

---

# 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
DUPLICATION 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
INTROUCTION .....	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

IDENTITY THEFT PREVENTION AND ANONYMISATION .....	137
CONCLUSION .....	142
CHAPTER 6 .....	145
PRIVACY.....	145
INTRODUCTION .....	145
THE IMPORTANCE OF PRIVACY .....	149
DEVELOPING TORT OF PRIVACY IN AUSTRALIA .....	150
IMPACT OF PROPOSED AMENDMENTS TO COMMONWEALTH .....	153
PRIVACY LEGISLATION.....	153
EUROPEAN PRIVACY CASES .....	156
FREE ACCESS TO LAW IN THE EUROPEAN UNION .....	162
AUSTRALIAN INFORMATION PRIVACY.....	163
PRIVACY AND STATUTORY LIMITATIONS.....	167
CONCLUSION .....	170
CHAPTER 7 .....	173
THE OPEN COURT RULE AND PRIVACY .....	173
LIMITING THE PRESUMPTION OF OPENNESS.....	176
ONLINE LAW REPORTING .....	182
EXPRESSING PRIVACY.....	187
SENTENCING REMARKS .....	189
FREEDOM OF THE PRESS.....	193
THE OPEN COURT RULE IS NOT ABSOLUTE.....	197
PRIVACY V SECRECY .....	201
CONCLUSION .....	204
CHAPTER 8 .....	206
MODELS FOR CHANGE.....	206
INTRODUCTION .....	206
RESPONSIBILITIES OF THE COURTS.....	208
IMPLEMENTING PRIVACY IN THE OPEN COURT RULE .....	209
PRIVACY PROTECTION STANDARDS: TWO TIER POLICY (MODEL I).....	212
TECHNICAL MEASURES: IMPLEMENTING MODEL I.....	217

RESTRICTED ONLINE ACCESS (MODEL II).....	221
REGULATORY MEASURES BY ONLINE PUBLISHERS.....	225
CONCLUSION .....	228
CHAPTER 9 .....	230
CONCLUSION.....	230
APPENDIX A .....	238
PRIVACY PROCEDURE STANDARDS (PPS).....	238
APPENDIX B .....	244
AUSTRALIAN PRIVACY PRINCIPLES (APPs).....	244
APP 1 - Open and Transparent Management of Personal Information.....	244
APP2 - Anonymity and Pseudonymity .....	244
APP3 - Collection of Solicited Personal Information.....	244
APP4 - Receiving Unsolicited Personal Information.....	245
APP 5 - Notification of the Collection of Personal Information.....	245
APP 6 - Use or Disclosure of Personal Information .....	245
APP 7 - Direct Marketing .....	245
APP 8 - Cross-border Disclosure of Personal Information.....	246
APP 9 - Adoption, Use or Disclosure of Government Related Identifiers .....	246
APP10 - Quality of Personal Information.....	246
APP 11 - Security of Personal Information .....	246
APP 12 - Access to Personal Information.....	246
APP 13 - Correction of Personal Information.....	247
APPENDIX C .....	248
PRIVACY: ICCPR AND OECD.....	248
THE OECD GUIDELINES IN THE CONTEXT OF PRIVACY .....	250
AND LAW REPORTING .....	250
APPENDIX D .....	256
HIERARCHY OF AUSTRALIAN COURTS.....	256
APPENDIX E .....	257
TERMS OF REFERENCE .....	257
SERIOUS INVASIONS OF PRIVACY IN THE DIGITAL ERA.....	257

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 for the State of NSW v John Fairfax Publications Pty Limited* [1999] 318 NSWCA

*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)

*A.B. v. Bragg Communications Inc., 2012 SCC 46* [2012] 2 S.C.R. 567

*Bakarich v Commonwealth Bank of Australia* [2010] NSWCA 314 (26 November 2010)

*Baker v Campbell* [1983] HCA 39; (1983) 153 CLR 52

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

*Barach v University of New South Wales* [2011] NSWSC 431 (24 May 2011)

*Barton v R* [1980] HCA 48; (1980) 147 CLR 75 (5 December 1980)

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

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

*Breen v Williams (Medical Records Access case)* (1996) 138 ALR 259; (1996) 70 ALJR 772; (1996) 43 ALD 481; (1996) 186 CLR 71; [1996] HCA 57

*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)

*Carter v Northmore Hale Davy & Leake P14/1994* [1994] HCATrans 114, (15 November 1994)

*Cedic v R* [2011] VSCA 258

*Center for National Security Studies v US Department of Justice* [2003] USCADC 134; 331 F.3d 918 (17 June 2003)

*Chahal v United Kingdom* [1996] ECHR 54

*Child and Family Services Act, RSO* (1990) (Nova Scotia)

*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

*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)

*Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835, 883

*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)

*Douglas v Hello! Ltd* [2000] EWCA Civ 353; [2001] QB 967; [2001] 2 All ER 289

*Dow Jones and Company Inc v Gutnick* [2002] HCA 56; (2002) 210 CLR 575

*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 NSWLR 344

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

*Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55; (1980) 30 ALR 353; (1980) 54 ALJR 460; (1980) 80 ATC 4357; (1980) 11 ATR 24

*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)

*Florida Star v B J F* [1989] USSC 123; 491 U.S. 524; 109 S.Ct. 2603; 105 L.Ed.2d 443; No. 87-329 (21 June 1989)

*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)

*Gee v Burger* [2009] 149 (Unreported, NSWSC 13 March 2009)

*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)

*Globe Newspaper Co v Superior Court* [1982] 457 US 596; 73 L Ed 2d 248; 102 SCt 2613; 73 L Ed 248

*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)

*Grosse v Purvis* [2003] QDC 151 (16 June 2003)

*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

*Hamilton v Oades* [1989] HCA 2166 CLR 486 (12 April 1989) [1989] HCA 21; (1989) 166 CLR 486 (12 April 1989)

*Harman v Secretary of State for the Home Department* [1983] 1 AC 280, 303 [1983] 1 AC 280, 303

*Harris v Caladine* [1991] HCA 9; (1991) 172 CLR 84 (17 April 1991)

*Henty 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

*Herald and Weekly Times Pty Ltd v A* [2005] VSCA 189; (2005) 160 A Crim R 299

*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

*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 Australian Crime Commission* (2010) HCA 21; (2010) 240 CLR 651

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

*Home Office v Harman* [1981] QB 534; [1981] 2 All ER 349; [1981] 2 WLR 310

*Horta v Commonwealth* (1994) 181 CLR 183

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

*Hoxton Park Residents' Action Group Inc v Liverpool City Council* [2010] NSWSC 1312; (2010) 246 FLR 207

*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

*A J v The Queen* [2011] VSCA 215 (27 July 2011)

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

*Jackson v Sterling Industries Ltd* [1987] HCA 23; (1987) 162 CLR 612

*Jago v District Court of NSW* [1989] HCA 46; (1989) 168 CLR 23 (12 October 1989)

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

*Jarvie and Another v The Magistrates' Court of Victoria at Brunswick and Others* [1995] VicRp 5; [1995] 1 VR 84 (18 July 1994)



*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 Limited v the Attorney General for New South Wales* [2000] NSWCA 198; (2000) 181 ALR 694

*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

*Katz v United States* [1967] 389 US 347; 19 L Ed 2d 576; 364

*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)

*Krakouer v R* [1998] HCA 43; (1998) 194 CLR 202; (1998) 155 ALR 586; (1999) 13 Leg Rep C1; (1998) 72 ALJR 1229; (1998) 102 A Crim R 490

*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

*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

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

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

*McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1; (1998) 156 ALR 257

*McPherson v McPherson* [1936] AC 177

*Melbourne Corporation v Commonwealth* [1947] HCA 26; (1947) 74 CLR 31; [1947] ALR 377

*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 [No2]* (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

*New South Wales Crime Commission v Jason Lee* [2012] NSWCA 276 (6 September 2012)

*Nicholas v R* [1998] HCA 9; (1998) 193 CLR 173

*Nichols v Singleton Council* [2011] NSWSC 946 - BC201106424 - Practice and procedure

*Nixon v Warner Communications, Inc.* [1978] USSC 59; 435 U.S. 589; 98 S.Ct. 1306; 55 L.Ed.2d 570; No. 76-944 (18 April 1978)

*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

*Onus v Alcoa of Australia Ltd* [1981] HCA 50; (1981) 149 CLR 27; (1981) 36 ALR 425; (1981) 55 ALJR 631

*P v D* [2000] 2 NZLR 591

*P v DI [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 M47-2012 v Director General of Security* [2012] HCA 46 (5 October 2012)

*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- BC201010243

*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 Binder* [1990] VicRp 50; [1990] VR 563 (11 August 1989)

*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 Crowther-Wilkinson* [2004] NSWCCA 249

*R v Davis* [1995] FCA 1321

*R v Dudley and Stephens* (1884) 14 QBD 273; (1884) 54 LJMC 32

*R v Dymont* [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 Kwok* [2005] NSWCCA 245 [2005] NSWCCA 245; (2005) 64 NSWLR 335

*R v Lodhi* [2006] NSWCCA 101; (2006) 65 NSWLR 573

*R v Long* (2002) 128 A Crim R 11 at 38, 39

*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 Richards & Bijkerk* [1999] NSWCCA 114; (1999) 107 A Crim R 318

*R v Savvas* (1989) 43 A Crim R 331

*R v Secretary of State for the Home Department ex parte Shingara and Radiom* [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 Nolan; Ex Parte Young* [1991] HCA 29; (1991) 172 CLR 460 (27 June 1991)

*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* [2011] NSWCA 425 (21 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 another v United Kingdom* (2008) 25 BHRC 557 (App nos 30562/04 and 30566/04)

*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)

*Silbert v Director of Public Prosecutions for Western Australia* (2004) 217 CLR 181; (2004) 205 ALR 43; (2004) 78 ALJR 464; [2004] HCA 9; BC200400674

*Slater v May* (1704) 1 Ld Raym 1071

*SPM v LWA* [2013] QSC 138 - BC201309888

*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)

*State Drug Crime Commission (NSW) v Chapman* (1987) 12 NSWLR 447

*Sullivan v Moody* [2001] HCA 59; (2001) 207 CLR 562; (2001) 183 ALR 404

*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

*Thomas v Mowbray* [2007] HCA 33 [2007] HCA 33 (2 August 2007)

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

*Toonen v Australia* [1994] UNHRC 9 (24 March 1994)

*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 John Doe, Inc I* [1987] USSC 62; 481 U.S. 102; 107 S.Ct. 1656; 95 L.Ed.2d 94; No. 85-1613 (21 April 1987)

*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 McVeigh* [1997] USCA 10 282; 106 F.3d 325; 65 USLW 2543, 97 CJ C.A.R. 196 (11 March 1997)

*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 R Amodeo Newsday Inc.* [1995] USCA2 1300; 71 F.3d 1044; 24 Media L. Rep. 1203 (8 December 1995)



*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 States Department of Justice, et al., Petitioners v Reporters Committee for Freedom of the Press et al.* [1989] 489 US 749

*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

*Weiss v R* [2005] HCA 81; (2005) 224 CLR 300; (2005) 223 ALR 662; (2005) 80 ALJR 444; 158 A Crim R 133

*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

*William Thomas Bartlett v Claire Patricia Weir, Henry J T Rook, Noel E Aikman, Philip Edwards and Michael B Mckay* [1994] FCA 1143; (1994) 72 A Crim R 511

*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

*Wright v Western Australia* [2010] WASCA 199; (2010) 203 A Crim R 339

*"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.