MAINTAINING THE PRINCIPLE OF OPEN JUSTICE: PRIVACY AND THE OPEN COURT RULE

REZA CYRUS VATANDOUST

Solicitor of the Supreme Court of New South Wales
Federal Court and the High Court of Australia

Year of Submission of Thesis for Examination: 2014

This Thesis is submitted in fulfilment of the requirements of the postgraduate degree of Doctor of Philosophy in Law (C02028)
Faculty of Law
University of Technology, Sydney
Copyright © 2014 Reza C. Vatandoust
CONTENTS

CONTENTS ...................................................................................................................... ii
CERTIFICATE OF ORIGINALITY ................................................................................... vii
ACKNOWLEDGMENTS .............................................................................................. viii
TABLE OF CASES ................................................................................................ x
ABSTRACT ................................................................................................................... xxvii
CHAPTER 1 .................................................................................................................... 1
INTRODUCTION ........................................................................................................ 1
THESIS AIM, HYPOTHESIS AND THE RELEVANT RESEARCH QUESTIONS .......... 12
I. AIM OF THE THESIS .......................................................................................... 12
II. HYPOTHESIS AND RESEARCH QUESTION .................................................. 13
III. APPROACH AND METHODOLOGY .................................................................. 13
VI. STRUCTURE OF THE THESIS .......................................................................... 14
CHAPTER 2 .................................................................................................................. 19
THE PRINCIPLE OF OPEN JUSTICE & THE OPEN COURT RULE .................... 19
INTRODUCTION ...................................................................................................... 19
ORIGINS AND DEFINITION .................................................................................. 20
JUDICIAL ACCOUNTABILITY ................................................................................ 26
THE OPEN COURT RULE ....................................................................................... 29
MODERN PRACTICAL APPLICATION .................................................................... 32
CONCLUSION ........................................................................................................... 35
CHAPTER 3 .................................................................................................................. 37
THE REPORTING OF LAW ..................................................................................... 37
INTRODUCTION ...................................................................................................... 37
THE REPORTING OF LAW ..................................................................................... 38
ORIGINS AND DEVELOPMENT OF ENGLISH LAW REPORTING ................... 40
ORAL TRADITION .................................................................................................... 42
DUPICATION AND RELIABILITY OF EARLY LAW REPORTS ............................ 43
THE PRINTING PRESS .............................................................................................. 46
JUDICIAL AUTHORITY AND ACCOUNTABILITY OF LAW REPORTING ............ 48
EARLY SHORTCOMINGS ................................................................. 50
INCORPORATED COUNCIL OF LAW REPORTING ................................ 52
LAW REPORTING IN COLONIAL AUSTRALIA .................................... 54
ELECTRONIC REPORTING OF LAW .................................................. 56
THE BEGINNING OF ELECTRONIC LAW REPORTING IN AUSTRALIA .... 58
MONOPOLIES, COMMERCIALISATION, MOTIVATIONAL TRANSITION .... 60
THE LEGAL INFORMATION INSTITUTE (LII) & THE FREE ACCESS TO LAW
MOVEMENT (FALM) ............................................................................ 63
ELECTRONIC LAW REPORTING AND THE OPEN COURT RULE .................. 68
CORRELATION BETWEEN LAW REPORTING AND PRIVACY .................. 71
CHAPTER 4 ....................................................................................... 76
COMMON LAW EXCEPTIONS TO THE OPEN COURT RULE ..................... 76
INTRODUCTION ................................................................................. 76
PRACTICAL OBSCURITY ..................................................................... 78
THEORETICAL OPENNESS V PRACTICAL OPENNESS ............................. 82
EXCEPTIONS ARE FEW AND STRICTLY DEFINED ................................... 86
PRACTICAL LIMITATIONS TO THE OPEN COURT RULE ....................... 89
SUPPRESSION AND NON-PUBLICATION ............................................. 94
MOTIVATIONAL TRANSITION: LAW REPORTING .................................. 99
COURTS EMBRACE TECHNOLOGY ...................................................... 104
CONCLUSION ..................................................................................... 107
CHAPTER 5 ....................................................................................... 108
STATUTORY EXCEPTIONS TO THE OPEN COURT RULE ....................... 108
INTRODUCTION ................................................................................. 108
MODERN EXCEPTIONS ........................................................................ 110
NATIONAL REGISTER FOR SUPPRESSION AND .................................... 115
NON-PUBLICATION ORDERS ............................................................ 115
COURT SUPPRESSION AND NON-PUBLICATION ORDERS ACT 2010 (NSW) ... 118
SUPER-INJUNCTIONS ............................................................................ 125
OPEN ACCESS TO COURT DOCUMENTS ............................................. 127
COURT INFORMATION ACT: FLAWED LEGISLATION ............................. 130
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>RESTRICTED ONLINE ACCESS (MODEL II)</td>
<td>221</td>
</tr>
<tr>
<td>REGULATORY MEASURES BY ONLINE PUBLISHERS</td>
<td>225</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>228</td>
</tr>
<tr>
<td>CHAPTER 9</td>
<td>230</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>230</td>
</tr>
<tr>
<td>APPENDIX A</td>
<td>238</td>
</tr>
<tr>
<td>PRIVACY PROCEDURE STANDARDS (PPS)</td>
<td>238</td>
</tr>
<tr>
<td>APPENDIX B</td>
<td>244</td>
</tr>
<tr>
<td>AUSTRALIAN PRIVACY PRINCIPLES (APPs)</td>
<td>244</td>
</tr>
<tr>
<td>APP 1 - Open and Transparent Management of Personal Information</td>
<td>244</td>
</tr>
<tr>
<td>APP2 - Anonymity and Pseudonymity</td>
<td>244</td>
</tr>
<tr>
<td>APP3 - Collection of Solicited Personal Information</td>
<td>244</td>
</tr>
<tr>
<td>APP4 - Receiving Unsolicited Personal Information</td>
<td>245</td>
</tr>
<tr>
<td>APP 5 - Notification of the Collection of Personal Information</td>
<td>245</td>
</tr>
<tr>
<td>APP 6 - Use or Disclosure of Personal Information</td>
<td>245</td>
</tr>
<tr>
<td>APP 7 - Direct Marketing</td>
<td>245</td>
</tr>
<tr>
<td>APP 8 - Cross-border Disclosure of Personal Information</td>
<td>246</td>
</tr>
<tr>
<td>APP 9 - Adoption, Use or Disclosure of Government Related Identifiers</td>
<td>246</td>
</tr>
<tr>
<td>APP10 - Quality of Personal Information</td>
<td>246</td>
</tr>
<tr>
<td>APP 11 - Security of Personal Information</td>
<td>246</td>
</tr>
<tr>
<td>APP 12 - Access to Personal Information</td>
<td>246</td>
</tr>
<tr>
<td>APP 13 - Correction of Personal Information</td>
<td>247</td>
</tr>
<tr>
<td>APPENDIX C</td>
<td>248</td>
</tr>
<tr>
<td>PRIVACY: ICCPR AND OECD</td>
<td>248</td>
</tr>
<tr>
<td>THE OECD GUIDELINES IN THE CONTEXT OF PRIVACY AND LAW REPORTING</td>
<td>250</td>
</tr>
<tr>
<td>APPENDIX D</td>
<td>256</td>
</tr>
<tr>
<td>HIERARCHY OF AUSTRALIAN COURTS</td>
<td>256</td>
</tr>
<tr>
<td>APPENDIX E</td>
<td>257</td>
</tr>
<tr>
<td>TERMS OF REFERENCE</td>
<td>257</td>
</tr>
<tr>
<td>SERIOUS INVASIONS OF PRIVACY IN THE DIGITAL ERA</td>
<td>257</td>
</tr>
</tbody>
</table>
APPENDIX F ............................................................................................................................................... 258
DECLARATION ON FREE ACCESS TO LAW ......................................................................................... 258
APPENDIX G ........................................................................................................................................ 260
HAGUE CONFERENCE GUIDING PRINCIPLES .................................................................................... 260
APPENDIX H ........................................................................................................................................ 262
AUSTRALASIAN LEGAL INFORMATION INSTITUTE ............................................................................ 262
FREE ACCESS TO LAW PRINCIPLES .................................................................................................... 262
BIBLIOGRAPHY ................................................................................................................................... 263
CERTIFICATE OF ORIGINALITY

I certify that this thesis has not already been submitted for any other degree or diploma in any other university or other institute of higher learning, is not being submitted as part of a candidature for any such degree or diploma, and does not contain any material which has been accepted as part of the requirements for any such degree and diploma.

I also certify that the thesis does not contain any material previously published or written by another person, except where due acknowledgement is made in the text.

I also certify that the thesis has been written by me and that, to the best of my knowledge and belief, any help I have received in preparing the thesis, and all sources used, have been acknowledged in the thesis.

Reza Cyrus Vatandoust
Certified on 27 June 2014
ACKNOWLEDGMENTS

There are a large number of people to whom I owe a debt of gratitude for the assistance and advice they afforded me throughout this research. These include members of the office of the NSW Privacy Commissioner and the Office of the Information Commissioner, and employees of the Supreme Court of NSW, the District Court of NSW, the Federal Court of Australia, the Federal Attorney-General's Department, Australian Law Reform Commission, Berkman Centre for Internet & Society at Harvard University, Harvard Law School Library, University of Technology, Sydney Law Library, and Sydney University Law Library.

I wish to thank my supervisors, Professor Andrew Mowbray and Professor Anita Stuhmcke, Faculty of Law, University of Technology, Sydney, for the tremendous foresight and encouragement they provided to me throughout the project. I also wish to thank them for their terrific suggestions, comments and their motivational support.

I wish to thank Mr Tim Baker for his editing works on the thesis, and the Australasian Legal Information Institute, in particular, Mr Jones Olatunji and Mr Armin Wittforth for their motivational and technical assistance through the initial stages of the project.

I am also grateful to everyone who encouraged me to keep going despite the many challenges and obstacles, particularly my wife Anna, who kept me on my toes and kept me on course.

I also wish to thank Professor Lesley Hitchens, current Dean of the Faculty of Law, University of Technology Sydney, Professor Jenni Millbank, Professor Philip Griffith and Dr Daniel Joyce, Faculty of Law, The University of New South Wales, for their suggestions and encouragements throughout the project.
I acknowledge past lecturers in law and other disciplines who helped me develop my ideas and who inspired me along the way. Special thanks to Dr Patrick Tooth, University of Technology, Sydney Librarian for his tremendous assistance with the correct formatting of the dissertation.

This thesis is dedicated to my mother, Tahere Miras Vatandoust, who raised me as a single parent, who taught me to believe in myself, to never give up and compromise my principles and to always strive for the best.
TABLE OF CASES

**AA v BB [2013] VSC 120 (20 March 2013)**

**Agar v Hyde [2000] HCA 41; 201 CLR 552; 173 ALR 665; 74 ALJR 1219 (3 August 2000)**

**AGU v Commonwealth of Australia (No 2) [2013] NSWCA 473**

**Aldi Stores (a limited partnership) v Coles Supermarkets Australia Pty Ltd [2010] FCA 563**

**Al Rawi & Ors v The Security Service & Ors [2011] UKSC 34**

**Al Rawi v Security Service [2010] EWCA Civ 482**

**Anderson v Fairfax (1883) 4 NSW 183**

**Andrew v Raeburn (1874) LR 9 Ch 522**

**Anns v Merton London Borough Council [1977] UKHL 4**

**Application by Chief Commissioner of Police (Vic) for leave to appeal [2004] VSCA 3 (12 February 2004)**

**Arvinder Singh Mann v R [2011] VSCA 189**

**Ashton v Pratt [2011] NSWSC 1092 (12 September 2011)**

**Associated Newspapers Ltd, R (On the application of), Rt Hon Lord Justice Leveson [2012] EWHC 57**

**Attorney General v Budd [2013] NSWSC 155 (19 April 2013)**

**Atkinson v Commissioner of Taxation (No 2) [2000] FCA 637**

**Attorney-General (Cth) v R [1957] HCA 12; (1957) 95 CLR 529**

**Attorney-General (NSW) v Mayas Pty Ltd (1988) 14 NSWLR 342**

**Attorney-General for New South Wales v Nationwide News Pty Limited & Anor [2007] HCATrans 719**

**Attorney-General for the United Kingdom v Wellington Newspapers Ltd (No 2) CA 203/87 [1988] NZCA 41; [1988] 1 NZLR 180**

**Attorney-General v Leveller Magazine Ltd [1979] AC 440, 450**
Attorney-General v. Marchant (1866) LR 3 Eq 424, LR 3 Eq 424

Attorney-General (SA) v Corporation of the City of Adelaide [2013] HCA 3 (27 February 2013)


Attorney General v Scotcher (2005) EWCA Civ 292

Aubry v Duclos (1996) 141 DLR (4th) 683

Australian Broadcasting Commission v Parish and Others (1980) 29 ALR 228

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63; (2001) 208 CLR 199

Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106

Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia SRL [2011] FCA 938; 2011 WL 3666713 (Unreported, FCA)

Australian Conservation Foundation Inc v Commonwealth [1979] HCA 1; (1979) 28 CLR 257; (1980) 28 ALR 257; (1980) 54 ALJR 176; 54 ALLR 176

Australian Consolidated Press Ltd v Ettingshausen [13 October 1993] Unreported, Court of Appeal of New South Wales


Bankers Trust Australia Limited & Ors v National Companies and Securities Commission (1989) 15 ACLR 58


Bass v Permanent Trustee Co Ltd [1999] HCA 9; (1999) 198 CLR 334

Birdon Pty Ltd v Houben Marine Pty Ltd [2011] FCAFC 126

Briscoe v. Reader’s Digest Ass’n, Inc., 483 P.2d 34, 36, 44 (Cal. 1971)

Burnett v The Queen in right of Canada (1979) 94 DLR (3d) 281 (1979) 94 DLR (3d) 281

BUSB v R [2011] NSWCCA 39

C v C (1915) 34 NZLR 626

Cain v Glass (No 2) (1985) 3 NSWLR 230

Campbell v MGM Ltd [2004] 2 AC 457

Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22

Caparo Industries Plc v Dickman [1990] UKHL 2

Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 4) [2010] NSWLEC 91 (10 June 2010)


Cedic v R [2011] VSCA 258


Chahal v United Kingdom [1996] ECHR 54


Church of Scientology v Woodward [1982] HCA 78; (1982) 154 CLR 25; 31 ALR 609; 54 ALJR 542

College of Law (Properties) Pty Ltd v Willoughby Municipal Council (1978) 38 LGRA 81

College of Law Pty Ltd v Attorney General of NSW [2009] NSWSC 1474

Commissioner of Police (NSW) v Nationwide News Pty Ltd (2008) 70 NSWLR 643

Commissioners for Special Purpose of Income Tax v Pemsel [1891] UKHL 1; [1891] AC 531

Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd (Wool Tops Case) [1922] HCA 62; (1922) 31 CLR 421; 29 ALR 138

Commonwealth v John Fairfax & Sons Ltd [1980] HCA 44; (1980) 147 CLR 39; 32 ALR 485; 55 ALJR 45

xii
Consul Developments Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373; 5 ALR 231

Corporation of the City of Enfield v Development Assessment Commission [2000] HCA 5; (2000) 199 CLR 135

Coulter v The Queen [1988] HCA 3; (1988) 164 CLR 350

Cowley v Pulsifer (1884) 137; 50 Am Rep 318 Mass 392

Cox Broadcasting Corporation v Cohn (1975) 420 US 469

Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)

Crouch v The Commonwealth [1948] HCA 41; (1948) 77 CLR 339; [1949] ALR 114

Cruise & Kidman v Southdown Press Pty Ltd (1 MLR 84) (1993) 26 IPR 125

CTB v News Group Newspapers Ltd [2011] EWHC 1232 (QB)

CY v AEF and Northern Sydney Local Health District (GD) [2012] NSWADTAP 46 (14 November 2012)


Daubney v Cooper [1829] EngR 48; (1829) 10 B & C 237

David Syme & Co Ltd v General Motors-Holden’s Ltd [1984] 2 NSWLR 294, 300

Davis v United States, USSC 119; 417 U.S. 333; 94 S.Ct. 2298; 41 L.Ed.2d 109; No. 72—1454 (10 June 1974)

Dezfouli v State of New South Wales (Justice Health) and anor (No.2) [2008] NSWADT 155

Dickason v Dickason (1913) 17 CLR 50; [1913] HCA 77

DJL v Central Authority [2000] HCA 17; (2000) 201 CLR 226

Donald v Ntuli (Guardian News & Media Ltd intervening) [2010] EWCA Civ 1276

Donoghue v Stevenson [1932] UKHL 100

Douglas Oil Co of Cal v Petrol Stops Northwest [1979] USSC 70; 60 L.Ed.2d 156; 99 S.Ct. 1667; 441 U.S. 211; No. 77-1547 (18 April 1979)


DPP v Weiss [2002] VSC 153

Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations (No 3) [2011] FCA 1019

Dutton v State (1914) 123 Md. 373, 387, 91 A. 417

Dyson v Attorney-General (1912) 1 Ch 158; [1911] 1 KB 410

Ebner v Official Trustee in Bankruptcy [2000] HCA 63; 205 CLR 337; 176 ALR 644; 75 ALJR 277 (7 December 2000)

Edmonton Journal v Alberta (A-G) [1989] 2 SCR 1326, 1338

Emcorp Pty Ltd v Australian Broadcasting Corporation [1988] 2 Qd R 169

Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10

Ex parte The Queensland Law Society Incorporated [1984] 1 Qd R 166

Fairfax Publications Pty Ltd v District Court of NSW (2004) 61 NSWR 344

Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22


Ferdinand v Mgn Ltd (Rev 2) [2011] EWHC 2454 (QB)

First National Bank of Boston v Bellotti 435 US 765; 55 L Ed 2d 707; 98 SCt 1407 USSC (United States Supreme Court, 1978)


Forge v Australian Securities and Investments Commission [2006] HCA 44; (2006) 228 CLR 45

A.G. (Nova Scotia) v MacIntyre [1982] 1 SCR 175

Gannett Co v DePasquale [1979] USSC 146; 443 U.S. 368; 99 S.Ct. 2898; 61 L.Ed.2d 608; No. 77-1301 (2 July 1979)


General Television Corporation Pty Ltd v Director of Public Prosecutions [2008] VSCA 49; (2008) 19 VR 68
Giller v Procopets [2004] VSCA 236

Giller v Procopets (No 2) [2009] 72 ((Unreported, VSCA, 8 April 2009)


Godbout v Longueuil (City) [1997] 3 SCR 844

Godfrey v Demon Internet Ltd [2001] QB 201

Grassby v The Queen [1989] HCA 45; (1989) 168 CLR 1

Gray v Uvw [2010] EWHC 2367 (QB)

Griffiths v Rose - BC201100170 [2011] FCA 192 ((Unreported, FCA)


Guardian News and Media Ltd & Ors, Re HM Treasury v Ahmed & Ors [2010] UKSC 1

H M & O Investments Pty Ltd v Ingram (No 1) [2011] NSWSC 550

Halliday v Nevill [1984] HCA 80


Hent v Schroder (1879) 12 Ch.D 666

Herald & Weekly Times Ltd v Medical Practitioners Board (Vic) [1999] 1 VR 267

The Herald & Weekly Times Ltd v The Magistrates’ Court of Victoria [1999] 3 VR 231, 248


Hinch & Macquarie Broadcasting Holdings Ltd v Attorney-General (Vic) (1987) 164 CLR 15 (HCA)

Hirt v College of Physicians and Surgeons (British Columbia) (1985) 63 BCLR 185

xv
HM Advocate v Beggs (No 2) [2002] SLT 39

Hobbs v CT Tinling & Co Ltd; Hobbs v Nottingham Journal Ltd [1929] 2 KB 1


Hogan v Hinch [2011] HCA 4; (2011) 243 CLR 506


Horta v Commonwealth (1994) 181 CLR 183

Hosking v Runting [2004] NZCA 34; [2005] 1 NZLR 1


Huang v Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 AC 167

I v Finland, Case 20511/03 (17 July 2008) ECHR

Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 744

In re Oliver [1948] USSC 28; 333 U.S. 257; 68 S.Ct. 499; 92 L.Ed. 682; No. 215 (8 March 1948)

Incorporated Council of Law Reporting (Qld) v FCT [1971] HCA 44; (1971) 125 CLR 659; [1972] ALR 127; (1971) 2 ATR 515; 45 ALJR 552

Independent Publishing Co Ltd v Attorney-General of Trinidad and Tobago [2004] EWCA Civ 844

J v L & A Services Pty Ltd (No 2) [1995] 2 Qd R 10


Jackson and others (Appellants) v. Her Majesty's Attorney General (Respondent) [2005] UKHL 56


Jane Doe v Australian Broadcasting Corporation & Ors [2007] VCC 281 (3 April 2007)


xvi
JIH v News Group Newspapers Ltd [2011] EWCA Civ 42
John Fairfax & Sons Ltd v Police Tribunal of New South Wales (1986) 5 NSWLR 465
John Fairfax Group Pty Ltd v Local Court of New South Wales (1991) 26 NSWLR 131
John Fairfax Publications Pty Ltd & 2 Ors v Ryde Local Court & 3 Ors (2005) 62 NSWLR 512
John Fairfax Publications Pty Ltd & v District Court of NSW & Ors [2004] NSWCA 324; (2004) 61 NSWLR 344
Johnson v Agnew [1980] AC 367
K and T v Finland, Case 25702/94 [2001] ECHR 465
Kable v DPP (NSW) [1996] HCA 21; (1996) 189 CLR 5
Kalaba v Commonwealth [2004] FCA 763
Keddington v State (1918) 19 Ariz 457
Keighley v Durant [1901] AC 240
Koowarta v Bjelke-Petersen (1982) 153 CLR 168
Kracke v Mental Health Review Board & Ors (General) [2009] VCAT 646 (23 April 2009)
Lane v Morrison [2009] HCA 29; (2009) 239 CLR 230
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520
Le and Secretary, Department of Education, Science and Training (2006) 90 ALD 83
Lew & Ors v Priester & Ors (No 2) [2012] VSC 153 (24 April 2012) 153 (24 April 2012)
Liu v The Age Company Limited [2012] NSWSC 12 (1 February 2012)
Mabo v Queensland (No 2) (1992) 107 ALR 1

xvii
Macaree v State of Western Australia [2011] WASCA 207; BC201107639

Macdougall v Knight (1889) 14 App 194

Maher v Roe, USSC 126; 432 U.S. 464; 97 S.Ct. 2376; 53 L.Ed.2d 484; No. 75-1440 (1977)

Malone v United Kingdom [1984] ECHR 10; (1985) 7 EHRR 14

Manchester City Council v Pinnock [2010] UKSC 45

Mann v O’Neill (1997) 191 CLR 204 (HCA)

Mansfield v Director of Public Prosecutions for Western Australia [2006] HCA 38; 80 ALJR 1366; 228 ALR 214 (20 July 2006)

Mapp v Ohio, 142; 367 U.S. 643; 81 S.Ct. 1684; 6 L.Ed.2d 1081; No. 236 (9 October 1961) (USSC, 1961)

Marbury v Madison [1803] USSC 16

Maynes v Casey [2011] NSWCA 156

McKernett and others v Ash and another [2005] EWHC 3003 (QB)

McLoughlin v O’Brien [1983] 1 AC 410 (House of Lords)


McPherson v McPherson [1936] AC 177


Mellor v Thompson (1885) 31 Ch D 55

Mercedes Holdings Pty Ltd v Waters (No 3) [2011] FCA 236

Mettoy Pension Trustees Ltd v Evans [1991] 2 All ER 513

Minter Ellison (a Firm) v Raneberg [2011] SASC 159

R v Miroslav Jovanovic [2014] ACTSC 98

Mirror Newspapers Ltd and Another v Waller and Another (1985) 1 NSWLR 1

Mokbel v DPP [2002] VSC 127
Momcilovic v R [2011] HCA 34 (8 September 2011)
Monis v The Queen [2013] HCA 4 (27 February 2013)
Mooregate Tobacco Co Ltd v Philip Morris Ltd (No 2) (1984) 156 CLR 414
Morgan v Western Australia [2011] WASCA 185
Mosley v News Group Newspapers Ltd [2008] EWHC 1777
Motherwell v Motherwell (1976) 73 DLR (3rd) 62
Mraz v R [1955] HCA 59; (1955) 93 CLR 493; [1955] ALR 929
Murray v Big Pictures (UK) Ltd [2008] EWCA Civ 446
Murray v Express Newspapers PLC [2007] EWHC 1908
N (No. 2) v Director General, Attorney General's Department [2002] NSWADT 33 (8 March 2002)
Nagle-Gillman v Christopher (1876) 4 Ch D 173
Nationwide News Pty Ltd v Wills (1992) 177 CLR 1
Nationwide News Pty Ltd v Wills (1992) 177 CLR 1
New South Wales v Commonwealth [1915] HCA 17; (1915) 20 CLR 54; 21 ALR 128
Nichols v Singleton Council [2011] NSWSC 946 - BC201106424 - Practice and procedure
Northern Territory v Mengel [1995] HCA 65
Olmstead v United States [1928] USSC 133; 277 U.S. 438; 48 S.Ct. 564; 72 L.Ed. 944; No. 493; No. 532; No. 533 (4 June 1928)
Ontario (Attorney-General) v Dieleman (1994) 117 DLR (4th) 449
P v D [2000] 2 NZLR 591

P v D1 [No 3] [2010] NSWSC 644

Parsons v Martin (1984–5) FCA 408 (19 December 1984)

Pelechowski v The Registrar, Court of Appeal (NSW) (1999) 198 CLR 435

Pfeifer v Austria (2007) 24 BHRC 167 (App no 12556/03)

Pitt v Holt [2011] EWCA Civ 197


Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32

Polyukhovich v The Commonwealth (1991) 172 CLR 50

Qantas Airways Ltd v Transport Workers’ Union of Australia [2011] FCA 470 (13 May 2011)

Qantas Airways Ltd v Rolls-Royce PLC [2010] FCA 1481- BC20101243

R (Davies) v HM Revenue and Customs Commissioners [2011] UKSC 47

R (Guardian News and Media Ltd) v City of Westminster Magistrates Court and the Government of the United States of America [2012] EWCA Civ 420

R and H v the United Kingdom Case 35348/06 [2011] ECHR 844


R v Chambers [2008] EWCA Crim 2467

R v Chief Registrar of Friendly Societies, Ex parte New Cross Building Society [1984] 1 QB 227

R v Clerk of Petty Sessions, Court of Petty Sessions Hobart; Ex parte Davies Bros Ltd (1998) 8 Tas R 283, 288

R v Cogley [2000] VSCA 231 at 10-18

R v Crown Court at Southwark; Ex parte Godwin [2005] EWCA Crim 1983


R v Davis [1995] FCA 1321
R v Dudley and Stephens (1884) 14 QBD 273; (1884) 54 LJMC 32

R v Dyment [1988] 2 SCR 417

R v Felixstowe Justices; Ex parte Leigh [1987] QB 582

R v Felixstowe Justices; Ex parte Leigh (1987) QB 582; [1987] 1 All ER 551; [1987] 2 WLR 380

R v Glennon [2001] VSCA 17

R v Governor of Lewes Prison; Ex parte Doyle [1917] 2 KB 254

R v Horsham Justices; Ex parte Farquharson [1982] QB 762; [1982] 2 All ER 269

R v Howell [2003] EWCA Crim 486

R v K [2003] NSWCCA 406

R v Kirby; Ex parte Boilermakers' Society of Australia [1956] HCA 10; (1956) 94 CLR 254; [1956] ALR 163


R v MacFarlane; Ex parte O'Flanagan and O'Kelly [1923] HCA 39; (1923) 32 CLR 518

R v McLachlan [2000] VSC 215

R v Md Kowser Ali [2008] NSWDC 318

R v Oakes [1986] SCR 103

R v Paddington Valuation Officer ex parte Peachey Property Corporation Ltd (1966) 1 QB 380; [1965] 2 All ER 836 (QB)

R v Perish; Perish & Lawton [2012] NSWSC 355

R v Perish; R v Lawton; R v Perish [2011] NSWSC 1101

R v Peterson [1992] 1 VR 297

R v Savvas (1989) 43 A Crim R 331

R v Secretary of State for the Home Department ex parte Shingara and Radim [1997] 3 CMLR 703

R v Smith (1996) 86 A Crim R 308

R v Socialist Worker Printers and Publishers Ltd; Ex parte Attorney-General [1975] QB 637 at 644 per Lord Widgery CJ

R v Sussex Justices; Ex parte Macarthy [1924] 1 KB 256

R v Tait (1979) 46 FLR 386; (1979) 24 ALR 473

R v Young [1999] NSWCCA 166 (7 July 1999)

R. v Murrell (1836) 1 Legge 72

R. v Wedge (1976) 1 New South Wales Law Reports

R (on the application of Wood) v Metropolitan Police Commissioner [2009] EWCA Civ 414

Rana v Google Australia Pty Ltd [2013] 60 ((Unreported, FCA, 11 October 2012)

Raybos Australia Pty Ltd v Jones (1985) 2 NSWLR 47

Re "Mr C" (1993) 67 A Crim R 562

Re Applications by Chief Commissioner of Police (Vic) [2004] VSCA 3; (2004) 9 VR 275

Re Guardian News and Media Ltd [2010] UKSC 1

Re Hastings-Bass [1975] Ch 25


Re Pochi and Minister for Immigration and Ethnic Affairs (1979) 36 FCR 482; (1979) 36 FLR 482; (1979) 26 ALR 247; (1979) 2 ALD 33

Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd [2007] EWCA Civ 197

Registrar of the Supreme Court v Herald & Weekly Times Ltd No. SCCIV-02-1015 [2004] SASC 129

Reklos and Davourlis v Greece, Case 1234/05 [2009] ECHR 200
Rich v Attorney-General (NSW) [2013] NSWSC 891 (BC201310712)

Richmond Newspapers, Inc v Virginia [1980] USSC 154; 448 U.S. 555, 592, 596

Rinehart v Welker [2011] NSWCA 403 (7 December 2011)


Rinehart v Welker & Ors [2012] HCATrans 7 (1 February 2012)

Rinehart v Welker and Ors [2011] NSWCA 345 (31 October 2011)

Rinehart v Welker [2012] NSWCA 1 (13 January 2012)

Roberts v Parole Board [2004] EWCA Civ 1031

Robinson v NSW and Others [2013] BC201313210 1398 ((Unreported, NSWSC)

Roe v Wade [1973] USSC 43; 410 U.S. 113; 93 S.Ct. 705

Rogers v Nationwide News Pty Ltd (2003) 216 CLR 327

Russell v Russell [1976] HCA 23; (1976) 134 CLR 495, 520

Russell v Russell; Farrelly v Farrelly (1976) 9 ALR 103

Rutan v Republican Party of Illinois (1990) 497 WorldLII 62 (United States Supreme Court)


S and Marper v the United Kingdom, Case 30562/04 [2008] ECHR 1581

Scott v Scott [1913] AC 417

Seven Network (Operations) Limited & Ors v James Warburton (No 1) [2011] NSWSC 385 (5 April 2011)

Showtime Touring Group Pty Ltd v Mosley Touring Inc [2011] NSWSC 1401 (22 November 2011)


Slater v May (1704) 1 Ld Raym 1071

SPM v LWA [2013] QSC 138 - BC201309888

xxiii
Smith v Kerr [1902] 1 Cth 774

Southern Pacific Terminal Co v ICC, USSC 36; 219 U.S. 498; 31 S.Ct. 279; 55 L.Ed. 310; Nos. 459, 460 (1911)


Tame v New South Wales [2002] HCA 35; 211 CLR 317; 191 ALR 449; 76 ALJR 1348 (5 September 2002)

Taylor v Attorney-General [1975] 2 NZLR 675

TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82; (2002) 54 NSWLR 333

Theophanous v Herald & Weekly Times (1994) 182 CLR 104


Tomkins v Civil Aviation Safety Authority [2006] FCA 1253; 91 ALD 645


Toronto Star Newspapers Ltd. v Ontario [2005] 2 S.C.R 188, 2005 SCC 41

Troughton v McIntosh (1896) 17 NSW (L) 334


United States v Johnson [1943] USSC 145; 319 U.S. 503; 63 S.Ct. 1233; 87 L.Ed. 1546; Nos. 4 and 5 (11 October 1943)


United States v Melendrez [2004] USCA9 751; 389 F.3d 829 (9 November 2004), (United States)

United States v Procter & Gamble Co [1958] USSC 102; 356 U.S. 677; 78 S.Ct. 983; 2 L.Ed.2d 1077; No. 51 (2 June 1958)

United States v Sells Engineering, Inc [1983] USSC 161; 77 L.Ed.2d 743; 103 S.Ct. 3133; 463 U.S. 418; No. 81-1032 (30 June 1983)


United Telecasters Sydney Ltd v Hardy (1991) 23 NSWLR 323

University of Western Australia v Gray (No 20) (includes corrigendum dated 29 April 2008 and 22 April 2008) [2008] FCA 498 (17 April 2008)

USA v Tariq Hamad [2008] USCA6 715 (13 November 2008) (United States)

A v Hayden (ASIS case) [1984] HCA 67; 156 CLR 532; (1984) 56 ALR 82; (1984) 59 ALJR 6

Victoria Park Racing and Recreation Grounds Co Ltd v Taylor [1937] HCA 45; (1937) 58 CLR 479

Viro v R [1978] HCA 9; (1978) 141 CLR 88

Von Hannover v Germany [2004] ECHR 294

Von Hannover v Germany (no 2) 40660/08 [2012] ECHR 228

Von Hannover v Germany (No 3) - 8772/10 - Chamber Judgment (French Text) [2013] ECHR 835

Wainohu v State of New South Wales (2011) HCA 24; (2011) 278 ALR 1; (2011) 85 ALJR 746; BC201104388

Waterhouse v Broadcasting Station 2GB Pty Ltd (1985) 1 NSWLR 58


Welker & Ors v Rinehart [2011] NSWSC 1094 (13 September 2011)

Welker & Ors v Rinehart & Anor (No 6) [2012] NSWSC 160 (6 March 2012)

White v Jones [1995] UKHL 5

Wik Peoples v State of Queensland (1996) 187 CLR 181


Williamson v. Lacy 86 Me. 80, 82, 83, 29 A. 943, 944, 25 L.R.A. 506
Witham v Holloway (1995) 183 CLR 525 (HCA)

Wood v Midgley (1854) 5 De GM & GBy 41; 43 ER 784

Wright v Gasweld Pty Ltd (1991) 22 NSWLR 317


"X" v Sydney Children's Hospitals Specialty Network & Anor [2011] NSWSC 1272 (27 October 2011)

Yao Essaie Motto & Ors v Trafigura Ltd and Trafigura Beheer BV [2011] EWHC 90201 (Costs)

Ying v Song [2009] NSWSC 1344

Yuen Kun Yeu v Attorney-General (Hong Kong) [1988] AC 175

Yao Essaie Motto & Ors v Trafigura Ltd and Trafigura Beheer BV [2011] EWHC 90201 (Costs)

Ying v Song [2009] NSWSC 1344

Yuen Kun Yeu v Attorney-General (Hong Kong) [1988] AC 175
ABSTRACT

Transparency and consistency of judicial decision making is a prerequisite to the operation of the principle of open justice in all common law legal systems. However, the rapid implementation of digital law reporting, giving rise to free access to law and its movement, the consequent increased levels of publication and dissemination of legal information on the internet, has brought about unintended consequences for the effective application of that principle. Whereas in the past, the open court rule operated on a theoretical level, where court decisions were effectively available only to legal practitioners and some academic institutions by subscription, today the open court rule operates at a very practical level, where judgments are readily and freely accessible, posing real risks to privacy. One such risk is that once ‘published’ on the internet, personal information obtained from members of the public and those involved in court proceedings, is published in perpetuity, making the ability to exercise control over personal information impracticable. There is significant potential for misuse and abuse. Powerful search engines are able to instantly locate specific information with minimum effort. This is important, particularly in light of serious issues relating to identity theft, disclosure of personal information to third parties, issues relating to reputation, economic loss and failure to lead a private life.

This thesis examines the interaction of the open court rule and privacy in the context of the digital dissemination of judicial decisions, with a specific focus on the common law and with reference to the free access to law and its movement. It is suggested that the principle of open justice is comprised of a number of important sub-elements or rules working together in symbiosis, two of which are the central focus of this thesis - privacy and the open court rule. This thesis argues that privacy should not be treated as being in conflict with the principle of open justice, but rather is better conceptualised as an exception to the open court rule. There are several important reasons for this, including the fact that privacy has always existed alongside the open court rule and that privacy is not the same as secrecy. The thesis proposes practical and analytical dimensions of privacy protection expressed through the open court rule and in line with the Declaration on Free Access to Law and the Hague Conference Guiding Principles, in order to regulate personal information for the maintenance of the principle of open justice and the rule of law. The thesis does not propose that the principle of open justice be altered. On the contrary, it is essential that a presumption of openness flowing from the open court rule remains in place and that the principle of open justice remains intact. To ensure this outcome and to administer justice, courts may adopt and adhere to policies designed to protect individual privacy regarding the disclosure of judicial information on the world wide web. This thesis suggests such changes at both a practical and theoretical level.