# HOW THE IMPLIED CONSTITUTIONAL FREEDOM OF COMMUNICATION ON GOVERNMENT AND POLITICAL MATTER MAY REQUIRE THE DEVELOPMENT OF THE PRINCIPLES OF OPEN JUSTICE

**Judicial Conference of Australia Colloquium 2007 – Sydney**
**Sunday 7 October 2007**

**Steven Rares***

*It is just over 10 years since former New Zealand Prime Minister David Lange made his most significant contribution to Australian law – allowing the High Court of Australia to expound that the Constitution contained an implication of freedom of communication on government and political matters. This enables the people to exercise free and informed choice as electors (**Lange v Australian Broadcasting Corporation**[1]). But, does it affect the principles, or operation, of open justice? What can the public, and in particular, the media now see of any documentary material used in court? With more and more written and electronic material being used in court proceedings, what rights do persons who are not parties to the case being heard have to access this material?*

1. Today I want to discuss two concepts which are fundamental to the way we are governed. The first is the principle of open justice. That principle requires that justice should be administered in public, transparently and openly, and that every member of society has the right not only to see what takes place in open court but to make fair and accurate reports of it, to discuss it and to comment on it.

2. The second principle has been the subject of more recent exposition but is rooted in similarly fundamental values. It is the freedom from legislative or executive control of citizens' rights to discuss matters concerning government and politics. In 1997 the High Court of Australia identified this as an implication in the *Constitution* of the Commonwealth which constrained the making of laws or the use of executive power to inhibit citizens from being able to participate in the parliamentary democracy and mechanism for changing the *Constitution* by referendum for which the *Constitution* itself provided. If there are to be elections

---

* A judge of the Federal Court of Australia. The author gratefully acknowledges the assistance of his associate, Aaron Timms, in the preparation of this paper. The errors are the author's alone.

1 (1997) 189 CLR 520

or referenda, the electors must be able to discuss freely matters of government and politics which fall within the spectrum of issues about which they may wish to cast their vote.

3. Courts, too, are institutions of government in a democratic society. Each of the three arms of government, the Parliament, the executive and the judiciary, has a role in making and changing the laws under which citizens live. The *Constitution* defuses the power of each arm of government by distributing various responsibilities and functions among them.

4. The Parliament is given the power to enact legislation which, subject to its constitutional competence, determines public and private legal rights, obligations, duties and discretions.

5. The executive has the traditional function of enforcing the law although it can exercise powers delegated to it by the legislature to make regulations within limits. Moreover, the executive carries out tasks confided to it by laws made by the Parliament. These include the exercise of powers that affect citizens and non-citizens in their ordinary lives and activities such as the granting of licenses, permissions, concessions, pensions, the collection of revenues and the prosecution and confinement of offenders.

6. The judicial branch has the function of declaring the law and applying it to the facts of particular cases. In a constitutional democracy such as ours, it is the role of the courts to determine whether, ultimately, the Parliament or the executive have acted within the constitutional bounds of their powers. But judicial decisions can have political consequences. One only has to remember the controversy that emerged from the decision of the High Court in *Mabo v State of Queensland (No 2)*[2] to appreciate that by declaring the law judicial decisions can have profound political impacts. Political and governmental reactions follow from decisions of the courts. Talk back radio and the tabloid press comment daily on the adequacy, or more usually the perceived inadequacy, of sentences imposed

---

[2] (1992) 175 CLR 1

by magistrates and judges. Frequently, they assert the need for *'... the government to do something about it'*.

7. Members of the community are entitled to agitate to change the law declared by the courts through the legal means afforded them by the *Constitution*. They may do this not only by discussing matters of government and politics and seeking to influence elections or politicians, but also by promoting a referendum to vest in or remove from the Parliament of the Commonwealth some legislative power under the mechanism in s 128 of the *Constitution*. Part of the debate on such a question may involve discussion about the judicial reasoning process which led to various judges determining the law which is sought to be changed, modified or addressed by a referendum. There is an open question whether discussion about the judicial reasoning process itself is protected by the implied constitutional freedom, as the diversity of views expressed by McHugh and Kirby JJ in *APLA Ltd v Legal Services Commissioner (NSW)*[3] shows[4].

8. This suggests a capacity for interaction to occur between the rights of the public afforded under the principle of open justice and the implied constitutional freedom of communication on government and political matter. And it raises an important question as to whether each of those legal concepts affects the ability of third parties, including the media, to have access at any particular time to the material before the Court on which it is acting or asked to act. It is to those matters that I wish now to turn.

**The principle of open justice**

9. A classic statement which goes to the heart of one aspect of the principle of open justice[5], is the aphorism of Lord Hewart CJ in *R v Sussex Justices; Ex parte McCarthy*[6]:

---

3 (2005) 224 CLR 322

4 (2005) 224 CLR 322 at 360 [63], 440 [347]

5 *The Queen v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 262-263 per Barwick CJ, Gibbs, Stephen and Mason JJ

6 [1924] 1 KB 256 at 259

> *'It 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.'*

10. A second fundamental aspect of the principle lies in its recognition that everyone is entitled to access to the Courts. This is achieved in two ways. First, members of the public are entitled to be present in court, not by leave or licence, but as of right. As long ago as 1829, in *Daubney v Cooper*[7] the Court of King's Bench held that:

> *'... it is one of the essential qualities of a court of justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on ... have a right to be present for the purpose of hearing what is going on.'*

11. Secondly, there is a right to publish a fair and accurate report of court proceedings which is of fundamental importance[8]. McHugh JA described the importance which the common law has attached to a fair and accurate report of court proceedings as being illustrated by the rule that its publication is not a contempt of court even though it is likely to prejudice the fair trial of pending proceedings[9]. McHugh JA said:

> *'It is also illustrated by the rule that a fair and accurate report of court proceedings made in good faith is not an actionable defamation. Without the publication of the reports of court proceedings, the public would be ignorant of the workings of the courts whose proceedings would inevitably become the subject of the rumours, misunderstandings, exaggerations and falsehoods which are so often associated with secret decision making. The publication of fair and accurate reports of court proceedings is therefore vital to the proper working of an open and democratic society and to the maintenance of public confidence in the administration of justice. It is a right which can only be taken away by words of plain intendment.'* [10]

---

7 (1829) 10 B & C 237 at 240

8 *John Fairfax & Sons Limited v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 481C-E per McHugh JA, with whom Glass JA agreed; see too: *Esso Resources Australia Ltd v Plowman* (1995) 183 CLR 10 at 43 per Toohey J

9 *Police Tribunal* 5 NSWLR at 481D-E; *R v Evening News; Ex parte Hobbs* [1925] 2 KB 158; *Re Consolidated Press Ltd; Ex parte Terrill* (1937) 37 SR (NSW) 255; 54 WN 106

10 *Police Tribunal* 5 NSWLR at 481E-F

12. These values are by no means unique to Australian or English common law. A striking early formulation came when Mirabeau rose before the French National Constituent Assembly in the early 1790s and declared:

> *'Donnez-moi le juge que vous voudrez, partial, corrupt, mon ennemi même, si vous voulez: peu m'importe pourvu qu'il ne puisse rien faire qu'à la face du public.'*[11]

13. As Lord Shaw of Dumfermline remarked in *Scott v Scott*[12] the principle had moved Jeremy Bentham to say:

> *'Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.'*[13]

14. Nonetheless, the principle of open justice is not absolute. It is subject to the fundamental principle that the chief object of every court of justice must be to secure that justice is done. Thus, as Viscount Haldane LC remarked in *Scott*[14], there are three recognised categories of exceptions to the open administration of justice. The first concerns proceedings involving wards of the Court or children. The second concerns persons who are incapable of conducting their own affairs, quaintly referred to in 1913 as '*lunatics'*. In each of those two classes of cases his Lordship explained that the Court was really sitting primarily to guard the interests of the ward or mentally incapable person. Thus its jurisdiction in that respect was paternal and administrative, and the disposal of controversial questions was an incident only in the exercise of the jurisdiction. In order to achieve the proper care of the child or mentally incapable person, it may often be necessary to exclude the public so that the Court can attain its primary object of achieving justice. Viscount Haldane LC explained that the broad principle of

---

11 "Give me whatever judge you will – partial, corrupt, my enemy even, if you must; these things will trouble me little, so long as what he does, he is only able to do it in the face of the public." As quoted in Robert W Millar, "The Formative Principles of Civil Procedure" (1923-24) 18 *Illinois Law Review* 1 at 156.

12 [1913] AC 417 at 477

13 J Bowring, ed, *The Works of Jeremy Bentham*, Vol 4 (Edinburgh: William Tait, 1843), pp 316-317; as cited by Spigelman CJ in *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at 525 [61]

14 [1913] AC at 437-438

open justice then yields to the paramount duty which is the care of the ward or the mentally disabled person. The third class of exception involves commercial secrets, secret processes, confidential information and the like where the open administration of justice in respect of the secret would destroy its subject matter.

15. Ultimately, the exceptions may be seen to resolve into the principle that the Court will sit in public unless it is necessary, in the interests of justice, not to do so. Necessity, not preference, is the metwand by which the Court is guided to move from the rigour of always sitting in public[15].

16. Every court has an implied jurisdiction to exercise powers which are necessary to ensure that justice is done in the case before it. The superior courts of record, in addition, have inherent jurisdiction, a more elusive concept, as Dawson J outlined in *Grassby v The Queen*[16], to prevent abuse of their processes and to punish for contempt. Moreover, the inherent jurisdiction of a superior court of unlimited jurisdiction entails a general responsibility for the administration of justice. Under the *Constitution*, the division of powers, including judicial power, between the Commonwealth and the States may affect the ambit of the inherent jurisdiction of superior courts of record of their different polities, but that is a topic for another day.

17. The implied or inherent power of a court to do justice in the proceedings before it authorises it to make such orders as are necessary in the interests of justice to protect the integrity of these proceedings. Thus, the Courts possess the power to make orders in the proceedings by prohibiting disclosure of matter or excluding the public so that the overriding purpose of the proceedings, namely to do justice between the parties according to law, may be achieved[17]. Examples of this are the power to exclude the public or to limit the disclosure of evidence or matter in order to protect:

---

15 *Scott* (1913) AC at 437

16 (1989) 168 CLR 1 at 16

17 *Food Improvers Pty Limited v BGR Corporation Pty Limtied (No 2)* (2006) 155 FCR 216 at 232 [29], *Llewellyn v Nine Network Australia Pty Ltd* (2006) 154 FCR 293 at 295-296 [8]-[13]; see also *Re Her Honour Chief Judge Kennedy; Ex parte West Australian Newspapers Ltd* [2006] WASCA 172 at [39]-[40] per Steytler P, with whom Roberts-Smith and McLure JJA agreed

- a person's identity (such as an informer[18]);
- a victim of an alleged or attempted blackmail from identification[19];
- trade secrets;
- confidential information;
- matters attracting public interest immunity[20].

18. If such things were revealed in court, it could have the effect of entirely deterring a person seeking to exercise his, her or its legal rights. Legislatures also create express power in courts to limit publicity for more abundant caution[21].

**The implied constitutional freedom**

19. An implication is a curious thing. It is an expression or meaning conveyed by, or inherent within, words spoken or used in a document. But it involves a different concept, idea or matter. The statement or document necessarily conveys, at the same time and by the same medium, something which has not been explicitly stated. Politicians have a gift for creating implications of all sorts, particularly in the language they use in legislation. An implication is not, however, connoted by Sir Winston Churchill's prognostication of the likely action of Russia in October 1939 as being:

> *'... a riddle wrapped in a mystery inside an enigma ...'*[22]

20. Our country's founding fathers were wise enough to create a constitution in which implications abound. As Dixon J said in *Australian Communist Party v The Commonwealth*[23], the *Constitution*:

---

18 *Cain v Glass* (1985) 3 NSWLR 230; *D. v National Society for the Prevention of Cruelty to Children* [1978] AC 171

19 *John Fairfax Publications Pty Limited v Local Court of New South Wales* (1991) 26 NSWLR 131

20 e.g. *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39; *Commonwealth v Northern Land Council* (1993) 176 CLR 604

21 see e.g. ss 17(4), 50 of the *Federal Court of Australia Act 1976* (Cth)

22 Radio broadcast, London, 1 October 1939 – *Winston S. Churchill: His Complete Speeches, 1897-1963,* ed Robert Rhodes James, vol 6, p 616 (1974)

23 (1951) 83 CLR 1 at 193

> '*... is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.*'

21. That assumption profoundly affects the way in which the Australian nation is governed. Even though New Zealand has not yet taken up the opportunity afforded by s 6 of the *Commonwealth of Australia Constitution Act 1900* (Imp)[24], to be admitted as part of the Commonwealth of Australia, its former Prime Minister, the Rt Hon David Lange was instrumental in exposing an implication in the *Constitution* of the Commonwealth. The High Court noted that discussion of matters concerning New Zealand may often throw light on government or political matters in Australia[25]. This was because of matters such as geography, history and the constitutional and trading arrangements between our nations. It is unlikely that their Honours had in mind what Mr Lange said in his valedictory speech in 1996 to the Parliament of New Zealand:

> *'I want to thank those people whose lives were wrecked by us. They had been taught for years they had the right to an endless treadmill of prosperity and assurance, and we did them. People over 60 hate me.'*

22. The subject matter of the defamation on which he sued is not revealed by the report of *Lange v Australian Broadcasting Corporation*[26]. Mr Lange had commenced the proceedings in 1989, while Prime Minister. He alleged that the ABC had broadcast a '*Four Corners*' program which conveyed a number of defamatory imputations including that he was guilty of abuse of public office and he was unfit to hold public office. The defendant broadcaster sought to plead a defence of qualified privilege arising pursuant to a freedom guaranteed by the *Constitution*.

23. The High Court held that freedom of communication on matters of government and politics was an indispensable incident of the system of representative

---

24 or, 'covering clause 6'

25 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 576

26 (1997) 189 CLR 520

government which the *Constitution* creates by directing that the members of the House of Representatives and the Senate shall be '*directly chosen by the people*' of the Commonwealth and the States, respectively[27]. So, when a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the *Constitution*, the Court said that two questions had to be answered before the validity of the law could be determined. Those questions were:

1. Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

2. If the law effectively burdens that freedom, is it reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the *Constitution* to the informed decision of the people?[28]

24. If the first question were answered 'Yes' and the second 'No', the law is invalid[29].

25. In *Lange*[30], Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ characterised the implication as being negative in nature: it invalidates laws and, consequently, creates an area of immunity from legal control, particularly from legislative control, but the implied freedom confers no rights on individuals.

26. The second question involves the formation of a value judgment, rather than a determination that the law is either essential or unavoidable. There is little

---

27 *Lange* 189 CLR at 599

28 *Lange* 189 CLR at 567 as varied in *Coleman v Power* (2004) 220 CLR 1 at 50-51 [83]-[96] per McHugh J, 77-78 [196] per Gummow and Hayne JJ, 82 [211] per Kirby J

29 *Lange* 189 CLR at 567-568

30 *Lange* 189 CLR at 560

difference between the concept of '*reasonably appropriate and adapted*' and the notion of '*proportionality*'[31].

**Are courts, judges or judgments within the implied constitutional freedom?**

27. An underlying rationale in *Lange*[32] is that the electors must have the ability to acquire relevant information in order to cast a fully informed vote in an election for members of the Parliament. Accordingly, the ability to cast such a fully informed vote depends upon the freedom of communication which *Lange*[33] identified as an indispensable incident of the representative government mandated by the *Constitution*[34]. Gummow, Kirby and Crennan JJ pointed out in *Roach*[35] that a law will be invalid which proscribes communication under the guise of characterising it as '*abusive*' or '*insulting*' or '*offensive*' if the words used are not so hurtful that they may be regarded as intended, or to be reasonably likely, to provoke unlawful physical retaliation. Gummow, Kirby and Crennan JJ explained the decision in *Coleman v Power*[36], saying[37]:

> *'Were that not so, and were a broader meaning given to the area of proscribed communication then the end served by the statute would necessarily be the maintenance of civility of discourse; given the established use of insult and invective in political discourse, that end could not satisfy the second question or test in* Lange[38]*.'*

28. Another effect of the constitutional implication is that the common law must conform with it. As the Court said in *Lange*[39]:

> *'The development of the common law in Australia cannot run counter to constitutional imperatives*[40]*. The common law and the requirements of the Constitution cannot be at odds.'*

---

31 *Roach v Electoral Commissioner* [2007] HCA 43 at [85] per Gummow, Kirby and Crennan JJ
32 189 CLR 520
33 189 CLR 520
34 *Roach* [2007[ HCA 43 at [86] per Gummow, Kirby and Crennan JJ
35 [2007] HCA 43 at [87]
36 (2004) 220 CLR 1 at 77 [193], 87 [226]
37 [2007] HCA 43 at [87]
38 220 CLR 1 at 78-79 [197]-[199, 98-99 [255]-[256]
39 *Lange* 189 CLR at 566
40 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 140

So, the Court decided that the common law of qualified privilege in defamation proceedings should be developed consistently with the existence of the implied constitutional freedom to discuss government and political matters.[41]

29. Gleeson CJ, Gummow, Hayne and Heydon JJ said in *D'Orta-Ekanaike v Victoria Legal Aid* [42]:

> *'The community has a vital interest in the final quelling of controversies which are brought to the judicial arm of government to resolve.'*

30. They said that the reference to the '*judicial branch of government*' was more than a mere collocation of words designed to instil respect for the judiciary. They said it reflected a fundamental observation about the way in which our society was governed.

31. The extent to which communication about the judicial branch is included within the umbrella of '*government and political matter*' is a topic of on-going judicial consideration. Debate abounds[43]. Perhaps this is a consequence of the view taken by Gleeson CJ and Heydon J in *APLA*[44] that the meaning of the expression

---

41 Later, in *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503 at 534-535, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ said that the common law with respect to the choice of law rule for tort should be developed to take into account various matters arising from the Australian constitutional text and structure. Those matters included:

- the existence and scope of Federal jurisdiction;
- the investment of State Courts with Federal jurisdiction pursuant to s 77(iii) of the *Constitution*;
- the position of the High Court of Australia as the ultimate court of appeal;
- the impact of ss 117 and 118 of the *Constitution*;
- the predominant territorial concern of statutes of States and Territory legislatures; and
- '*more generally the nature of the federal compact*': *John Pfeiffer* 203 CLR at 534-534 [67]. They identified constitutional imperatives which could dictate development of the common law: *John Pfeiffer* 203 CLR at 535 [70].

42 (2005) 223 CLR 1 at [32]

43 See the discussion in: P Heywood-Smith: *'Government and Political Matters:* 'Lange*' Seven Years On* (2006) 80 ALJ 22

44 224 CLR at 350 [27]

'*freedom of communication about government or political matters*' is '*imprecise*'[45].

32. In *APLA*[46] McHugh J said that there was a difference between a communication concerning legislative and executive acts or omissions involving the administration of justice on the one hand and, on the other hand, communications concerning that subject which did not involve, expressly or inferentially, acts or omissions of the legislature or executive government. Included in the topics which could attract the *Lange* freedom were discussion of appointment or removal of judges, the prosecution of offences, withdrawal of charges, the provision of legal aid and the funding of courts. McHugh J reasoned that that was because each of these concerned activities of the legislature or executive government. But, he said, communications concerning the results of cases or the reasoning or conduct of the judges who decide them, were not ordinarily within the *Lange* freedom. He recognised that this distinction '*may sometimes appear to be artificial*' but said that it resulted from the necessity to promote and protect representative and responsible government. He continued[47]:

> *'Courts and judges and the exercise of judicial power are not themselves subjects that are involved in representative or responsible government in the constitutional sense.'*[48]

33. So, in *APLA*, McHugh J held[49] that the implied freedom does not extend to communication about the exercise of judicial power by courts. He said:

> *'*Lange *refers to "political or government matters". But those words must be read in the context of the decision. That context leaves no doubt that the term "government" is used to describe acts and omissions of the kind that fall within Chs I, II and VIII of the Constitution. It refers to representative and responsible government. In a broad sense, "government" includes the actions of the judiciary as the third branch of government established by the Constitution. But the freedom of communication recognised by* Lange *does not include the exercise of the*

---

45 see too *Peek v Channel Seven Adelaide Pty Ltd* (2006) 228 ALR 553 at 555 per Debelle J (SAFC)

46 *APLA* 224 CLR at 361 [65]

47 *APLA* 224 CLR at 361 [66]

48 see too per Callinan J at 481 [459]-[460]; Kirby J expressly disagreed with McHugh's views (see at 440 [347]; see too per Gummow J at 403-404 [216]-[220]

49 (2005) 224 CLR at 360 [63]

> *judicial power of the Commonwealth by courts invested with federal jurisdiction or, for that matter, the judicial power of the States. Nothing in Lange or the subsequent decision of this Court in* Coleman v Power *supports the proposition that the exercise of judicial power is within the freedom recognised by* Lange*.'* (Footnotes omitted.)

34. On the other hand, Kirby J tellingly disagreed with McHugh J, saying[50]:

> *'Communication about access to courts is communication about government and political matters. The courts are part of government. They resolve issues that are, in the broad sense, political, as this case clearly demonstrates.'*

35. In *John Fairfax Publications Pty Limited v Attorney-General (NSW)*[51], Spigelman CJ described the task undertaken by the High Court in *Lange* as one of '*explaining the elliptical and expounding the unexpressed*'. In that case the Court of Appeal of the Supreme Court of New South Wales held that part of s 101A of the *Supreme Court Act 1970* (NSW) was not a valid law. The section permitted the Attorney-General to refer questions of law arising out of the acquittal of a person on a charge of criminal contempt to the Court of Appeal. This procedure would not impugn the acquittal. It is similar to the well known power to refer to criminal appellate review questions of law arising out of acquittals[52].

36. In *Fairfax*[53] the section required the proceedings to be heard in camera and prohibited publication of any submissions made on the reference and the identity of the alleged contemnor. Any contravention of those restrictions on publication was punishable as a contempt of the Supreme Court. Spigelman CJ, with whom Priestley JA agreed on this point, held that the requirement that the whole of the proceedings be in camera went well beyond what was necessary in order to achieve the objective of the legislation. They also held that the prohibition against publication of a report of any reference also went well beyond what was

---

50 *APLA* 224 CLR at 440 [347]
51 (2000) 181 ALR 694 at 708 [78]
52 see eg: *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289
53 181 ALR 694

required in order to serve that objective[54]. But, they held that the legislation was valid in prohibiting publication disclosing the acquitted person's identity.

37. The majority held that the State Attorney-General had power under s 101A to make a reference in respect of contempt charges that arose in the exercise of federal jurisdiction by State courts. Thus, his or her role in making a reference was the same whether the charges arose under State or federal jurisdiction. Furthermore, Spigelman CJ pointed out that the policy of a State Attorney-General, manifest in contentions or submissions put to a court on his or her behalf, may be relevant to government or political decisions at a Commonwealth level. Questions could arise about whether the Commonwealth should exercise such powers as it may have to affect the operations of State courts in the exercise of federal jurisdiction, or indeed, whether it should confine or remove the conferral of such jurisdiction. The law of contempt, being part of the common law of Australia applicable to all courts, including Federal courts and State courts exercising federal jurisdiction, could also affect the exercise of rights protected by the implied constitutional freedom of communication on government and political matters. Spigelman CJ said that when a State Attorney-General institutes and prosecutes proceedings with respect to the law of contempt, he or she is exercising a function of government with respect to the law of contempt that could involve the protection of the process of the Court exercising federal jurisdiction[55].

38. The Chief Justice and Priestley JA rejected the contention that the requirement to sit in camera and the prohibition of publicity of the institution of the reference were reasonably appropriate and adapted to serve a legitimate objective, namely the protection from further adverse publicity of a person acquitted of a criminal charge[56].

---

54 *Fairfax* 181 ALR at 717 [127], 721 [157]
55 *Fairfax* 181 ALR at 713 [104]-[107]
56 *Fairfax* 181 ALR at 717 [129]

**Interaction of the two principles – Open justice and freedom of communication on government and political matter**

39. The *Fairfax*[57] case emphasised the interaction of the law of contempt, the exercise of freedom of speech and the implied constitutional freedom of communication. This interaction may in part have been anticipated by the celebrated judgment of Jordan CJ in the *Bread Manufacturers Case*[58], where he said:

> *'It is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a Court of justice from having his case tried free from all matter of prejudice. But the administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested; and if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant.*
>
> *It is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by reason merely of the fact that the matter in question has become the subject of litigation, or that a person whose conduct is being publicly criticised has become a party to litigation either as plaintiff or as defendant, and whether in relation to the matter which is under discussion or with respect to some other matter ... .'*

40. Jordan CJ had previously referred to the public interest in securing a fair trial of proceedings, particularly those involving criminal proceedings, which the common law of contempt secures[59], and its interaction with the importance of being able to discuss matters of public interest, including matters which incidentally may have become part of litigation. Part of the balancing exercise to

---

57 181 ALR 694

58 *Ex parte Bread Manufacturers Limited; Re Truth and Sportsman Limited* (1937) 37 SR (NSW) 242 at 249-250

59 *Hinch v The Attorney-General (Vic)* (1987) 164 CLR 15

determine what is necessary in the interest of justice in a particular case may involve the Court considering another public interest, reflected in the purpose of the implied constitutional freedom of communication on government and political matter.

41. In *Home Office v Harman*[60] a bare majority of the House of Lords held that after a judge had reserved judgment it was a contempt of court for a solicitor of a party to provide to a member of the press access to discovered documents of another person to the litigation which had been read out in open court during the trial. The judge later held the documents to be inadmissible. But, the contempt found, was that a solicitor was bound by the implied undertaking to the court that she would use documents produced under compulsion in the process of the litigation only for the purpose of the litigation. The majority held that by disclosing the documents to the journalist, she had breached that implied undertaking.

42. Lord Diplock, one of the majority, recognised that anyone who was present in the courtroom at the time the documents were read out could have taken them down in shorthand, if they were competent to do so, and could publish them as part of a report of the proceedings in the Court[61]. He said that anyone who had possession of the documents at the close of the trial would have had a great advantage over anyone else who did not have that access and desired to use them '*for some collateral or ulterior purpose unconnected with the proper conduct of the action ... in which they were disclosed*'[62]. And, he said, because '*Ms Harman did not undertake the long and costly task of obtaining from the official shorthand writers a transcript of the mechanical recording of counsel's five day opening speech*'[63] she could not use the simple expedient of actually showing a reporter the documents, the contents of which would have been recorded at length in such a

---

60 [1983] 1 AC 280

61 *Harman* [1983] 1 AC at 303-G. It did not matter that, after having been read out, it turned out that the documents ought not to have been because they were later ruled inadmissible.

62 *Harman* [1983] 1 AC at 304F-G

63 *Harman* [1983] 1 AC at 305D-E

transcript. He concluded that public policy required the enforcement of the implied undertaking by the action of contempt[64].

43. The celebrated dissenting speech of Lord Simon of Glaisdale and Lord Scarman said:

> *'A distinction between use of a transcript containing the documents and the documents themselves would be absurd.'*[65]

They gave the example of Ms Harman sitting at her desk with a copy of the disclosed documents in her left hand and a transcript of the trial proceedings in her right hand. They pointed out that if she handed the journalist what was in her right hand, the transcript, she would not commit a contempt, but if she handed the actual documents, the contents of which were recorded verbatim in the transcript, she would. Their comment was, appositely:

> *'A guilty left hand and an innocent right hand? Rights and duties in the field of fundamental freedoms cannot depend upon such distinctions.'*[66]

44. Lords Simon and Scarman concluded that the public policy of the English common law, by its recognition of the principle of open justice, ensured that the public administration of justice would be subject to public scrutiny. They said that such scrutiny serves no purpose unless it is accompanied by the rights of free speech, namely the right publicly to report, to discuss, to comment, to criticise, to impart and to receive ideas and information on the matters subjected to scrutiny. They continued[67]:

> *'Justice is done in public so that it may be discussed and criticised in public. Moreover, trials will sometimes expose matters of public interest worthy of discussion other than the judicial task of doing justice between the parties in the particular case. It cannot be desirable that public discussion of such matters is to be discouraged or obstructed by refusing to allow a litigant and his advisors, who learnt of them through the*

---

64 *Harman* [1983] 1 AC at 306D-E; see too at 308D-E per Lord Keith of Kinkel and 326G-327E per Lord Roskill who completely agreed with Lords Diplock and Keith

65 *Harman* [1983] 1 AC at 315F

66 *Harman* [1983] 1 AC at 315

67 *Harman* [1983] 1 AC at 316

> *discovery of documents in their action, to use the documents in public discussion after they had become public knowledge.'*

45. Significantly Lords Simon and Scarman concluded that the documents became public knowledge at the time when, without any restriction imposed by the trial judge, they were read out aloud in open court. They said:

> *'… from that moment [Ms Harman's] undertaking, even if it had [contrary to our view] continued, could not have availed to prevent their publication to the world at large.'*[68]

**Present English position**

46. In *Harman*[69], Lords Simon and Scarman observed that it would need legislation or perhaps a new rule of court to introduce a right to inspect a public judicial record based on the American model into the English judicial system.

47. In England, new rules were introduced in October 2006 entitling members of the press and public to obtain copies of, among others, any initiating process and statements of each party's case or defence. Documents such as copies of contracts or expert reports are obtainable only if the Court gives permission. The Court can, on application by a party or a person identified in a statement of case, make an order preventing or restricting disclosure of the statement of case or requiring it to be edited before disclosure[70].

**New Zealand position**

48. As the twentieth anniversary of the sinking of the *Rainbow Warrior* in Auckland Harbour approached, Television New Zealand began preparing a documentary. Video tapes recording pleas of guilty by Alain Marfart and Dominique Prieur to charges of manslaughter arising out of the sinking had been made at the committal proceedings in 1978 and held on the sentencing file in the High Court of New Zealand. TV NZ sought access in 2005 for the purposes of copying the

---

68 *Harman* [1983] 1 AC at 320B-C
69 *Harman* [1983] 1 AC at 318B-C
70 Civil Procedure Rules Pt 5 r 5.4C

video tapes to use in the documentary. The former French secret service agents opposed access.

49. The Supreme Court of New Zealand held that the application for access to the records was a civil proceeding[71]. Elias CJ, Blanchard and McGrath JJ pointed to the distinction between, first, entries in the books, registers and documents maintained by the Court, which were formal steps in proceedings and, secondly, other material received by it during the course of the proceedings and held on the Court file. They held that records in the first category were conclusive as to essential court processes and the outcome of the proceedings and constituted the formal record[72].

50. They also noted that in the second category, the file would include, in addition, documents, exhibits (which might remain the property of party or persons from whom they were subpoenaed) and other material which constituted an archive generated by the proceedings but which were not the formal record of the Court. They said that access to the second category of material was subject to the approval of the Court[73] and held that no general right of public access to material which did not constitute the formal record of the Court was given by any enactment or recognised by New Zealand authority[74]. They reasoned that in New Zealand there was no common law right of access to judicial records[75], distinguishing *Nixon v Warner Communications Inc*[76] and *Vickery v Nova Scotia Supreme Court (Prothonotary)*[77].

51. Since *Marfart* was decided the New Zealand Law Commission has published a report: *Access to Court Records*[78]. The Commission recommended the enactment of a *Court Information Act* the purpose of which would be to increase access to court records within principled limits. There would be a presumption of

---

71 *Marfart v Television New Zealand* [2006] 3 NZLR 18
72 *Marfart* [2006] 3 NZLR at 28 [21]
73 *Marfart* [2006] 3 NZLR at 29 [22]
74 *Marfart* [2006] 3 NZLR at 29 [22]-[24] applying *R v Mahanga* [2001] 1 NZLR 641 at [35]
75 *Amery v Marfart (No 2)* [1988] 2 NZLR 754 at 757 per Gault J
76 435 US 589 (1978)
77 [1991] 1 SCR 671
78 Report 93

accessability to court information with a number of exceptions, some conclusive and others discretionary[79].

**United States position**

52. In the United States, the principle of open justice is recognised as deriving from the First Amendment. Rehnquist CJ acknowledged the role of the court as a part of government in a democracy under the rule of law in *Wilson v Layne*, stating[80]:

> *'There is certainly language in our opinions interpreting the First Amendment which points to the importance of "the press" in informing the general public about the administration of criminal justice. In* Cox Broadcasting Corp v Cohn*[81], for example, we said "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations." See also* Richmond Newspapers v Virginia[82]*. No one could gainsay the truth of these observations, or the importance of the First Amendment in protecting press freedom from abridgement by the government.'*

53. The Supreme Court of the United States recognised the right to inspect judicial records as a common law right in *Nixon*[83] but it held that right had been overridden by a federal statute. There is also a qualified right of access to judicial records under the First Amendment to the United States Constitution[84].

54. In *Nixon*[85], the Supreme Court held that:

> *'[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.'*

55. The rationale for the common law right of access in the United States was explained by the Second Circuit Court of Appeals in *United States v Amodeo*[86]:

---

79 New Zealand Law Commission Report 93 p 10 [10]
80 *Wilson v Layne* 526 US 603 at 612-613 (1998)
81 420 US 469, 491-492 (1975)
82 448 US 555 at 572-573 (1980)
83 435 US 589
84 see eg: *Press-Enterprise Co v Superior Court of California* 478 US 1 at 8 per Burger CJ; see too *Lugosch v Steingraber* 435 F 3d 110 at 120 (CA2:2006)
85 *Nixon v Warner Communications Inc* 435 US 589 (1978) at 597
86 *United States v Amodeo* 71 F3d 1044 at 1048 (CA 2:1995) *Lugosch* 435 F 3d at 119

> *'Without monitoring ... the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions.'*

**Issues for the future**

56. Does any interaction among the principle of open justice, the right to make fair reports, and the implied constitutional freedom of communication on government and political matter affect public access to material that has been deployed in open court, either by being read out, tendered, or handed up to the judge or jury to be read by them silently to themselves?

57. In the quarter century since *Harman*[87] was decided there have been substantial diminutions in the use of orality in court. Much of the common law's procedures evolved when proceedings were tried wholly orally. Even today, an accused must enter his or her plea orally by offering the words '*Guilty*' or '*Not Guilty*'. Until recently, even judgments had to be given orally even if it took days to read them out aloud[88]. Most court proceedings no longer hold the public fascination which crisp jury trials with flamboyant counsel did at the commencement of the 20th century. In the interests of efficiency and economy, documents are handed up to the Court, or read before court by judicial officers to save time. Moreover, the advent of electronic trials, in which vast number of documents are tendered and accessed from computer data bases, has further reduced the ability of members of the public to hear or have ready access to the evidence or material upon which the Court is being asked to act. Witnesses frequently give their evidence in chief by use of statements or affidavits which are '*read*', not as in days gone by aloud, but silently by the judge and counsel before the witness is first exposed to a cross-examination about some passage or passages in that material.

58. Vindication of the purpose sought to be achieved by the principle of open justice may call for some adaptations to court procedure which incorporate these new or

---

87 [1983] 1 AC at 280

88 e.g. *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 at 209 where the report notes that Cumming-Bruce, Templeman and Brightman LJJ *'... took it in turns to read the judgment'*.

more frequently used '*efficient methods*' of putting material before the Court. The purpose of the principle was well expressed by Gibbs J in *Russell v Russell*[89]:

> *'It is the ordinary rule of the ... courts of the nation, that their proceedings shall be conducted "publicly and in open view"*[90]*. This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for "publicity is the authentic hall-mark of judicial as distinct from administrative procedure"*[91]*.'*

59. Different Australian courts have different practices and rules in relation to these matters. The Federal Court of Australia has made rules which permit any member of the public to search in the registry to inspect documents in proceedings in a particular class[92]. This includes the right to inspect originating process and pleadings.

60. In *Re Richstar Enterprises Pty Limited; Australian Securities and Investments Commission v Carey (No 2)*[93] French J held that there was a far stronger case for access by the public to affidavits which formed part of the evidence before the Court than to those which are not in evidence. He followed Sackville J in *Seven Network Limited v News Limited (No 9)*[94] and the Full Court of the Federal Court in *R v Davis*[95] and held that, where rules such as FCR O 46 r 6 apply[96], ordinarily the interests of justice require the Court to take the view that a non-party should have access to all non-confidential documents and other material admitted into evidence.

---

89 (1976) 134 CLR 495 at 520
90 *Scott* [1913] AC at 441
91 *McPherson v McPherson* [1936] AC 177 at 200
92 see too *Llewellyn v Nine Network Australia Pty Limited* (2006) 154 FCR 293
93 (2006) 232 ALR 389 at 402-403 [16]-[19]
94 (2005) 148 FCR 1
95 (1995) 57 FCR 512 at 514 per Wilcox, Burchert and Hill JJ
96 *Richstar* 232 ALR at 403 [18], per French J applying Sackville J in *Seven Network* 148 FCR at [27]

61. More recently, Edmonds J considered[97] the *National Classification Code* made pursuant to the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) which restricted publications which promoted, incited or instructed in matters of violence and crime. He held that the legislation did not trench upon the implied constitutional freedom.

62. In Australia there have been debates as to what the record of court is and who is entitled to have access to it. Spigelman CJ delivered an emphatic rejection of the argument that a common law right of access to judicial records exists for non-parties to proceedings, saying in *John Fairfax Publications Pty Ltd v Ryde Local Court* [98]:

> *'Neither the claimants, nor the public at large, have a right of access to court documents. The "principle of open justice" is a principle, it is not a freestanding right. It does not create some sort of freedom of information Act applicable to courts. As a principle, it is of significance in guiding the court in determining a range of matters including, relevantly, when an application for access should be granted pursuant to an express or implied power to grant access. However, it remains a principle and not a right.'*

63. Spigelman CJ interestingly concluded that, absent statutory authority, the Local Court had no implied power to grant any access to its records[99]. His Honour noted that the implied constitutional freedom of communication identified in *Lange*[100] is a negative one which creates an immunity rather than any right. In that case, the Court record, which media claimants wished to inspect, was the application for an apprehended domestic violence order that had been made against a judicial officer. An interim order had been made by telephone, but when returned before the Court, a magistrate in open court had continued the order. Later another magistrate, by consent and without admissions, again continued the order[101].

---

97 *NSW Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108 at 150 [205]-[207]

98 (2005) 62 NSWLR 512 at 521 [29] (Mason P and Beazley JA agreed)

99 *Ryde Local Court* 62 NSWLR at 514 [48]

100 189 CLR 520

101 Magistrate Pat O'Shane: see 62 NSWLR at 514 [3]-[5]

64. The media argued that because the allegations in the application must have been sufficient to warrant the Local Court exercising its power[102] against a judicial officer who could exercise the judicial power of the Commonwealth[103], electors may wish to discuss government or political matters relating to the magistrate or more generally judicial officers. Spigelman CJ rejected the argument, holding that the constitutional immunity had no operation. He said:

> *'There must be a burden on a freedom that exists independently of the law. There is none here.'*[104]

65. Earlier the same judicial officer had sued one of the publishers for defamation. The publisher sought to rely on a defence of qualified privilege based on *Lange*[105]. The New South Wales Court of Appeal held that the defendant publisher had not acted reasonably so that even if the defence of qualified privilege in *Lange*[106] applied, it could not succeed[107]. Special leave to appeal was refused because the findings on the defendant's reasonableness gave insufficient prospects of success[108]. The Court of Appeal[109] emphasised what Spigelman CJ had said in *Fairfax*[110], namely:

> *'The conduct of the courts is not, of itself, a manifestation of any of the provisions relating to representative government upon which the freedom is based.'*

66. A similar result to that in *Ryde Local Court*[111] was reached by the Victorian Court of Appeal in *The Herald & Weekly Times v Popovic*[112]. There Wineke ACJ and Warren AJA expressed the view that a newspaper criticism of a judicial officer's conduct or handling of proceedings was not a discussion of government or

---

102 Under s 562BA of the *Crimes Act 1900* (NSW): see 62 NSWLR at 524 [54]
103 see s 77(iii) of the *Constitution*
104 *Ryde Local Court* 62 NSWLR at 532 [96]
105 189 CLR 520: *John Fairfax Publications Pty Ltd v O'Shane* (2005) Aust Torts Reports §81-789
106 189 CLR 520
107 see *O'Shane* (2005) Aust Torts §81-789 per Giles JA at 67,466-67,467 [85]-[90], Ipp JA agreeing at 67,473 [139]; see too per Young CJ in Eq at 67,487 [307]-[308], 67,481 [249]
108 *John Fairfax Publications Pty Ltd v O'Shane* [2005] HCA Trans 965
109 *O'Shane* (2005) Aust Torts Reports §81-789 at 67,468 [94]-[95], 67,484 [273]
110 181 ALR at 709 [83]
111 62 NSWLR 572
112 (2003) 9 VR 1

political matter within the *Lange*[113] principle[114]. Gillard AJA expressed a provisional view, which conformed to that of the trial judge, that the article complained of was a discussion of government, but not political matter[115]. In refusing special leave to appeal, Gummow and Hayne JJ emphasised that they were not to be understood as endorsing the conclusions of the Victorian courts about whether or how *Lange*[116] ought be applied[117].

67. And another Victorian case of *Smith v Harris*[118], Byrne J, after referring[119] to the US position, said:

> *' ... I find it difficult to understand how an awareness of allegations made in pleadings or of the content of discovery permits the public to evaluate the work of court officials or contributes to a public understanding of the judicial process. ... The argument which would extend privilege to ... documents confuses the subject matter of the judicial process with the judicial process itself. Publicity properly attaches to the latter not to the former unless and until the subject matter bears upon an understanding of the judicial process.'*[120]

68. The Full Court of the Supreme Court of South Australia has held that it is first necessary to characterise a communication in order to determine whether it is about one or more matters within the implied Constitutional freedom[121]. Thus in *Peek*[122], Besanko J said that the process of characterisation had to be approached in a broad way. A communication may be about more than one subject matter. He held that it is not sufficient that the subject matter of the communication is one of public interest. Rather, Besanko J held that the constitutional protection is not based on the broad ground of public interest, but on the system of representative and responsible government enshrined in the *Constitution*.

---

113 189 CLR 520

114 *Popovic* 9 VR at 8-9 [6], 105 [507]

115 9 VR at 53 [251],-[253]

116 189 CLR 520

117 *The Herald & Weekly Times Ltd v Popovic* [2004] HCA Trans 180; see too: K Gould: *When the Judiciary Is Defamed: Restraint Policy Under Challenge* (2006) 80 ALJ 602

118 [1996] 2 VR 335

119 [1996] 2 VR at 346

120 [1996] 2 VR at 347; see too *Ryde Local Court* 62 NSWLR at 527 [70]

121 *Peek* 228 ALR at 575-577 [70]-[78] per Besanko J with whom Duggan J at 554 [1] agreed; and Debelle J took the same approach at 557 [14] – 560 [21]

122 228 ALR at 580 [88]

69. A similar approach has been adopted in some other common law jurisdictions[123]. But, this result may need to be evaluated against other considerations.

**The importance of a free flow of information**

70. In proceedings for contempt by publication, the Court engages in a balancing exercise weighing the competing public interests in protecting the administration of justice and the rights to freedom of speech, discussion and information. As Mason J once said:

> *'Without information there can be no meaningful discussion. In a given case it is not easy to point to specific and tangible benefits that flow from preserving that freedom. The general experience of human affairs enables us to say that the freedom should not be qualified except in the face of a competing public interest of equal or greater importance.'*[124]

71. Two further significant statements of principle highlight the importance information has in exercising the freedom to express one's opinion about what occurs in court.

72. In *The King v Nicholls* [125], Griffith CJ said in relation to a charge of contempt:

> *'... if any Judge of this Court or of any other Court were to make a public utterance of such character as to be likely to impair the confidence of the public, or of suitors or any class of suitors in the impartiality of the Court in any matter likely to be brought before it, any public comment on such an utterance, if it were a fair comment, would, so far from being a contempt of Court, be for the public benefit, and would be entitled to similar protection to that which comment upon matters of public interest is entitled under the law of libel.'*

73. And in *Ambard v Attorney-General for Trinidad and Tobago*[126] Lord Atkin said:

> *'But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice.*

---

123 In England, for instance, it had been held that the court file is '*not a publicly available register*': *Dobson v Hastings* [1992] Ch 394 at 401

124 *Victoria v Australian Building Construction Employees' and Builders Labours' Federation* (1982) 152 CLR 25 at 98

125 (1911) 12 CLR 280 at 286 (Barton and O'Connor JJ agreeing)

126 [1936] AC 322 at 335 (UKPC)

> *The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.'*

74. Scrutiny is aided by information. Judicial officers often lament that their decisions or activities in court are misrepresented in the media. In *Ambard*[127] Lord Atkin recognised that it was very seldom that an observer of court proceedings had the same means of ascertaining all of the circumstances which weigh with an experienced judge in passing sentence. The more paper or electronic material before the court, the less likely it is that the observer will obtain adequate information as to the judicial process he or she observes, unless that written or electronic material is publicly available.

75. Should access to information about the basis on which a court acts beyond what is actually capable of observation when more is before the court, be available to public scrutiny in the court's discretion or as of right?

**Conclusion**

76. The authorities raise a question as to how a fully informed debate on proceedings or the conduct of a judicial officer in open court can occur without access, at least, to the record of the court concerned, if not all the material before the court on which it was asked to act.

77. Of course, exceptions or derogations from such access must always be available where it is necessary in the interests of justice. The Court must always do justice, sometimes even at the price of a derogation from the general rule of openness. There is no need for disclosure of material merely filed in the Court but not deployed forensically before a judicial officer. Any right of access is an adjunct to scrutiny of either the conduct of proceedings in open court or the basis of a party's invoking or negating its jurisdiction.

---

127 [1936] AC at 336

78. If one does not know what the judge read before he or she made a decision or did or said something, how can one first discuss or criticise it and, secondly, be able to consider whether to express opinions such as those identified by Griffith CJ in *Nicholls*[128]? That was Mason J's point about the importance of information in the *BLF* case[129]. Information is necessary for meaningful discussion. Can the courts in 2007 gainsay the provision of full information in respect of what occurs in open court by unnecessary constraints on access to their records?

---

[128] 12 CLR at 286

[129] 152 CLR at 98