other departures from open justice, if provided for by common law principles. Thus, although the media enjoys statutory rights in Victoria, the common law principles are still relevant.

D *South Australia*

South Australia has not enacted the model legislation. However, s 69A of the *Evidence Act 1929* (SA) deals with suppression orders and provides certain persons with the entitlement 'to make submissions to the court on the application', and 'with the permission of the court, call or give evidence in support of those submissions'.[35] The other jurisdictions do not provide an equivalent statutory right to call or give evidence.

Section 69A is quite different to both the model legislation jurisdictions and the Victoria position. Firstly, 'suppression order' is defined as an order forbidding the publication of certain forms of evidence, the names of various persons involved in the proceedings, or of any other material tending to identify any such persons.[36] Non-parties would not have those statutory rights to appear in relation to a decision to close a court. Secondly, s 69A does not attribute the procedural rights to news publishers or news media organisations, but to 'a representative of a newspaper or a radio or television station'.[37] This language is dated, and ought to be amended to cover new forms of news media, such as wholly online publications.

E *The Remaining States and Territories*

The remaining states and territories do not provide media organisations with the kinds of statutory rights previously described. This does not mean that media organisations cannot be heard in these jurisdictions. Rather, it means that media organisations do not enjoy the benefit of an 'entitlement' recognised by statute. Instead, they must rely on general principles regulating the involvement of non-parties in litigation.

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33 Victoria, *Parliamentary Debates*, Legislative Assembly, 27 June 2013, 2418 (Robert Clark, Attorney-General).

34 Note that s 7(d)(i) provides that the Act does not affect common law powers to make pseudonym orders.

35 *Evidence Act 1929* (SA) s 69A(5).

36 Ibid s 68.

37 Ibid s 69A(5)(a)(iii).

III The Media's Standing at Common Law

A *Non-Party Involvement in an Adversarial Justice System*

The essential function of judicial power is to resolve disputes, quell controversies, and ascertain and determine rights and liabilities.[38] There is a tension between that function and the judge's object of doing justice according to law.[39] The parties to a dispute will make submissions in their self-interest, and in doing so they may avoid certain issues. If our judicial system were merely designed to resolve disputes, this would be entirely desirable. However, because individual decisions impact the broader public, in some cases, this is not desirable. By failing to ventilate important perspectives on issues of public significance, the adversarial system has the potential to create injustice.[40] So it is important that non-parties have the opportunity to be heard when appropriate. The 'appropriate' caveat reflects the practical concern that an open-ended process would be costly and inefficient.[41] The common law has developed to map the outline of appropriateness of non-party involvement. That outline is drawn with the concepts of standing, intervention and amicus curiae.

In *Allan v Transurban City Link Ltd*[42] the High Court held that 'standing' is a metaphor to describe the interest required, apart from a cause of action as understood at common law, to obtain remedies.[43] To have standing, a plaintiff or applicant must have a sufficient interest in the subject matter of the proceedings and the relief sought.[44] Usually, standing is only relevant to the issue of whether proceedings can be commenced at all,[45] thus it is relevant to those media challenges made by the commencement of proceedings.[46] A broader meaning of 'standing' is simply the right

38 *South Australia v Totani* (2010) 242 CLR 1, 162 [444] (Kiefel J).

39 *Jones v National Coal Board* (1957) 2 QB 55, 63 (Denning LJ).

40 See generally Ray Finkelstein, 'The Adversarial System and the Search for Truth' (2011) 37(1) *Monash University Law Review* 135.

41 *Tindle v Ansett Transport Industries (Operations) Pty Ltd* (1990) 21 NSWLR 492, 497 (Kirby P, Clark and Handley JJA).

42 (2001) 208 CLR 167, 174 [15] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

43 Ibid 174 [15] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ), cited in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 659 (Gummow, Hayne, Crennan and Bell JJ) ('*Plaintiff S10*').

44 *Re Bromfield* (1991) 6 WAR 153, 162 (Malcolm CJ); *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 547–8 (Mason J); *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 42 (Stephen J).

45 Dorne Boniface, Miiko Kumar and Michael Legg, *Principles of Civil Procedure in New South Wales* (Thomson Reuters, 2nd ed, 2011) 335 [6.20]; Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985) 2.

46 See, eg, in the *Police Tribunal* case a newspaper publisher commenced proceedings seeking prerogative relief in respect of a decision of the Police Tribunal suppressing publication of evidence; standing was a central issue. See *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 470 (Mahoney JA). See also *Re Bromfield* (1991) 6 WAR 153, 168 (Malcolm CJ).

to appear in court and argue a case.[47] This definition does not chain the right to the *commencement* of proceedings. Non-parties can have standing to appear and argue a case in existing proceedings in which they are strangers by way of intervention.

Questions of *locus standi* and non-party intervention are closely related.[48] In *Corporate Affairs Commission v Bradley*[49] the New South Wales Court of Appeal held that a person accepted by the court as an intervener becomes a party to the proceedings with all the privileges of a party, including the ability to appeal.[50] 'Intervention' involves the application of principles of standing to non-parties approaching proceedings already commenced. The common thread between the concepts of standing and intervention is the issue of the appropriate parties to legal proceedings.

An amicus curiae or 'friend of the court' is a person who is allowed to put submissions to court not as a party, but in order to assist the court on a point of fact or law.[51] The role of an amicus must be distinguished from an intervener.[52] Amici curiae do not acquire the procedural rights of parties.[53] They appear entirely in the court's discretion, and only if they can assist the court in a way in which the court would not otherwise have been assisted.[54] Although, like a party with standing, an amicus is allowed to appear in court, it does not do so *as of right*, whereas an intervener is often entitled to present argument as of right.[55] Strictly speaking an amicus does not 'argue a case'.

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47 LexisNexis, *Encyclopaedic Australian Legal Dictionary* (at January 2011) 'Locus Standi'.

48 Law Reform Committee of South Australia, *Relating to the Law Governing Locus Standi— Non-Party Interventions and Amici Curiae in Relation to Proceedings in Civil Jurisdiction*, Report No 67 (1982) 4. See also Enid Campbell, 'Intervention in constitutional cases' (1998) *9 Public Law Review* 255, 262.

49 [1974] 1 NSWLR 391, 39 (Hutley JA, Reynolds and Glass JJA agreeing) ('*Bradley*').

50 *Re Medical Assessment Panel; Ex parte Symons* (2003) 27 WAR 242 (*'Symons'*). See also, eg, *United States Tobacco Co v Minister for Consumer Affairs* (1988) 19 FCR 184; see further Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20 *Adelaide Law Review* 159, 159.

51 George Williams, 'Amicus Curiae and Intervener in The High Court of Australia: Comparative Analysis' (2000) 28 *Federal Law Review* 365, 366.

52 *Wilson v Manna Hill Mining Co Pty Ltd* (2004) 51 ACSR 404, 414 [87] (Lander J); *Perdaman Chemicals and Fertilisers Pty Ltd v Griffin Coal Mining Company Pty Ltd (No 7)* 92 ACSR 281, 301 [112]–[113] (Edelman J).

53 Campbell, above n 48, 255.

54 *Levy v Victoria* (1997) 189 CLR 579, 604 (Brennan CJ) ('*Levy*'); *Bradley* [1974] 1 NSWLR 391, 399 (Hutley JA); *Wilson v Manna Hill Mining Co Pty Ltd* (2004) 51 ACSR 404, 414–15 (Lander J).

55 Anthony Mason, 'Interveners and Amici Curiae in the High Court: A Comment' (1998) 20 *Adelaide Law Review* 173, 174.

B *The Form of the Media's Challenge*

When a media organisation purports to challenge a departure from open justice in the jurisdictions that afford media organisations statutory rights, the media organisation is exercising a statutory entitlement 'to appear and be heard'. When the same occurs in the jurisdictions that do not afford media organisations those statutory rights, the position is less clear.

Leading authorities in this area do not actually use the terms 'intervene' or 'amicus'.[56] Instead, they speak of a 'right to be heard'.[57] The language of the leading judgments and the principles cited indicate that the media organisations are *challenging* a departure from open justice by actively seeking an outcome, in the form of orders.[58] For example, in *Medical Practitioners Board*,[59] the publisher sought to 'apply' to have a suppression order lifted. The better view is that, when media organisations seek court orders in cases of departures from open justice, just as other parties to the proceedings would, they are intervening rather than appearing as amici.

Intervention is superior to appearing as amicus curiae in a number of respects. With substantially the same benefits as a party to the proceedings, interveners enjoy rights that amici are not entitled to. Interveners can seek orders, but amici cannot. Interveners may have standing to appeal a decision when amici would not.[60] It is telling that in *John Fairfax Group* the publisher did not even seek to appear as an amicus.[61] The leading authority on intervention, *Levy*, allowed intervention by media organisations and confined amici to written submissions.[62] Further, an appearance as amicus is entirely a matter of discretion.[63] As explained below, this is not necessarily the case

56 See, eg, *Herald & Weekly Times Ltd v Medical Practitioners Board* (Vic) [1999] 1 VR 267 ('*Medical Practitioners Board*'); *Re Bromfield* (1991) 6 WAR 153 (cf 182 Rowland J). Cf *John Fairfax Group* (1991) 26 NSWLR 131, 151 (Kirby P); *Nationwide* (1996) 40 NSWLR 486, 499 (Meagher JA).

57 See, eg, *Medical Practitioners Board* [1999] 1 VR 267, 276–7 [33] (Hedigan J); *Re Bromfield* (1991) 6 WAR 153, 194 (Nicholson J).

58 Or revocation of orders, see, eg, *Re Bromfield* (1991) 6 WAR 153.

59 [1999] 1 VR 267, 267 (Hedigan J).

60 Explained below.

61 *John Fairfax Group* (1991) 26 NSWLR 131, 151, (Kirby P). See Michael Meek, 'Media — Non-party — Standing to Make Representations Regarding Orders Imposing Reporting Restrictions' (1993) 67 *Australian Law Journa*l 162, 162.

62 *Levy* (1997) 189 CLR 579, 605 (Brennan J).

63 Ibid 604 (Brennan CJ); *Bradley* [1974] 1 NSWLR 391, 399 (Hutley JA); *Wilson v Manna Hill Mining Co Pty Ltd* (2004) 51 ACSR 404, 414–15 (Lander J).

for interveners. For these reasons, it may be more valuable for a media organisation to seek intervention rather than mere appearance as amicus curiae.[64]

C *The Uncertainty of the Media's Standing at Common Law*

The media's standing to challenge a departure from open justice depends on the nature of the challenge and the forum in which it is made.[65] As observed by Mason J in *Robinson v Western Australian Museum*,[66] speaking on the interest sufficient for *locus standi*: 'The cases are infinitely various and so much depends in a given case on the nature of the relief which is sought, for what is a sufficient interest in one case may be less than sufficient in another.' The remainder of this Part examines the uncertainty over the media's standing at common law in various contexts. It looks at: (1) an application to the court or tribunal at first instance; (2) an appeal of a decision to depart from open justice; and (3) an application to a superior court for relief in respect of a decision to depart from open justice. The position is clearest in relation to the third category, which is addressed first.

1 *Standing to Seek Relief from a Superior Court*

If a magistrate or inferior court judge makes an order departing from open justice, a media organisation might seek judicial review from a superior court by applying for a prerogative remedy, an injunction or a declaration. Numerous cases have held that media organisations have the standing to seek this review.[67] More recently, French CJ made the point in *Hogan v Hinch*.[68] The standing considered in these cases might be distinguished from the standing to oppose an order at first instance; the latter would involve intervening, and the former does not. However, as discussed, the principles governing non-party intervention are closely related to the principles of *locus standi* applicable here.

In *John Fairfax & Sons Ltd v Police Tribunal of New South Wales*,[69] the Court found that the newspaper publisher had standing to seek prerogative relief and went on to

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64 In practice, the distinction may be of little significance: an intervener may be subject to orders that confine their role. However, the Parts below explain that this will occur when intervention occurs in exercise of the court's discretion, rather than by right. This article argues that media organisations should be able to intervene *by right* in appropriate cases.

65 *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 (1986) 5 NSWLR 465, 468 (Mahoney JA).

66 (1977) 138 CLR 283, 327–8, cited in *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 547–8 (Mason J); *Re Bromfield* (1991) 6 WAR 153, 162 (Malcolm CJ).

67 See the review of Hedigan J in *Medical Practitioners Board* [1999] 1 VR 267, 296–7. *Re Bromfield* (1991) 6 WAR 153 is an example. Media organisations have 'standing' in these cases, in the sense that they have a right to seek a remedy: *Allan v Transurban City Link Ltd* (2001) 208 CLR 167.

68 (2011) 243 CLR 506, 540–1 [43] (French CJ).

69 (1986) 5 NSWLR 465 ('*Police Tribunal*').

quash a decision to suppress the identity of an alleged police informer. In making this order, Mahoney JA cited English cases such as *R v Russell; Ex parte Beaverbrook Newspapers Ltd*,[70] which support the proposition that a newspaper publisher has standing as a 'person aggrieved' in these circumstances.[71]

Whatever the uncertainty in relation to other forms of challenge to departures from open justice, media organisations clearly have standing in these cases. This favours recognition of standing at first instance too. As recognised by Kirby P in *John Fairfax Group*,[72] 'it would be a curious result if they were to enjoy standing to approach the Supreme Court but to lack it before the Local Court dealing with the very same matter'. However, as his Honour continued, 'curiosities are not unknown to the law'.[73]

2 *Standing to Oppose an Order at First Instance*

This is a vexed area of law. More than a decade ago Hedigan J observed in *Medical Practitioners Board* [74] that the issue of the standing of the media to make a first instance application[75] to oppose an order departing from open justice[76] has led to the expression of differing judicial opinions.

In *Nationwide*[77] the New South Wales Court of Appeal held that representatives of the media have no absolute right to be heard in relation to the making of a suppression order or a pseudonym order.[78] President Mahoney cited the majority decision in *John Fairfax Group*[79] in support of this proposition.[80] The *Nationwide* case is also authority for the proposition that media organisations do have a right to seek leave to be heard.[81] Butler and Rodrick cite *Nationwide* and state that the current law is that

70 [1969] 1 QB 342. See also *R v Blackpool Justices; Ex parte Beaverbrook Newspapers Ltd* [1972] 1 WLR 95.

71 *Police Tribunal* (1986) 5 NSWLR 465, 468, 470 (Mahoney JA). The same point was made by Hunt J in *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1, 6–9. However, his Honour also made the point that even a 'stranger' can seek prerogative relief to ensure a tribunal is not acting in excess of jurisdiction. See also the dictum of Kirby P in *John Fairfax Group* (1991) 26 NSWLR 131, 151.

72 (1991) 26 NSWLR 131, 151 (Kirby P).

73 Ibid.

74 [1999] 1 VR 267, 297.

75 To an inferior court or tribunal, or even a superior court at first instance.

76 Which Hedigan J framed in a limited way, as an order 'restricting publication in whole or in part': [1999] 1 VR 267, 297.

77 (1996) 40 NSWLR 486, 489 (Mahoney P), 496 (Priestley JA), 497 (Meagher JA).

78 The case was cited by Whealy J to make the same point in: *Regina v Lodhi* (2006) 163 A Crim R 448, 474 [124].

79 It is notable that the cited majority was a bare one that included Mahoney JA, as he then was, which was juxtaposed to Kirby P's leading dissent: *John Fairfax Group* (1991) 26 NSWLR 131, 152–3 (Kirby P).

80 *Nationwide* (1996) 40 NSWLR 486, 491 (Mahoney P).

81 See Ibid 498 (Priestly JA).

media organisations have no absolute right to be heard,[82] but do have a less extensive right to seek leave to be heard.[83] Respectfully, this article argues that they are wrong.

In *Medical Practitioners Board*[84] a newspaper publisher sought to be heard by the Board in relation to a pseudonym order. The Board decided that the publisher did not have standing to apply to it to have the order lifted. In a judgment quashing the pseudonym order, Hedigan J held in obiter that the finding that the publisher had no standing 'was probably incorrect'.[85] However it was also held that 'it is entirely up to the relevant tribunal to decide the circumstances and time at which it will hear any such application, consistent with the efficient and just disposition of the dispute committed to it for determination'.[86] The case affirms the view that the media has no 'absolute right' to be heard, but can be heard. As expressed in *Nationwide,* the 'entitlement to be heard depends upon the nature of the order and the effect that it has upon the media interest'.[87]

The majority in *Re Bromfield* expressed a different view.[88] *Re Bromfield* concerned an application by West Australian Newspapers Ltd (WAN) to seek judicial review of a decision of Magistrate Bromfield to suppress publication of all details of a criminal hearing. Counsel for WAN had sought to be heard by Magistrate Bromfield in relation to the continuation of the suppression order at the conclusion of the preliminary hearing, which was denied.

Chief Justice Malcolm and Nicholson J each found that the Magistrate's decision to suppress publication was of such a nature that WAN had a right to be heard. The Chief Justice reasoned that WAN was 'directly affected' by the suppression.[89] Citing *Attorney-General v Leveller Magazine Ltd*,[90] his Honour held that the fact WAN was bound by the order on pain of contempt meant that it had an interest in the subject matter of the proceedings which gave rise to a right to be heard.[91] Adopting that reasoning, a media organisation will have standing to challenge a departure from open justice at first instance, no matter if the departure is either proposed to be made or already made, if the departure could result in the organisation being in contempt of court.[92] On this view, media organisations have an absolute right to be heard if acting contrary to the departure would place the media in contempt.

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82 Unless afforded that right by legislation.

83 Butler and Rodrick, above n 29, 270–272.

84 [1999] 1 VR 267.

85 Ibid 298.

86 Ibid 297 (Hedigan J).

87 *Nationwide* (1996) 40 NSWLR 486, 492 (Mahoney P).

88 This view has been followed, see eg, *Queensland v Nuttall* [2007] QSC 79 (22 February 2007) (Moynihan J); *Mills v Hendriksen* (2008) 184 A Crim R 212, 225 (Halsuck J).

89 *Re Bromfield* (1991) 6 WAR 153, 169.

90 [1979] AC 440, 451–2 (Lord Diplock).

91 *Re Bromfield* (1991) 6 WAR 153, 169, 171 (Malcolm CJ).

92 Ibid.

Justice Nicholson came to the same conclusion, but relied instead on WAN's identity as a newspaper publisher to make out the 'sufficient interest'. His Honour cited Mason J in *Kioa v West*,[93] where it was held that a person must be afforded natural justice whenever a decision will deprive a person of a right, interest or legitimate expectation of a benefit.[94] Evoking that language his Honour held that the liberty WAN usually enjoyed to report the news and the nature of WAN's business gave rise to an 'interest or legitimate expectation of benefit' which meant that the Magistrate had denied WAN natural justice.[95] The Magistrate's duty to afford WAN natural justice meant that, at a minimum, WAN should have been given a reasonable opportunity to present its case at first instance.[96]

In dissent, Rowland J held that WAN's financial interest in reporting the news was insufficient to support a duty on the part of the Magistrate to afford WAN natural justice.[97]

In the *Police Tribunal*[98] case McHugh JA considered, in obiter, the position if an invalid order departing from open justice had been binding on the applicant newspaper publisher. His Honour held, consistently with Malcolm CJ in *Re Bromfield*, that such an order would have directly affected the applicant. Nonetheless, his Honour found that the applicant had no absolute right to be heard by the decision-maker at first instance.[99] This characterisation of the effect on the applicant is ultimately supportive of the view that media organisations have a right to be heard at first instance in relation to departures from open justice.

We are left with an inconsistency in the law: the majority view in *Re Bromfield* is inconsistent with the majority in *John Fairfax Group*, and later, *Nationwide*.[100] The key difference is their characterisation of the effect of the departure on the media organisations' interests.

It is notable that the *Re Bromfield* judgment was dated 1 January 1991. The bare majority judgment in *John Fairfax Group* was dated 24 December 1991. In the latter case, Kirby P cited the majority in *Re Bromfield* as illustrative of the view that members of the media have a 'special interest' in departures from open justice.[101]

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93 (1985) 159 CLR 550, 582–4 ('*Kioa*').

94 *Re Bromfield* (1991) 6 WAR 153, 188–9 (Nicholson J).

95 Ibid 193 (Nicholson J).

96 See, eg, *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118 (Tucker LJ).

97 *Re Bromfield* (1991) 6 WAR 153, 185.

98 (1986) 5 NSWLR 465, 482.

99 Ibid.

100 Textbooks such as Butler and Rodrick favour the view that media organisations have no absolute right to be heard at first instance in relation to departures from open justice: see Butler and Rodrick, above n 29, 270–272.

101 *John Fairfax Group* (1991) 26 NSWLR 131, 152.

Although there was support for the 'no absolute right' view before 1991,[102] it was not presented as a binding ratio. With respect, their Honours Mahoney JA and Hope AJA should have followed Malcolm CJ and Nicholson J in Western Australia. The 'right to be heard as a matter of natural justice' view, that is, the view that there is an absolute right to be heard, followed from the ratio that Magistrate Bromfield denied WAN procedural fairness. In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[103] the High Court made it clear that intermediate appellate courts in one jurisdiction should not depart from decisions made at common law by intermediate appellate courts in another jurisdiction, unless convinced that those decisions are plainly wrong.[104] If Mahoney JA and Hope AJA were deciding their case consistently with the principle in *Farah*, perhaps it would have gone differently.[105]

3 *Standing to Appeal a Decision to Depart from Open Justice*

Any right to appeal a departure from open justice will come from legislation and not the common law.[106] The statutes considered in Part II above do contain provisions in respect of appeals. The model legislation does not provide news publishers with a right to appeal in respect of a suppression order. However, media organisations can appeal if they are considered 'by the court to have a sufficient interest in the making of the order'.[107] They do have an entitlement to appear and be heard in an appeal in respect of a suppression order,[108] if, for example, that appeal is brought by someone else. This is the position in New South Wales[109] and federal courts.[110] The *Open Courts Act 2013* (Vic) contains no clear right of appeal, although s 15 provides that a court may review a suppression order on the application of a news media organisation.[111] Media organisations are in a slightly stronger position in South Australia. Under s 69AC(2)(c) of the *Evidence Act 1929* (SA), a representative of newspaper, radio or television station has a right to appeal a suppression order.

It must be remembered though that these statutes provide for *statutory* suppression orders. The rights of appeal provided by those statutes relate to decisions to make, or not to make, statutory suppression orders. They have little relevance to jurisdictions that lack equivalent legislation.

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102 See, eg, *Police Tribunal* (1986) 5 NSWLR 465, 482 (McHugh JA); *Attorney-General for New South Wales v Mayas Pty Ltd* (1988) 14 NSWLR 342 ('*Mayas*').

103 (2007) 230 CLR 89, 150–1 [135] ('*Farah*').

104 Ibid.

105 Of course, *Farah* came years later. But, cf, *Mayas* (1988) 14 NSWLR 342.

106 'Appeals are creatures of statute': Mark Leeming, *Authority to Decide — The Law of Jurisdiction in Australia* (Federation Press, 2012) 278.

107 Draft Model Bill s 9(1)(b).

108 Ibid s 9(2)(d).

109 *Court Suppression and Non-publication Orders Act 2010* (NSW) s 14(3)(d).

110 See generally *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth).

111 *Open Courts Act 2013* (Vic) s 15(1)(b)(v).

For jurisdictions like Western Australia, media organisations will need to appeal to the 'usual' statutory authorities in order to appeal. For example, the Court of Appeal of the Supreme Court of Western Australia gains jurisdiction from s 58 of the *Supreme Court Act 1935* (WA), which is exercised in accordance with the *Supreme Court (Court of Appeal) Rules 2005* (WA). In those jurisdictions, the question is whether a media organisation, as a non-party, has a right to appeal a decision made in proceedings to which it is not a party. A judgment is not binding on a person who was not a party to the proceedings in which it was granted and so generally a non-party has no right of appeal.[112]

The issue was considered in *Herald & Weekly Times Ltd v Williams*.[113] The Federal Court considered a publisher's standing to appeal a decision under s 24 of the *Federal Court of Australia Act 1976* (Cth), prior to that Act's amendment by the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth), in circumstances where the publisher was not a party. It held that the non-party is usually required to show it is 'aggrieved', 'prejudicially affected' or 'sufficiently interested' in the proceedings to get leave to appeal.[114]

Although the standing to appeal will depend on the legislation relevant to the situation, as a general proposition, this position ought to be followed.[115] Media organisations are affected by decisions to depart from open justice and so should have a right to appeal such decisions. Thus French CJ held in *Hogan v Hinch* that where legislation provides for a general right of appeal from a decision by a judge, a media organisation will generally have standing in an appellate court to challenge the order by way of appeal.[116]

4 *Conclusions on the Media's Standing at Common Law*

An orthodox view of the current law is that: (1) media organisations do not have an absolute right to be heard at first instance; (2) media organisations do have a right to seek leave to be heard at first instance; (3) media organisations have standing to seek judicial review in respect of a departure from open justice; and (4) media organisations might have standing to appeal a decision to depart from open justice, depending on the statute and their rights at first instance.[117] Western Australians face a challenge in that the majority in *Re Bromfield* contradicts the first proposition.

112 *Gracechurch Holdings Pty Ltd v Breeze* (1992) 7 WAR 518, 522 (Ipp J); *Helicopter Sale (Australia) Pty Ltd v Rotor-Work Pty Ltd* (1974) 132 CLR 1, 14 (Stephen J). See Christopher Kendall and Jeremy Curthoys, LexisNexis, *Civil Procedure Western Australia* (at October 2013) [2450.15].

113 (2003) 130 FCR 435.

114 Ibid (2003) 130 FCR 435, 440 [16]–[17] (Merkel J). See *Commonwealth v Construction, Forestry, Mining & Energy Union* (2000) 98 FCR 31, 36–7.

115 *Herald & Weekly Times Ltd v County Court of Victoria* [2000] VSC 280 (9 June 2000) [15]–[17] (Beach J).

116 That 'does not seem in doubt': *Hogan v Hinch* (2011) 243 CLR 506, 540–1 [43] (French CJ).

117 See Butler and Rodrick, above n 29, 270–272.

Much of the remainder of this article focuses on clarifying this uncertainty, arguing that the orthodox view is incorrect.

IV Jurisdiction to Permit Non-Party Intervention

'Jurisdiction' is a troublesome term with various meanings, including 'authority to decide'.[118] The following is concerned with courts' authority to decide to permit non-party intervention. This authority is a necessary condition of a media organisation intervening as a non-party. This Part looks at the jurisdiction of State Supreme Courts, statutory courts of appeal, inferior courts, and the High Court.

A *Jurisdiction of State Supreme Courts*

Chapter III of the *Commonwealth Constitution* recognises the Supreme Courts of the States and the High Court, which are 'superior courts of record'.[119] This characterisation corresponds to broad powers that allow for non-party intervention.

The Supreme Court of Western Australia (WASC) is illustrative of the position in respect of each of the State Supreme Courts. The WASC is conferred with general jurisdiction under s 16 of the *Supreme Court Act 1935* (WA). Its powers are to be identified with reference to the 'unlimited' powers of the courts of Westminster.[120] As a superior court, it is said to have 'inherent jurisdiction'.[121] Its broad jurisdiction is a product of its position at the peak of the hierarchy of the West Australian judicial system. As explained by Dawson J in *Grassby*,[122] 'it is undoubtedly the general responsibility of a superior court … for the administration of justice which gives rise to its inherent power'.[123]

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118 *Residual Assco Group v Spalvins* (2000) 202 CLR 629, 639 [13] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Abebe v Commonwealth* (1999) 197 CLR 510, 524 [24] (Gleeson CJ and McHugh J); *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 569–570 [62], 573 [70] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Gipp v The Queen* (1998) 194 CLR 106, 126 [58] (McHugh and Hayne JJ). See Leeming, above n 106, 1–3.

119 Leeming, above n 106, 29.

120 *Grassby v The Queen* (1989) 168 CLR 1, 16 (Dawson J, Mason CJ, Brennan, Deane and Toohey JJ agreeing) ('*Grassby*'). However, due to the provisions of our *Commonwealth Constitution*, there is no Australian court with truly unlimited jurisdiction: *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240, 247 [16]. (French CJ, Gummow, Hayne and Crennan JJ).

121 *Grassby* (1989) 168 CLR 1, 16 (Dawson J, Mason CJ, Brennan, Deane and Toohey JJ agreeing). See I H Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23; see further Keith Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 *Australian Law Journal* 449. Cf Leeming, above n 106, 30–1.

122 (1989) 168 CLR 1 (Dawson J).

123 Ibid 16 (Dawson J).

There is no specific provision in the *Supreme Court Act 1935* (WA) that explicitly provides the Court with the power to permit intervention. However, the *Rules of the Supreme Court 1971* (WA) ('*SCR*') do consider intervention by non-parties. See *SCR* O 18 r 6(2):

> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application …
>
> (b) order that any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, be added as a party,
>
> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

This rule exists because the WASC determined that it should. Section 167(1)(a) of the *Supreme Court Act 1935* (WA) empowers the judges of the Court to make rules, which they have done in the form of the *SCR*. Although the *SCR* have the force of law, they do not confer the Court with any jurisdiction, or alter its jurisdiction.[124] This proposition is important for present purposes, as it means that *SCR* O 18 r 6 does not confer the WASC with any jurisdiction that it did not otherwise have. The WASC would have jurisdiction to permit non-party intervention even if *SCR* O 18 r 6 did not exist. However, in *Bradley*,[125] the New South Wales Court of Appeal held otherwise.

An action in the common law tradition is usually thought of as a private controversy between plaintiff and defendant (or the State and the accused).[126] In *Bradley* Hutley JA summed up this view with the words: 'to permit intervention would be contrary to the whole drive of the common law system'.[127]

The Court of Appeal considered whether the Commonwealth should have been allowed to intervene in proceedings in the Supreme Court of New South Wales in circumstances where it did not come under the equivalent rule of the Western Australian *SCR* O 18 r 6.[128] Counsel argued that, although the Commonwealth was not covered by either limb of the rule, the Court could allow intervention by exercise of its inherent jurisdiction.

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124 *K, PB & LS v Australian Red Cross Society* (1989) 1 WAR 335, 340 (Malcolm CJ).

125 [1974] 1 NSWLR 391.

126 David Shapiro, 'Some Thoughts on Intervention Before Court Agencies and Arbitrators' (1968) 81 *Harvard Law Review* 721, 721, cited in: Law Reform Committee of South Australia, *Relating to the Law Governing Locus Standi— Non-Party Interventions and Amici Curiae in Relation to Proceedings in Civil Jurisdiction*, Report No 67 (1982) 3.

127 [1974] 1 NSWLR 391, 397.

128 *Supreme Court Rules 1970* (NSW) pt 8 r 8(1). See Ibid 396–7 (Hutley JA).

Justice of Appeal Hutley provided a short history of the judiciary's disposition to non-party intervention,[129] illustrating that intervention was not permitted at common law or in equity. Intervention was permitted in jurisdictions derived from ecclesiastical or civil law, including in matrimonial cases, admiralty and probate jurisdictions. His Honour rejected the Commonwealth's position and held, with Reynolds and Glass JJA agreeing, that 'there is no inherent power in the court to order that an intervener be joined as a party, either at common law or in equity'.[130]

Bradley has received a mixed response.[131] In *Rushby v Roberts,*[132] Street CJ held that it should be strictly confined in its operation and that it may require reconsideration in an appropriate case. Justice Wheeler picked up those comments in *Western Power Corporation v Woodside Petroleum Development Pty Ltd*[133] and said that they were referable purely to statutory provisions peculiar to New South Wales.[134] In *Lukic v Lukic*[135] Young J recognised that *Bradley* had been distinguished on at least six occasions 'as being out of kilter with modern attitudes to litigation'.

The status of *Bradley's* ratio, that State Supreme Courts have no inherent jurisdiction to permit non-party intervention, is open to serious question. In any event, its authority is largely superseded by the dictum of Brennan CJ in the leading case of *Levy*.[136]

In *Levy* and *Lange v Australian Broadcasting Corporation*[137] the High Court considered important issues of the freedom of political communication implied in the *Commonwealth Constitution*.[138] When hearing these cases together, the Court allowed a number of interveners, including media organisations. In his Honour's reasoning Brennan CJ set out in detail the proper basis for allowing intervention.[139]

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129 *Bradley* [1974] 1 NSWLR 391, 397–8.

130 Ibid 392.

131 Positive treatment includes *Wilson v Manna Hill Mining Co Pty Ltd* (2004) 51 ACSR 404 (Lander J); *One Australia Pty Ltd v One.Tel Ltd* [2007] NSWSC 1320 (15 November 2007) [8] (Barrett J*); Re Great Eastern Cleaning Services Pty Ltd* [1978] 2 NSWLR 278, 280–1 (Needham J).

132 [1983] 1 NSWLR 350, 353 ('*Rushby*').

133 [1998] WASC 185 (12 June 1998).

134 However, since *Farah*, one should question her Honour's finding that 'there is no decision binding on me in relation to the jurisdiction of this Court to permit intervention. See: *Farah* (2007) 230 CLR 89, [135], (the Court); *Western Power Corporation v Woodside Petroleum Development Pty Ltd* [1998] WASC 185 (12 June 2008).'

135 (1994) 18 Fam LR 301, 302.

136 (1997) 189 CLR 579.

137 (1997) 189 CLR 520.

138 Williams, above n 51, 380.

139 *Levy* (1997) 189 CLR 579, 600–5.

His Honour recognised that, other than s 78A of the *Judiciary Act 1903* (Cth),[140] there is no constitutional or statutory provision that confers jurisdiction on the High Court to permit non-party intervention. In a judgment that allowed for intervention, his Honour held that:

> If there be jurisdiction apart from s 78A to allow non-party intervention, it must be an incident of the jurisdiction to hear and determine matters prescribed by the several constitutional and statutory provisions which confer this Court's jurisdiction.[141]

Citing *Commissioner of Police v Tanos*[142] it was held that jurisdiction must be exercised in accordance with the rules of natural justice. The exercise of jurisdiction should not affect the legal interests of persons who have not had an opportunity to be heard. Consistently with the majority decisions in *Re Bromfield*, his Honour held that:

> a non-party whose interests would be affected directly by a decision in the proceedings — that is, one who would be bound by the decision albeit not as a party — must be entitled to intervene to protect the interest liable to be affected.[143]

His Honour went on to consider the status of a non-party who is not directly affected by a decision. An indirect effect, through for example, the operation of a precedent, does not give rise to the same right to be heard. Ordinarily this sort of affection would not justify an intervention, '[b]ut where a substantial affection of a person's legal interests is demonstrable … or likely, a precondition for the grant of leave to intervene is satisfied'.[144] In these cases, although there is no absolute right to intervene, a court *may* allow the non-party to intervene in exercise of its discretion, if it can show that the parties may not present fully the submissions on a particular issue.[145]

Chief Justice Brennan's approach to intervention was applied by the High Court in *Roadshow Films Pty Ltd v iiNet Ltd*.[146] Further, it is consistent with a recent High Court decision on standing.[147] *Argos* concerned an application for a commercial development, which would likely result in a loss of profits for nearby supermarkets. The Court held that the operators of those supermarkets were persons aggrieved by

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140 Which provides for intervention by Attorneys-General as of right in constitutional matters. See Campbell, above n 48.

141 *Levy* (1997) 189 CLR 579, 601.

142 (1958) 98 CLR 383, 395–6 (Dixon CJ, Webb J).

143 *Levy* (1997) 189 CLR 579, 601.

144 Ibid 602.

145 Ibid 602–3.

146 (2011) 248 CLR 37, 38–9 [2]–[3]. (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) ('*iiNet*).

147 *Argos Pty Ltd v Minister for the Environment and Sustainable Development* (2014) 254 CLR 394 ('*Argos'*).

the decision, which provided them with the entitlement to seek (statutory) review. Chief Justice French and Keane J cited another Brennan J dictum on 'directness'[148] in their contribution to the majority finding that the operators had *locus standi*.[149] Accordingly, the approach to intervention set out by Brennan CJ in *Levy* is an authoritative statement of the law of Australia.

Although Brennan CJ was considering intervention in the High Court, the principles that he set out are of general application. There is a strong presumption that natural justice applies to any exercise of judicial power by court.[150] Unless there is a clear, contrary statutory intention, judicial decision-makers will be bound by the requirements of natural justice.[151] If they fail to comply with those requirements, they will ordinarily fall into jurisdictional error.[152] Natural justice requires that sufficiently affected persons be given an opportunity to be heard.[153] So any person directly affected by a court's decision has a right to intervene as a matter of natural justice. Chief Justice Martin applied Brennan CJ's approach in *Levy* in relation to a State Supreme Court in *Smith v Commissioners of the Rural and Industries Bank of Western Australia*.[154]

Bradley is not entirely inconsistent with this position. In that case, the would-be intervener was not covered by the equivalent of *SCR* O 18 r 6(2) and so was not covered by the expression 'ought to have been joined as a party'. Arguably, if a person's interests are directly affected, they 'ought to be joined' (or at least they ought to be given the opportunity) as a matter of natural justice.

However, the Court's finding in *Bradley* that the New South Wales Supreme Court had no inherent jurisdiction[155] was, with respect, plainly wrong.[156] Justice of Appeal Hutley misplaced the source of the Court's jurisdiction in the Rules,[157] which brought nothing to the table that was not already there. The Supreme Court's jurisdiction to

148 Ibid 408 [38], citing *McHattan v Collector of Customs* (1977) 18 ALR 154, 157.

149 Note, that 'directness' is described as a conclusionary judgment: *Argos* (2014) 254 CLR 394, 408 [39]. The test for whether a person is 'directly' affected is explored further below.

150 Robin Creyke and John McMillan, *Control of Government Action — Text, Cases & Commentary* (LexisNexis Butterworths, 4th ed, 2015) 637.

151 *Kioa* (1985) 159 CLR 550, 584 (Mason J).

152 *Plaintiff S157/2002* (2003) 211 CLR 476, 489 (Gleeson CJ).

153 *Allesch v Maunz* (2000) 203 CLR 172, 184–5 [35] (Kirby J); *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 86 [99] (Gaudron J), 86–7 [140] (McHugh J).

154 [2009] WASC 100 [41] (22 April 2009).

155 'Inherent jurisdiction' corresponds to the power which a court has simply because it is a court of a particular description: *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1, 7 (Menzies J); see *Parsons v Martin* (1984) 5 FCR 235, 240–1 (the Court).

156 *Wilson v Manna Hill Mining Co Pty Ltd* (2004) 51 ACSR 404, 416 [97] (Lander J).

157 *Supreme Court Rules 1970* (NSW) pt 8 r 8(1), now repealed; cf *Uniform Civil Procedure Rules 2005* (NSW) r 6.27.

permit intervention was an 'incident', in the words of Brennan CJ, of its general jurisdiction. This is an application of the maxim *ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest*: a grant of power carries with it everything necessary for its exercise.[158] As Supreme Courts determine disputes between parties that sometimes directly affect the interests of non-parties, and as judges have a duty to act judicially, the State Supreme Courts have the power to permit non-party intervention.

This power is identifiable within superior courts' inherent jurisdiction to control their own procedure.[159] Indeed, the very existence of *SCR* O 18 r 6 is owed to that inherent jurisdiction. The fact that common law courts did not historically exercise their jurisdiction to permit intervention does not preclude the existence of that jurisdiction. Statements to the contrary are now overborne by the endorsement of *Levy* in *iiNet*.

Further, the position articulated by Brennan CJ shows that courts have the power to permit intervention even when a non-party's interests are not directly affected, if it is a substantial indirect effect. To the extent that *Bradley* provides that State Supreme Courts do not have the jurisdiction to even consider this sort of intervention, *Levy* provides that *Bradley* was incorrectly decided, as foreshadowed by Street CJ in *Rushby*.[160]

B *Jurisdiction of Statutory Courts of Appeal*

In *Perdaman Chemicals & Fertilisers Pty Ltd v The Griffin Coal Mining Company Pty Ltd*[161] Pullin JA held that the Western Australian Court of Appeal 'being a statutory court [has] no inherent jurisdiction' but has 'incidental powers'. His Honour considered the Court's power to grant an injunction, which he identified as being an implied incident of its substantive appellate jurisdiction, citing *DJL v The Central Authority*[162] and *Jackson v Sterling Industries Ltd*[163] in support.

In *DJL*, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ considered the powers of the Family Court, a court that derives its jurisdiction from statute.[164] The Court confirmed that, in addition to the powers conferred on it expressly or by implication, the Family Court has such powers as are incidental and necessary to the exercise of the jurisdiction or powers so conferred. Similarly, in *Jackson* the High Court found that the Federal Court had jurisdiction to grant a Mareva injunction under s 23 of the *Federal Court Act 1976* (Cth). It went further and said that even in the absence of that section, the Court would have the power to make such orders

158 *Grassby* (1989) 168 CLR 1, 16 (Dawson J).

159 *Jago v District Court of New South Wales* (1989) 168 CLR 23; *Batistatos v Road Traffic Authority of New South Wales* (2006) 226 CLR 256.

160 *Rushby* [1983] 1 NSWLR 350, 353.

161 [2011] WASCA 188 (29 August 2011) [4].

162 *DJL v The Central Authority* (2000) 201 CLR 226, 240–1 [25] ('*DJL*').

163 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 ('*Jackson*').

164 *DJL* (2000) 201 CLR 226, 240–1 [25].

in relation to matters properly before it, as an incident of the general grant to it as a superior court.[165]

Although courts of appeal constituted by statute do not have an inherent jurisdiction to permit intervention, they do have implied incidental powers corresponding to the inherent jurisdiction of a court to control its own procedure. Statutory courts of appeal are bound by the same rules of natural justice that apply to State Supreme Courts. Accordingly, applying the same reasoning of Brennan CJ in *Levy*, statutory courts of appeal have the power to permit non-party intervention even if their rules do not provide for it. Their jurisdiction to do so is an incident of their general jurisdiction to hear and determine the matters.[166]

C *Jurisdiction of Inferior Courts*

As Dawson J explained in *Grassby*,[167] inferior courts do not have inherent jurisdiction. They possess jurisdiction by implication in the same way that Courts of Appeal do. The legislative grant of power to an inferior court carried with it everything necessary for its exercise.[168] Thus Gleeson CJ held in *R v Mosely*[169] that the New South Wales District Court has the implied power to do what is necessary to carry its statutory powers into effect. A decade later Gaudron J also considered the power of a District Court and said, expressing the matter generally, that a court whose powers are defined by statue has 'an implied power to do that which is required for the effective exercise of its jurisdiction'.[170] These cases follow the cited maxim, and an English line of authority that there 'can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary[171] to enable it to act effectively within such jurisdiction'.[172]

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165 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 613 (Mason CJ, Wilson, Deane, Dawson and Gaudron JJ). Cf the consideration of the meaning of 'superior court' in: Leeming, above n 106, 29–33. Cf also the judgment of Lander J which, with respect, ought not be followed in light of the High Court authorities: Wilson v Manna Hill Mining Co Pty Ltd (2004) 51 ACSR 404, 415 [93] (Lander J). See Natalie Cujes and Imtiaz Ahmed, Annotated Federal Court Legislation and Rules (LexisNexis, 2013) 703–704 [r 9.12.10].

166 In the case of the Western Australian Court of Appeal, that jurisdiction is provided by the *Supreme Court Act 1935* (WA) s 58(1)(b).

167 (1989) 168 CLR 1, 16–7.

168 Ibid.

169 (1992) 28 NSWLR 735, 739 (Gleeson CJ), citing *Stanton v Abernathy* (1990) 19 NSWLR 656, 671 (Gleeson CJ).

170 *TKWJ v The Queen* (2002) 212 CLR 124, 138 [44] (Gaudron J).

171 In *Pelechowski* Gaudron, Gummow and Callinan JJ held, after considering the judgment of Dawson J in *Grassby*, that '[i]n this setting, the term 'necessary' does not have the meaning of 'essential'; rather it is to be 'subjected to the touchstone of reasonableness': *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435, 452 (Gaudron, Gummow and Callinan JJ).

172 *Connelly v Director of Public Prosecutions* [1964] AC 1254, 1301 (Lord Morris), cited in *Police Tribunal* (1986) 5 NSWLR 465, 476 (McHugh JA).

In *John Fairfax Publications Pty Ltd v District Court of New South Wales*[173] Spigelman CJ held that the test for determining whether an inferior court has an implied power is the test of necessity. To comply with the requirements of natural justice, courts *need* the power to hear persons whose interests are directly affected. The power to hear interveners is necessary for any court, including an inferior court.

Adopting the same reasoning as presented in relation to statutory courts of appeal, inferior courts have the jurisdiction to allow non-party intervention as an exercise of an implied power carried with the statutory conferral of their jurisdiction.

D *Jurisdiction of the High Court*

Chief Justice Brennan's decision in *Levy* was in relation to the High Court's jurisdiction to permit intervention. The position is clear: the Court has the necessary jurisdiction.

E *Conclusions on Jurisdiction to Permit Non-Party Intervention*

Aside from specific legislation contemplating intervention, every Australian court has either inherent or implied incidental powers that form an indispensable part of their jurisdiction. Intervention is possible[174] in each Australian court by virtue of the fact we are talking about a court. Courts, by definition, must act judicially. Natural justice lies at the heart of the judicial function and the rule of law.[175] Applying *Levy*, intervention is available as a matter of natural justice. This principle lays the foundation for the proposition that, at common law, media organisations may intervene 'as of right' in any court contemplating a departure from open justice, rather than as a matter of the court's discretion. That proposition turns on the way that courts must exercise their jurisdiction to permit non-party intervention.

V Exercise of Jurisdiction to Permit Non-Party Intervention

A *The Levy Test for Intervention*

Chief Justice Brennan's judgment in *Levy* is significant not only for its identification of the source of power to permit non-party intervention, but also for the provision of principles that determine when a non-party can intervene. Those principles can be summarised as follows ('*Levy test*'):

173 (2004) 61 NSWLR 344, 352–3, 357 (Spigelman CJ).

174 Subject to legislative exclusion.

175 Chief Justice Robert S French, 'Procedural Fairness — Indispensable to Justice?' (Speech delivered at the Sir Anthony Mason Lecture, The University of Melbourne Law School, 7 October 2010) 1.

(1) A non-party has a right to intervene in proceedings that directly affect its legal rights or interests.[176]

(2) A court has discretion to allow a non-party to intervene in proceedings that have an indirect but substantial effect on the non-party's legal rights or interests. A court may exercise that discretion if a non-party seeking leave to intervene can show that the parties may not fully present submissions on a particular issue.[177]

In his Honour's judgment, Brennan CJ states: 'a non-party whose interests would be directly affected by a decision in the proceeding … *must be entitled* to intervene to protect the interest liable to be affected'.[178] Thus, the first limb of the test is not discretionary. In these cases, intervention is of absolute right. The perceived usefulness of the intervener's submissions will not affect the right to intervene if intervention is of right. That perceived usefulness will be critical in cases of only an indirect effect on a non-party's interest.

If the court considers that a non-party is only indirectly affected by a decision, it may permit intervention and limit that intervention to particular issues.[179] Media law cases like *Medical Practitioners' Board* that are inconsistent with the 'absolute right to be heard'[180] view may be intelligible as statements that media organisations fall under the second limb of the *Levy* test. On this view, as media organisations are only indirectly affected by decisions to depart from open justice, courts *may* exercise their discretion to 'allow them to be heard' (that is, courts may exercise their discretion for media organisations to intervene on a limited basis).

Chief Justice Brennan's decision invokes principles familiar to administrative law. The grounding of the first principle of the *Levy* test in 'natural justice' deserves consideration of that topic.

B *The Threshold Test for Natural Justice*

In *Kioa,* Mason J referred to affection of a person's 'rights, interests and legitimate expectations' as the basis for the duty to afford natural justice.[181] This 'threshold test' determined when the requirements of natural justice would apply.[182] He held that '[t]he reference to

176 *Levy* (1997) 189 CLR 579, 601.

177 Ibid 602.

178 Ibid 601 (emphasis added).

179 See Ibid 603–4 (Brennan CJ).

180 See *Medical Practitioners Board* [1999] 1 VR 267, 298 (Hedigan J). Ibid 297 (Hedigan J).

181 (1985) 159 CLR 550, 584, applying *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 14 (Lord Denning), following *FAI Insurances v Winneke* (1982) 151 CLR 342, 360 (Mason J).

182 *Kioa* (1985) 159 CLR 550, 616 (Brennan J). See also Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5th ed, 2013) 405.

'right or interest' in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.'[183] It is notable that in the same case Brennan J (as he was) was critical of the 'legitimate expectations' criterion,[184] emphasising the importance of the *way* a person's interest is affected as determining whether natural justice will apply.[185]

The 'legitimate expectations' doctrine was affirmed in decisions such as *Minister of State for Immigration and Ethnic Affairs v Teoh*.[186] However in *Re Minister for Immigration and Multicultural Affairs; Ex parte Hieu Trung Lam* ('*Lam*'),[187] Justices McHugh and Gummow said that there was a fundamental question about the relevance and utility of the doctrine of legitimate expectation.[188] Still, a majority did not overturn the doctrine. In 2012 the High Court decided *Plaintiff S10*,[189] where a majority extended the criticism flagged in *Lam* and held that 'legitimate expectations' 'either adds nothing or poses more questions than it answers'.[190] More recently, that view was affirmed by another majority in *Minister for Immigration and Border Protection v WZARH* ('*WZARH*').[191] Each member of the High Court criticised the 'legitimate expectations' concept.[192]

After *WZARH* and *Plaintiff S10*, the proper approach to the threshold test for whether natural justice applies is that of Brennan J in *Kioa*.[193] His Honour gave a very broad definition of the requisite 'interest', going beyond proprietary, financial interest[194] or reputation, and covering 'any interest possessed by an individual'. Significantly, his Honour equated the requisite interest to that which gives standing at common law to seek a public law remedy.[195]

The key question endorsed in *WZARH* and *Plaintiff S10* is whether an exercise of power is apt to affect any individual's interest in a way substantially different from

183 *Kioa* (1985) 159 CLR 550, 582 (Mason J).

184 Ibid 617.

185 Ibid 619; see Aronson, Dyer and Groves, above n 182, 428.

186 (1995) 183 CLR 273.

187 (2003) 214 CLR 1.

188 Ibid 16. For differing reasons, Hayne and Callinan JJ agreed: 38 (Hayne J), 45–6 (Callinan J).

189 (2012) 246 CLR 636.

190 *Plaintiff S10* (2012) 246 CLR 636, 658 [64]–[65] (Gummow, Hayne, Crennan and Bell JJ).

191 (2015) 90 ALJR 25.

192 (2015) 90 ALJR 25, 31-2 [28]–[30] (Kiefel, Bell and Keane JJ), 36 [61] (Gageler and Gordon JJ).

193 (1985) 159 CLR 550, 619. *Plaintiff S10* (2012) 246 CLR 636, 659 (Gummow, Hayne, Crennan and Bell JJ). See Ibid, 130.

194 *Kioa* (1985) 159 CLR 550, 618–9. Cf *FAI Insurances v Winneke* (1982) 151 CLR 342, 412 (Brennan J).

195 *Kioa* (1985) 159 CLR 550, 617–22 (Brennan J).

the way in which the exercise it is apt to affect the interests of the public at large.[196] If so, the threshold test will be satisfied and natural justice will apply.[197] These cases are a strong affirmation that the *Levy* test is complete and affirm Brennan J's approach to the 'requisite effect' stated in *Kioa*. Applying that approach, the standing of an intervener depends on whether that person is likely to be affected in the same way that a litigant with standing to obtain public remedies is affected.

VI The Media as Intervener at Common Law

Applying *Levy* and *WZARH*, if a departure from open justice has or will have a direct effect on a media organisation's legal rights or interests, intervention is as of right. If the effect is or will be only indirect, intervention is discretionary, and so the majority in *Re Bromfield* was incorrect.

'Directness' depends on whether the individual's interest is likely to be affected more than the interests of other members of the public are likely to be affected.[198] Thus Rowland J was right to ask in *Re Bromfield*: 'what is the special interest that a newspaper has in that issue, that any other member of the public does not?'[199] In most proceedings, the media will not be 'directly affected' in the required sense. Even when a media organisation does seek to be heard (by intervention or otherwise), it will not be seeking an outcome that affects the rights or duties that are the primary focus of the proceedings. But in those cases in which the court is contemplating a departure from open justice, a media organisation seeking to be heard will be directly affected in the required sense. Media organisations have a special interest in open justice, which distinguishes them from other members of the public.

A *Pecuniary Interests*

In *Re Bromfield* Rowland J accepted that 'a newspaper has a pecuniary interest in publishing the news'.[200] A pecuniary interest can satisfy the threshold test for whether the requirements of natural justice apply, as identified by Brennan J in

196 Ibid 619 (Brennan J); *Plaintiff S10* (2012) 246 CLR 636, 658–9 (Gummow, Hayne, Crennan and Bell JJ).

197 Although Brennan J in *Kioa* was considering limitations on the exercise of statutory power, the same principles apply at general law. The source of a judge's power statute, inherent or implied jurisdiction is irrelevant. The more important question is whether legislation has ousted the application of the principles. Cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 69–70 (Gleeson CJ and Hayne J), 83–4 (Gaudron J).

198 As in public interest litigation: *Edwards v Santos Ltd* (2011) 242 CLR 421, 435–6 [37], Heydon J, French CJ, Gummow, Crennan, Kiefel and Bell JJ agreeing; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27. See also Michael Kirby, 'Deconstructing the Law's Hostility to Public Interest Litigation' (2011) 127 *Law Quarterly Review* 537, 541–2.

199 (1991) 6 WAR 153, 182.

200 Ibid 185. See also Ibid 193 (Nicholson J).

Kioa.[201] Further, courts have recognised that if a decision affects a business interest, there is a strong presumption that the requirements of natural justice apply.[202]

It could be objected that that not every departure from open justice will directly affect the pecuniary interests of every media organisation. However, if a media organisation seeks to contest a flagged departure from open justice, this demonstrates that reporting on the matter serves that organisation's commercial objectives.[203] The motivation to challenge in itself indicates that the court's decision will affect the organisation's commercial interests. As a general proposition, media organisations' pecuniary interests distinguish them from other members of the public, and so provide them with the right to intervene whenever they seek to intervene.

Accepting this argument, an emerging issue is the status of non-traditional journalists, as compared to what this paper calls media organisations, in the courts. Working for an organisation like Fairfax is no longer a necessary condition of disseminating information to a wide audience. Social media allows anyone with an internet connection and a web browser to participate in news creation. Bloggers can earn income through individuals reading their content,[204] or by referring consumers to some other product.[205] If a blogger operating autonomously — that is, a sole-proprietor of a blogging business — sought to challenge a departure from open justice, and could demonstrate a pecuniary interest in reporting the news online, that blogger should be allowed to intervene as of right.[206]

B *Freedom, or the Interest in Being Not in Contempt*

Media organisations enjoy a 'liberty of reporting and publishing in the absence of prohibition'.[207] A court order can restrict that liberty. A departure from open justice may lead to a journalist or a media organisation being in contempt of court, even for conduct occurring outside the court.[208] For example, if an organisation publishes material protected under a non-publication order, it may be liable in contempt even

201 (1985) 159 CLR 550, 612, 618–9.

202 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *J Wattie Canneries Ltd v Hayes* (1987) 74 ALR 202, 213–4 (Keely, Wilcox and Gummow JJ).

203 On the media's commercial objectives, see Colleen Davis, 'The Injustice of Open Justice' (2001) 8 *James Cook University Law Review* 92, 99–100.

204 See, eg, Entrepreneur Press and Jason R Rich, *Start Your Own Blogging Business* (Entrepreneur Press, 2nd ed, 2010).

205 Andreas M Kaplan and Michael Haenlein, 'The Early Bird Catches the News: Nine Things You Should Know About Micro-Blogging' (2011) 54 *Business Horizons* 105, 111.

206 It is important to couple this argument with a conservative approach to the hearing rule. This is described below. It would be an unjustifiable burden to require courts to inform individual bloggers of every proposed departure from open justice.

207 *Re Bromfield* (1991) 6 WAR 153, 193 (Nicholson J).

208 *In re Johnson* (1887) 20 QBD 68, 71–2 (Lord Esher MR).

if the organisation was not specifically named in the order.[209] The organisation itself may be fined in contempt.[210]

In *Nationwide,* Mahoney P affirmed his previous judgment in the *Police Tribunal*[211] case in holding that orders restricting publication of information only *indirectly* affect media organisations.[212] When orders like those contemplated are made, the entire world is bound on pain of contempt. However, it is important to remember that the 'directness' criterion lies in the issue of whether the exercise of power is 'apt to affect the interests of [a media organisation] in a way that is substantially different from the way in which it is apt to affect the interests of the public at large'.[213] Anyone *could* be in contempt by disobeying one of these orders, but most people would not want to. The pecuniary interests of media organisations, combined with their special role in disseminating news to the public (explored below), means that media organisations are motivated to report on court proceedings. Media organisations and their journalists are more likely to actually be in contempt for defying these orders.[214] Accordingly, media organisations are affected in a way substantially different from the way that the public at large is affected.

With respect, *Nationwide* was wrongly decided. If a media organisation is aware of an order that might put it in contempt, it will be directly affected.[215] Thus Malcolm CJ recognised in *Re Bromfield* that there could be 'no doubt' that a newspaper was directly affected by a suppression order,[216] which provided a sufficient interest for standing at first instance. As media organisations are often served with notice of orders departing from open justice, their unique position is even more pronounced.

Not every departure from open justice will provide an opportunity for a media organisation to be in contempt by publication. Non-publication orders and pseudonym orders may provide that opportunity, but a decision to close a court entirely may not. In those cases where contempt is not a prospect, a media organisation's pecuniary interests should still provide it with standing to make a challenge.

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209 *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191; *Mayas* (1988) 14 NSWLR 342.

210 See, eg, *Attorney-General (NSW) v Radio 2UE Sydney Pty Ltd* [1997] NSWCA 29 (3 October 1997).

211 (1986) 5 NSWLR 465.

212 (1996) 40 NSWLR 486, 492.

213 *Kioa* (1985) 159 CLR 550, 619 (Brennan J).

214 '[S]ome types of contempt of court are more likely than others to be committed by the media': David Rolph, Matt Vitins and Judith Bannister, *Media Law* (Oxford, 2010) 428.

215 See *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 466 (Lord Edmund-Davies).

216 *Re Bromfield* (1991) 6 WAR 153, 167.

C *The Interest in Fulfilling a Special Role in Our Democracy*

Media organisations recognise that they have a special role in our democracy.[217] One aspect of that role is fulfilling our 'right to know' about matters of public interest.[218] Another aspect lies more specifically in court reporting. Not all members of the public are able to attend court,[219] and so the media is the eyes and ears of the public.[220] This serves the operation of the judiciary. It encourages honesty on the part of all stakeholders and guards against the arbitrary exercise of judicial power.[221] In turn, court reporting encourages the impartial administration of justice, thus serving the values at the heart of our liberal democracy.[222]

The media's special role was mentioned by McHugh JA in *Mayas*: 'we live in an era where almost everybody depends on the media for information concerning matters which affect the public interest'.[223] The gravity of this statement has waned in the post-Twitter world, but it is still valid.[224] Most would-be journalists on social media are merely 'curators' of news; media organisations are the 'creators'.[225]

However, in *Nationwide,* Mahoney P explicitly rejected the proposition that this special role could provide a right or entitlement 'to be heard'.[226] Aside from citing himself,[227] Mahoney P justified this conclusion by linking the counterfactual (that is, recognition of a *right* to be heard) to the need to be notified of the matter. Applying the orthodox approach of Brennan J,[228] the media's common law right to intervene

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217 See Ibid 163–4 (Malcolm J).

218 See, eg, Australia's Right to Know, *Report of the Review of Suppression Orders and The Media's Access to Court Documents and Information*, 13 November 2008 (27 July 2013) <http://www.australiasrighttoknow.com.au/files/docs/Reports2008/13-Nov-2008ARTK-Report.pdf>.

219 *Re Bromfield* (1991) 6 WAR 153, 164 (Malcolm CJ).

220 *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 183 (Donaldson MR); *Tuqiri v Australian Rugby Union Ltd* [2009] NSWSC 781 (7 August 2009) [5] (Einstein J) ('Tuqiri').

221 *Syme* [1984] 2 NSWLR 294, 300 (Street CJ).

222 See Murray Gleeson, 'The Role of the Judiciary in a Modern Democracy' (Paper presented at the Judicial Conference of Australia Annual Symposium, Sydney, 8 November 1997).

223 (1988) 14 NSWLR 342*,* 356; approved by Kirby P (dissenting) in *John Fairfax Group* (1991) 26 NSWLR 131, 153; see also *Tuqiri* [2009] NSWSC 781 (7 August 2009) [5] (Einstein J).

224 See Jacqui Ewart, 'Terrorism, the Media and Twitter' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media — Challenges in the Era of Digital and Social Media* (Halstead Press, 2012) 55.

225 Ian Marsh and Sam McLean, 'Why the Political System Needs New Media' in Helen Sykes (ed), *More or Less — Democracy & New Media* (Future Leaders, 2012) 68, 78.

226 *Nationwide* (1996) 40 NSWLR 486, 491.

227 *John Fairfax Group* (1991) 26 NSWLR 131.

228 *Kioa* (1985) 159 CLR 550, 615.

does not require notification.[229] Affording the right to be heard to only those organisations in the courtroom does not unreasonably burden the court, thus undermining the cogency of *Nationwide* on this point.

Court reporting is a special role of the media, and when court reporting is restricted, the media is especially affected in a way that other members of society are not. If a media organisation wants to report on a case involving a departure from open justice, it is directly affected, and so has a right to intervene at common law.

D *What Does the Right to Intervene Look Like?*

The *Levy* test shares the language of natural justice for a reason. Non-parties have a right to intervene in proceedings that directly affect their legal rights and interests, because it would not be just to deny them the opportunity to be involved. In accordance with the hearing rule, 'involvement' requires a reasonable opportunity for the non-party to present its case,[230] or the right to be heard.

Although historically a right to a 'hearing' has not entailed a right to an oral hearing,[231] if the non-intervening parties are given the opportunity to make oral submissions, denying an intervener the same opportunity may be unfair.[232] Thus, Sir Anthony Mason once observed that '[i]ntervention status has traditionally carried an entitlement to present oral argument, an entitlement that is both necessary and appropriate to a person who has the status of a party'.[233] Moreover, in *Bradley*, Hutley JA held that interveners can 'participate fully in all aspects of argument' and have 'all the privileges of a party'.[234]

A further aspect of the hearing rule is the requirement that decision makers provide affected persons with reasonable prior notice of the decision.[235] A contrary view, expressed by Brennan J, is that because the content of natural justice can be reduced to 'nothingness', notice is not required.[236]

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229 Cf the position under *Open Courts Act 2013* (Vic) ss 10, 11.

230 *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118 (Tucker LJ).

231 See, eg, *NAHF v Minister for Immigration and Multicultural and Indigenous* Affairs (2003) 128 FCR 359, 365 [33] (Hely J).

232 Cf *Botany Bay City Council v Minister of State Transport and Regional Development* (1996) 66 FCR 537, 568 (Lehane J), quoted in *Griffith University v Tang* (2005) 221 CLR 99, 118 [45] (Gummow, Callinan and Heydon JJ).

233 Mason, above n 55, 174; cf Police Tribunal (1986) 5 NSWLR 465, 482 (McHugh JA).

234 *Bradley* [1974] 1 NSWLR 391, 396 (Hutley JA, Reynolds and Glass JJA agreeing). This aspect of *Bradley* has been consistently applied; see, eg, *Symons* (2003) 27 WAR 242, 249 [17] (Heenan J), cited in *Perdaman Chemicals & Fertilisers Pty Ltd v The Griffin Coal Mining Company Pty Ltd* (2012) 8 BFRA 462, 484 [109] (Edelman J).

235 See, eg, *Andrews v Mitchell* [1905] AC 78, 80 (Lord Halsbury).

236 *Kioa* (1985) 159 CLR 550, 615.

The media law jurisprudence has sided with the latter position.[237] The cases[238] allude to directly affected media organisations who are not in court or seeking to intervene and who may not even know about the proposed departure.[239] Chief Justice Malcolm cleared a path to clarity in *Re Bromfield*, adding the caveat that if an affected media organisation seeks to be heard at the right time, they ought to be heard.[240] This is a sensible approach to the hearing rule, tailored to the situation of media interveners. If a media organisation wants to intervene, it is important that it should be able to. If it is not even represented in court, the parties should not be needlessly impeded in the resolution of their dispute. This reflects the orthodox flexibility allowed by courts in the interests of fairness in complying with the hearing rule.[241]

VII Conclusion

The standing of media organisations to challenge departures from open justice varies around Australia. The position in New South Wales, Victorian, South Australian and federal courts is clear, albeit varied. Common law jurisdictions have the benefit of a weak majority in *Re Bromfield*, which is contradicted by the New South Wales line of authority expressed in *Nationwide*. This inconsistency betrays the proposition that there is a common law of Australia.[242] State Supreme Courts can ignore interstate principles if convinced they are plainly wrong,[243] but they are of course bound by the High Court. Since *Levy*, and certainly since *iiNet* and *Plaintiff S10*, the jurisdiction to permit intervention, and the test for when a non-party may intervene as of right, are settled. The only remaining question facing a court when a media organisation seeks to be heard is this: would this court's decision directly affect this organisation's legal rights or interests? When that decision involves a departure from open justice, the answer will be yes. The media is uniquely and inseparably linked to open justice. This unique connection is the foundation of the media's standing to challenge departures from open justice. We ought to encourage their challenges to these departures. Open justice preserves the integrity of our judicial system and so strengthens our democracy.

237 See, eg, *Nationwide* (1996) 40 NSWLR 486, 489 (Mahoney P); *Re Bromfield* (1991) 6 WAR 153, 171 (Malcolm CJ); *John Fairfax Group* (1991) 26 NSWLR 131, 153 (Kirby P).

238 Ibid.

239 In some States, this is an area for law reform through introduction of a register of suppression orders, or an obligation to inform the media. This would be consistent with other jurisdictions. See, eg, *Evidence Act 1929* (SA) s 69A(10)–69A(12).

240 (1991) 6 WAR 153, 171.

241 *Kioa* (1985) 159 CLR 550, 584 (Mason J), 612 (Brennan J); *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 504 (Kitto J). See further Aronson, Dyer and Groves, above n 182, ch 8.

242 *Farah* (2007) 230 CLR 89, 152 [135] (Brennan CJ, Gummow, Callinan, Heydon and Crennan JJ).

243 Ibid.