Media Access to Transcripts and Pleadings and 'Open Justice': A Case Study

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ABSTRACT

This paper explores the rules that apply to media access to transcripts and pleadings in New South Wales and the concept of 'open justice'. If the principle of open justice *is* to be entrenched by judicial exegesis rather than constitutional referendum — which is probably much more likely — then steps need to be taken by journalists now to educate lawyers and courts about the media, the dynamics of their profession, and the dignity of risk that is a *necessary* concomitant of free speech.

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> [I]t is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[1]

Open Justice at Common Law

There is no common law *right* to open justice. There is a common law right to *justice*, and there is a common law *principle* that the pursuit of justice is ordinarily done in open court. But the principle of open justice was always qualified.[2] The paramount duty of the Court is to ensure that justice is done.[3] Openness is usually the means to that end. For that reason, any person who seeks to have the Court closed has the burden of satisfying the Court that nothing short of the exclusion of the public is necessary to ensure that justice can be done.[4]

Media Access To Court Documents in New South Wales

The principle of open justice is applied in context. In New South Wales[5] it has been applied to protect the identity of participants in court proceedings[6] and to prevent the publication of evidence,[7] the pleadings and even the transcript of proceedings. In this paper I will focus on public access to documents read in court. In the Supreme Court of New South Wales today, Practice Note No 97 and Part 67 rule 7 of the

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1 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.

2 *Daubeny v Cooper* (1829) 1 B & C 237 at 240; 'It is one of the essential qualities of a Court of Justice that its proceedings should be public…provided that they do not interrupt the proceedings, and provided there is no specific reason why they should be removed.' *Scott v Scott* at 478. *John Fairfax & Sons v Police Tribunal* (1986) 5 NSWLR 465 at 471472. *Cunningham v The Scotsman Publications Ltd* (1987) SLT 698 at 705–706: 'Of course there must be exceptions to the general rule and these exceptions may also be found to be justified by other considerations of public interest and public policy in the administration of justice … But these considerations should not detract from the general principle of openness in judicial proceedings.'

3 *Scott v Scott* [1913] AC 417 at 437–438; *John Fairfax & Sons v Police Tribunal* (1986) 5 NSWLR 465 at 471. Spigelman, The Hon Chief Justice J., 'Seen To Be Done: The Principle of Open Justice – Part I', (2000) 74 *ALJ* 290, 292. See also *Federal Court of Australia Act* 1976 (Cth), s 50.

4 *Scott v Scott* [1913] AC 417 at 438.

5 Access to court documents varies greatly in different jurisdictions. This paper concentrates on the position in New South Wales.

6 See for example *Witness v Marsden* [2000] NSWCA 52 (22 March 2000); *Rimmer v Ormond College Council* (950435), Industrial Relations Court of Australia (1 September 1995).

7 See for example *Re Robins; Ex parte West Australian Newspapers Ltd* [1999] WASCA 16 (13 May 1999).

Supreme Court Rules[8] governs the conduct of proceedings to provide access to court documents.[9] The Rule and Practice Note have been considered in a number of cases.[10] Access to documents depends on such discretionary criteria as prematurity and the avoidance of the use of documents for collateral purposes,[11] the potential for abuse of the 'fair protected report' defence under s 24 of the *Defamation Act* 1974 (NSW),[12] to avoid surprise or ambush,[13] because some of the material sought is 'hearsay',[14] and sometimes to protect commercial confidentiality.[15]

The presumption is that documents are available. But in some cases courts say that the presence of the public renders the administration of justice impracticable. But where the media can show that the public interest in proper reporting of court proceedings requires access and that access would not be such as to jeopardise a fair trial or give rise to unfair prejudice to a party in that context, then that access should be allowed.[16] Fear that information will be used by unscrupulous journalists (labelled by one judge as the 'frenzied purveyors of fear and prejudice')[17] to satisfy prurient interests is generally regarded to be insufficient, by itself, to satisfy a Court that proceedings or court materials should be secret.

In some cases, however, it has even been suggested that access to documents should be denied for the rather more patronizing reasons that the public could only have a prurient interest in the matter in issue,[18] to avoid 'trial by media',[19] and to obviate the

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8 A person 'may not search in the Registry for or inspect any document or thing in any proceedings except with the leave of the Court'.

9 Practice Note No 97 is included as an appendix of this paper.

10 Including *eisa Limited v Brady* [2000] NSWSC 929; *ASIC v Rich* [2001] NSWSC 496.

11 See both *eisa Limited v Brady* [2000] NSWSC 929; *ASIC v Rich* [2001] NSWSC 496.

12 *ASIC v Rich* [2001] NSWSC 496 at [29]–[33]. See also eisa Limited v Brady [2000] NSWSC 929 at [21], referring to *Home Office v Harman* [1983] 1 AC 280 and *Akins v Abigroup Ltd* (1998) 43 NSWLR 539 and s 24 of the *Defamation Act* 1974 (NSW).

13 *ASIC v Rich* [2001] NSWSC 496 at [37]–[38].

14 *ASIC v Rich* [2001] NSWSC 496 at [41]–[42]. The rule against 'hearsay' is that: 'an assertion other than one made by a witness while testifying in proceedings is inadmissible as evidence of any fact asserted' (Ying, C., *Essential Evidence*, Cavendish Publishing, Sydney, 2001, 45).

15 *ASIC v Rich* [2001] NSWSC 496 at [43].

16 *eisa Limited v Brady* [2000] NSWSC 929 at [22].

17 *R v Clerk of Petty Sessions; Ex parte Davies Brothers Ltd* 19 November 1998, Supreme Court of Tasmania, at 3.

18 *ASIC v Rich* [2001] NSWSC 496 at [34]–[36].

risk of misleading reporting.[20] The proposition that judicial censorship of public information may be in the best interest of the public is a proposition that deserves very careful scrutiny.[21]

A Case Study

A recent case that throws up some interesting issues is *eisa Limited v Brady*.[22] In that case, the Supreme Court heard an application by the *Australian Financial Revie*w for access to the transcript and pleadings that were put by the parties in the case. The case involved an application by *eisa* for an injunction to stop its former Managing Director from dealing with his assets pending the determination of certain issues arising from his management of the company. The *AFR* supported their application for the documents in the following way:

> *eis*a is being purchased by a publicly-listed company on the ASX. It is in the public interest, that I can report on these proceedings to the investment community. I would like the court to give me leave to inspect these documents because dealing with the parties, who have vested interests, has the potential to enmesh me in a conflict of interest…
>
> We are seeking access to these documents on the grounds that the financial press publishing fair and accurate reports about legal actions involving this company is in the public interest. In this case, the public interest grounds are strong because, although the company is in voluntary administration, it is in the process of being purchased by a publicly-listed company, Austar.
>
> At the request of Justice Santow's office last week, I contacted the legal representatives for both parties about my application for non-party access to the statements of claim and defence. This afternoon Allen, Allen & Hemsley, representing the plaintiff, advised the voluntary administrators objected to my having access.

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19 *Stonham v Speaker of the Legislative Assembly of New South Wales (No 1)* (1999) 90 IR 325 at 333, cited with approval by Austin J in *ASIC v Rich* [2001] NSWSC 496 at [27].

20 *ASIC v Rich* [2001] NSWSC 496 at [39]–[40].

21 This paper focuses on the issues arising from a particular decision: for a fuller treatment of the issues raised in this paper see New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper, 2000, Ch 11.

22 *eisa Limited v Brady* [2000] NSWSC 929.

> Of more concern, Mr Brady's lawyer, Mr Mark Petrucco at The Argyle Partnership, said they objected to me having access to the pleadings because I could not have a 'fair understanding' of the case without access to documents the defence want to obtain throughout discovery.
>
> The *Australian Financial Review* has serious concerns about being denied access to the pleadings on these grounds. It is contrary to the fundamental notion of open justice if the court gives parties to actions, who have deeply vested interests, the ability to stonewall the media when it attempts to publish accurate reports about the initiating documents in legal proceedings. We are only seeking the pleadings and do not expect to be given discovered evidence that would bolster one side's case.

Ultimately the Court adopted the approach taken by a Victorian Supreme Court judge in granting access to the transcript (on terms as to payment) in a similar case:[23]

> It is highly unlikely that any media representative will be in attendance in court for more than a small proportion of that time. There is no point in lamenting that fact, still less in tailoring my response to this application on the basis that members of the media could attend if they chose to do so and thus put themselves in a position from which an accurate report of the proceedings could be compiled without recourse to the transcript. The reality is that the media will decide upon the level and frequency of its attendance here, as it will decide other issues concerning its priorities and the use it makes of its resources.

A fair comment, up to a point: the media does make decisions about resourcing that affect the quality of news coverage. But the idea that a journalist should have to wait in Court all day for information that could be supplied to them by the plaintiffs – if necessary at the conclusion of the proceedings – is faintly ridiculous. After all, the Courts have confirmed that if a person who was sitting in Court could transcribe the information put by the parties, and then make a fair report of the information, the publication would be protected by the fair protected report defence. Fortunately, in the circumstances, the Supreme Court of New South Wales concluded that the availability of the transcript was important. The media should not have to rely on the parties for information about the case. Lawyers' ethical obligations preclude them from providing the media with all the information in which the media is likely to be interested. Access would promote accuracy in reporting and transparency in the administration of justice.

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23 *Linter Group Ltd (in liq) v Price Waterhouse* [2000] VSC 90, 20 March 2000, unreported.

But in respect of the *pleadings*, the Court applied the decision of the Full Bench of the Industrial Relations Commission in *Stonham v Legislative Assembly (No. 1)*.[24] That case concerned an application by the ABC for court documents including pleadings, made in the context of 'investigative journalism' *rather than* 'straight reporting':

> The ABC submitted that access to the documents would assist full and fair reporting. However, this purpose would be best served if the dissemination of information occurred as part of the ordinary court proceedings where, after objection, documents were read in open court.

From this it seems that the Courts are only interested it seems in providing information to people engaged in 'straight' reporting. Access to the pleadings was ultimately denied on the footing that the pleadings, like affidavits, may be subject to objection and consequent revision when the matter was ultimately ventilated in Court. In *Stonham*, the IRC said:

> It may reasonably be expected that the Court's file presently contains material of a contentious nature as between the parties and which will, no doubt, be subject to objection and vigorous testing in the substantive proceedings. That process, we hasten to add, will occur in open court during public proceedings. But to give access to the material pre-trial would, we are satisfied, raise the concern earlier expressed as to trial of such material in the media.

The Supreme Court admitted that the *Australian Financial Review* might be '*to some extent assisted in its present understanding by having access to the complete pleadings*':

> But this should neither be overstated nor understated. There is already in the public domain a broad summation of what is *alleged though it is not complete*. It lacks particularity about the specific allegations. This is in terms not so much of their general nature as their specific content. But certainly the Press knows the nature of the allegations, whom they are about and the quantum involved. Moreover all parties are opposed to granting that access prematurely and for good reason. The interlocutory proceedings of 28 September 2000, in which the injunction has merely been discharged by consent orders and undertakings substituted *inter partes*, so far *have been perfectly comprehensible without the pleadings*. There are on-going settlement negotiations which may well be prejudiced by premature release of the pleadings, containing as they do serious allegations about a party. And no final hearing has yet taken place on the

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24 (1999) 90 IR 325 at 332.

> merits. If and when it does, the allegations may change in light of discovery and the evidence as it emerges (emphasis added).

Effectively, Judicial Censorship

Certainly, there will be some circumstances in which pleadings are amended or even abandoned during the course of a hearing, and it may be imprudent to provide access to such documents until the pleadings are settled. But the judgments in these cases raise some significant concerns. If a fair trial is not at risk, then it is sententious to suggest that the public should be satisfied by a less than complete account of information that would have been available to anyone in the court. If anyone who is physically located in the Court is entitled, by the principle of open justice, to make a fair protected report of what is said in Court, then why can't the documents tendered in evidence or filed in the Court registry be made freely available?

If the Courts want to improve public understanding of their work, they have to give journalists, the intermediaries between the courts and the public, the opportunity to do their work with complete information. Journalists are entitled to the dignity of the risk of the work they do. If that means greater risk passes to the media, then so be it. If Courts are public places, then the approach that is commonly being taken in these 'open justice' cases is directly contrary to the public right to know.

Constitutional Dimensions of Open Justice

Stepping back from a specific case, it is important to consider the broad principles involved. 'Open justice', like 'free speech' and a 'fair trial' are the ends of any virtuous society. In theory the principles are interconnected. In practice, to be enjoyed they have to be rights, not just principles.

Rights come from law, and from four sources of law: in order of ultimate significance, international law, constitutional law, statutes and common law.

International legal rights are not yet recognised as a separate type of law with operative force in Australia:[25] though international law can and does inform the development of the common law,[26] can be implemented into domestic law through statutes,[27] and can be taken into account by government officials when statutory

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25 This is the principle of *Walker v Baird* [1892] AC 41, recently approved again in *Victoria v Commonwealth* (1996) 187 CLR 416.

26 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

27 See ie. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1.

discretions are exercised.[28] International law is not yet part of our constitutional law. Only three cases have been taken to the United Nations High Commissioner for Human Rights by Australians under the First Optional Protocol of the *International Covenant on Civil and Political Rights*. It is not yet an effective way to improve the protection of rights in Australia. And we should not need to rely on it.

The principal way in which international legal norms operate in Australian domestic law is through the statutes of the Federal Parliament that implement international obligations into domestic law. So the ambit of these rights depends on the goodwill of Parliament and is subject to the majoritarian tendencies of that institution, and the excesses of executive power that are characteristic of Australian politics. A series of notable failures by the Federal Parliament to ensure the protection of minority rights, accompanied by a willingness to roll back protections that are already in place, indicates that proposals for a statutory Bill of Rights have missed the point.

That leaves the common law and constitutional law. In England, constitutional law was, in the main, common law. Common law decisions that described the relationship between courts, government and people were, adjectivally, 'constitutional law'.

The principle of open justice was recognised at common law long before Australian federation. The chronology is important because the Constitution is interpreted in accordance with its common law context *at the time of Federation, adapted to accord with contemporary standards* (Keyzer, 2000, 93).[29] If the principle was part of the common law at Federation, the Constitution must be read in light of its existence. The common law is 'the anterior law providing the sources of juristic authority for our institutions' (Dixon, 1965, p 203; Brennan, 1998 p v).[30]

So, in 1821, the Court of Kings Bench made an order at the commencement of a trial on an indictment of high treason that no publication of any of the proceedings was to be made until the end of the trial. The order extended to cover the trials of every one of the accused, who were being tried separately. The order was said to be made 'to preserve the purity of the administration of justice'.[31] That 1821 case was

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28 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

29 *Cheatle v The Queen* (1993) 177 CLR 541. See further Keyzer, P., 'Pfeiffer, Lange, the Common law of the Constitution and the Constitutional Right To Natural Justice', (2000) 20 *Australian Bar Review* 87, 91.

30 Dixon, O., 'The Common Law As An Ultimate Constitutional Foundation', in *Jesting Pilate,* William S Hein and Co Inc, Melbourne, 1965, 203; Brennan, F.G.B., 'Foreword' to Keyzer, P., *Constitutional Law*, Butterworths, Sydney, 1998, v.

31 *R v Clement* (1821) 4 B & Ald 218 at 230 (106 ER 918 at 922).

approved in 1913 in *Scott v Scott*, which I will return to in a moment. In 1976 Justice McHugh, when a member of the New South Wales Court of Appeal, said:

> The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom. Accordingly, an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it. The making of an order must also be reasonably necessary; and there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. Mere belief that the order is necessary is insufficient.[32]

Justice McHugh was describing a principle of common law that had applied in New South Wales for over one hundred and fifty years. In *Scott v Scott* the UK House of Lords, criticizing divorce proceedings held behind closed doors, said:

> This result, which is declared by the Courts below to have been legitimately reached under a free Constitution, is exactly the same result which would have been achieved under, and have accorded with, the genius and practice of despotism.[33]

It is therefore *constitutionally* necessary for courts to adhere to the principle of open justice. In *Scott v Scott*, Lord Shaw *also* went on to say:

> What has happened is a usurpation – a usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly denied to the judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.[34]

Lord Loreburn, in the same case, held open justice up as the *most* critical guarantee of liberty:

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32 *John Fairfax & Sons v Police Tri*bunal (1986) 5 NSWLR 465 at 476–477.

33 *Scott v Scott* [1913] AC 417 at 476–477.

34 *Scott v Scott* [1913] AC 417 at 476–477.

> Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise.[35]

The reservation of the discretion by the Courts to determine the ambit of the principle of open justice means that the place to go to develop the principle is the Courts, not the Parliament.

Murmurs have now emerged in judgments of the High Court that the principle of open justice may have a constitutional source. So, for example, in *Russell v Russell*,[36] Justice Gibbs approved the statement of the Privy Council in *McPherson v McPherson*[37] that 'publicity is the authentic hallmark of judicial as distinct from administrative procedure' and the majority of the Court struck down a federal provision requiring a State court to sit in private.

In *Re Nolan; Ex parte Young*[38] Justice Gaudron said that the 'judicial process', which Her Honour has elsewhere confirmed has constitutional sources, includes 'open and public inquiry (subject to limited exceptions) (and) the application of the rules of natural justice'.

The open justice principle was approved by Justice McHugh in *Grollo v Palmer*.[39] In that case McHugh J indicated that the *source* of the principle is the Constitution: 'open justice' was said to be 'an essential feature of the federal judicial power'.

The principle is certainly regarded to have Federal constitutional dimensions within New South Wales. In *John Fairfax Publications Pty Ltd v The Attorney-General of NSW*,[40] Spigelman CJ, Priestley and Meagher JJA said that 'the principle is so fundamental to be of constitutional significance'. In reaching their conclusions, the Court of Appeal referred extensively to Justice Gaudron's judgment in *Re Nolan; Ex parte Young*.

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35 *Scott v Scott* [1913] AC 417 at 477, quoting Hallam.

36 (1976) 134 CLR 495 at 520.

37 [1936] AC 177 at 200.

38 (1990) 172 CLR 460 at 496.

39 (1995) 184 CLR 348 at 379.

40 [2000] NSWSCA 198.

Time For A Head Count And A Test Case?

For journalists and their lawyers, the next step is to do a head-count in the High Court and find the right vehicle for a test case. I feel confident that a majority of the Court would favour the development of the common law principle of open justice, and a majority might confirm that it has a *necessarily* constitutional source.

These submissions will need to be developed very carefully because ultimately the extent of any qualification or exception to the general principle of open justice is governed by the principle of *necessity*.[41] The necessity argument was touched on by Chief Justice Spigelman in his keynote address to the 31st Australian Legal Convention in 2000:

> Australian public debate has a tendency to ignore such fundamental principles, in the same way as we fail to appreciate the skill embedded in the engineering infrastructure which ensures that if you flick a switch, the lights go on or, if you turn a tap, water pours out. No one thinks about it. We take it for granted.

In the constitutional context, once the High Court has decided that a new implied right or freedom is *necessary*, then the capacity of litigants to influence judicial thinking on the content of such a right may dramatically recede. In the mind of some people, the failure of the High Court to deliver on the promise of its early free speech jurisprudence demonstrates that this is so. If the principle of open justice *is* to be entrenched by judicial exegesis rather than constitutional referendum — which is probably much more likely — then steps need to be taken by journalists now to educate lawyers and courts about the media, the dynamics of their profession, and the dignity of risk that is a *necessary* concomitant of free speech.

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41 *Scott v Scott* [1913] AC 417 at 438; *John Fairfax & Sons v Police Tribunal* (1986) 5 NSWLR 465 at 472.