OPEN JUSTICE, THE MEDIA AND AVENUES OF ACCESS TO DOCUMENTS ON THE COURT RECORD

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I INTRODUCTION

The purpose of this article is to identify and evaluate potential avenues of access to documents on the court record. The question is of primary importance to media organisations, as one of their staple activities is reporting to the public on judicial proceedings. To that end, media organisations frequently wish to inspect and copy documents that relate to a particular proceeding in the course of preparing their reports. Media organisations that wish to procure access to documents on the court record are likely to invoke three main arguments. The first is the role of the media in giving practical substance to the principle of open justice. It is now habitually conceded by courts that in modern times, the demands of open justice are not adequately served by the fact that the doors of the courts are open to the public, as the reality is that most people do not avail themselves of their right to attend judicial proceedings, nor do they acquire information by word of mouth from those who have.[1] Courts freely acknowledge that, today, the vast majority of people rely on the media for information about judicial proceedings and, in deference to this fact, regard the principle of open justice as embracing the right of the public to receive media reports about the workings of the courts.

Second, media organisations are likely to argue that in view of the striking changes that have taken place in the way court cases are conducted, access to documents on the court record is critical if the media are to effectively discharge their role as the purveyors of information about the courts. Today, there is far less reliance on what takes place orally in open court, and a correspondingly greater emphasis on documentary evidence and written submissions and arguments. For example, pleadings are no longer read aloud in full by counsel in open court. This is largely because the length of the pleadings is now of a different order to earlier years, to the point where a reading aloud of the entirety

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1 *Richmond Newspapers Inc v Virginia*, 448 US 555, 572–3 (1980); *R v Davis* (1995) 57 FCR 512, 514; *Re Guardian Newspapers Ltd* [2005] 3 All ER 155, 162.

is no longer appropriate, especially in complex commercial cases.[2] Moreover, counsel frequently present their legal arguments in written form. Indeed, many courts require written outlines of submissions to be submitted to the court in advance of the hearing.[3] This means that counsel will just refer the court to pertinent paragraphs of the pleadings, and oral argument proceeds on the basis that the court is familiar with the written submissions.[4] It is also commonplace for witnesses to present their evidence-in-chief in the form of affidavits or witness statements (with exhibits) rather than orally.[5] The affidavits or witness statements which contain the evidence-in-chief are not read out verbatim, but are simply treated as read.[6] Oral evidence is usually confined to cross-examination of the witnesses. In *McCabe v British American Tobacco Australia Services Ltd*,[7] the Court explained that as a consequence of this change, the phrase 'read in court' has acquired a completely different meaning. In the words of the Court: '[i]mplementation of this recommended practice has the consequence that the expression "read in court", when referring to an affidavit or an exhibit, becomes a fiction which harks back to the days when this was done aloud'.[8]

A number of explanations can be advanced for these changes in the conduct of court cases. Primary among them is the need for increased efficiency in the trial process in view of the number, length and complexity of modern trials, and the consequent pressures they place on court time, the public purse and the litigants' pockets.[9] Whilst these changes have produced efficiencies in terms of time and money, their impact on the principle of open justice has not been as laudable. They effectively mean that a member of the public who wishes to understand a case can no longer adequately do so by sitting in the courtroom. For example, it is impossible to follow the cross-examination of a witness if the evidence-in-chief has not been given orally and the documentary evidence-in-chief, upon which the cross-examination is based, has not been read aloud in court or otherwise made public. Likewise, it is not possible to grasp the legal arguments put to the court if counsel is merely speaking to a detailed written outline of submissions. In the words of Byrne J, the changes that have taken place serve to

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2 *Idoport Pty Ltd v National Australia Bank Ltd* [2000] NSWSC 776 (Unreported, Einstein J, 27 July 2000) [5].

3 See, eg, *High Court Rules 2004* (Cth) rr 41.05, 41.06, 41.07; Federal Court of Australia, Practice Note No 1, *Appeals to a Full Court* (14 August 2003); Supreme Court of Tasmania, Practice Direction No 6, *Written Submissions to the Full Court and the Court of Criminal Appeal* (2005).

4 Ernst Willheim, 'Are Our Courts Truly Open?' (2002) 13 *Public Law Review* 191, 197.

5 *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 3)* (2002) ATPR 41-873. For example, in the Federal Court, the usual order made by the Court at the first directions hearing is that evidence-in-chief is to be given by way of affidavit. Deponents can be called and cross-examined only by leave of the court: Willheim, above n 4, 197.

6 Justice Arthur R Emmett, 'Towards the Civil Law?: The Loss of "Orality" in Civil Litigation in Australia' (2003) 26 *University of New South Wales Law Journal* 447, 460.

7 [2002] VSC 150 (Unreported, Byrne J, 7 May 2002).

8 Ibid [18].

9 *Hammond v Scheinberg* (2001) 52 NSWLR 49, 54; *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 150 (Unreported, Byrne J, 7 May 2002) [19].

'make the curial and adjudicative process less and less comprehensible to the person in the public gallery'.[10]

The impact of these changes has been most keenly felt by the media, since media organisations are the section of the public mostly likely to be seeking to take advantage of their right to attend hearings. Any inability to access information about a case has a detrimental impact on reporting. It has the potential to 'promote inaccurate, ill-informed and damaging speculation',[11] which in turn has a tendency to 'erode public confidence in the system of justice'.[12] As a result, media organisations are likely to maintain that if the principle of open justice is to continue to have meaningful content, it can no longer be confined to what takes place in the courtroom, but must be construed as extending to documents in the court registry.

Finally, media organisations appeal to the fact that they are protected from liability in contempt[13] and defamation[14] only if their reports of judicial proceedings are fair and accurate. Accessing documents on the court record is said to be essential if accurate reports are to be produced.

There are numerous cases in which courts have been called upon to determine whether a media organisation or other non-party should be accorded access to a particular document in a particular case.[15] Most of these cases have arisen in jurisdictions where the rules of court require non-parties to obtain leave of the court to inspect documents on the court record. These cases are instructive in that they elucidate the factors which govern the discretion of the court. In particular, they reveal the extent to which the principle of open justice is employed by courts as a factor in favour of granting access. Equally, they shed light on the countervailing considerations that militate against non-party access. However, this article is not concerned with how a judicial discretion has been – or should be – exercised in respect of particular documents in particular cases. Rather, this article is concerned with a more general question, namely, the sources of rights of access to documents on the court record. From where do such rights spring, if

10 *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 150 (Unreported, Byrne J, 7 May 2002) [19].

11 *R v Williams* (2003) 86 SASR 289, 293.

12 Ibid. See also *Cunningham v The Scotsman Publications Ltd* [1987] SLT 698, 705–6. Some of the frustration experienced by the media is conveyed in Vanda Carson, 'Information Shutdown Damages Justice System', *The Australian* (Sydney), 2 December 2005, Business 27.

13 *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255, 259; *R v Kray* [1970] 1 QB 125; *R v Sun Newspapers Pty Ltd* [1993] 1 Qd R 682.

14 *Civil Law (Wrongs) Act 2002* (ACT) s 139; *Defamation Act 2006* (NT) s 26; *Defamation Act 2005* (SA) s 27; *Defamation Act 2005* (NSW) s 29; *Defamation Act 2005* (Qld) s 29; *Defamation Act 2005* (Tas) s 29; *Defamation Act 2005* (Vic) s 29; *Defamation Act 2005* (WA) s 29.

15 See, eg, *R v Clerk of Petty Sessions, Court of Petty Sessions Hobart; Ex parte Davies Bros Ltd* (1998) 8 Tas R 283; *Stonham v Speaker of the Legislative Assembly of New South Wales (No 1)* (1999) 90 IR 325; *Eisa Ltd v Brady* [2000] NSWSC 929 (Unreported, Santow J, 28 September 2000); *Idoport Pty Ltd v National Australia Bank Ltd* [2000] NSWSC 769 (Unreported, Einstein J, 26 July 2000); *Idoport Pty Ltd v National Australia Bank Ltd* [2000] NSWSC 776 (Unreported, Einstein J, 27 July 2000); *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investment Commission v Adler* (2001) 39 ACSR 216; *Australian Securities and Investment Commission v Rich* (2001) 51 NSWLR 643; *Australian Securities and Investment Commission v Rich* [2002] NSWSC 198 (Unreported, Barrett J, 18 March 2002); *DPP (Cth) v Ling* [2003] VSC 447 (Unreported, Habersberger J, 15 October 2003).

they exist at all? Five potential sources of rights of access are considered in this article. They are: rights of access accorded by freedom of information legislation; common law rights of access; rights of access under the *Constitution*; access conferred pursuant to the exercise by courts of their inherent or implied powers; and rights of access conferred by rules of court and/or legislation.[16] The approach taken in the United States to non-party access to the court record is referred to throughout the article as a contrast to the approach taken in Australia.

Before discussing these five potential sources of rights of access, it is necessary to canvass the purposes intended to be served by the principle of open justice. These perceived purposes have had a significant bearing on how Australian courts have responded to assertions from media organisations that the public should enjoy a right of access to documents on the court record.

II THE ROLE AND PURPOSES OF OPEN JUSTICE

Historically, the purposes served by the principle of open justice have been exclusively entwined with its perceived impact on the administration of justice. Open justice is thought to advance the administration of justice in a number of ways.[17] First, the fact that judicial proceedings are exposed to the public gaze is believed to act as a spur to judges to act in an impartial, consistent and responsible manner.[18] In the famous words of Jeremy Bentham, open justice keeps the judge, 'while trying, under trial'.[19] Whilst judges are also subject to a number of internal checks – such as appellate review and the possibility of removal by Parliament for misbehaviour or incapacity – public monitoring is, nevertheless, regarded as an essential means of deterring arbitrary judicial behaviour.[20] Second, the prospect of giving evidence publicly is thought to act as a goad to witnesses to tell the truth.[21] A falsehood told publicly is more likely to

16 This article will not consider whether non-parties can procure access to court documents from the parties to the case; it will deal only with how access might be obtained from the court itself.

17 The benefits of open justice to the administration of justice were also canvassed in a previous article in which I considered a related topic, namely, whether media organisations should be shielded from the law of defamation in respect of reports of documents on the court record: Sharon Rodrick, 'Defamation, the Media and Reporting Documents on the Court Record' (2005) 10 *Media and Arts Law Review* 171. It should be noted that there are some exceptional situations in which open justice is regarded as operating to the detriment of the administration of justice. In these situations, courts claim an inherent or implied power to sit in camera, to conceal evidence from those in the courtroom or, perhaps, to issue a non-publication order forbidding aspects of a case from being reported. In many instances, parliaments have conferred power on courts to make orders of this nature.

18 *Cowley v Pulsifer*, 137 Mass 392 (1884); *Russell v Russell* (1976) 134 CLR 495, 520; *A-G (UK) v Leveller Magazine Ltd* [1979] AC 440, 450; *Richmond Newspapers Inc v Virginia*, 448 US 555, 592, 596 (1980); *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, 303; *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294, 300.

19 John Bowring (ed), *The Works of Jeremy Bentham* (1843) vol 4, 316–17 in Garth Nettheim, 'The Principle of Open Justice' (1986) 8 *University of Tasmania Law Review* 25, 28.

20 *United States v Amodeo*, 71 F 3d 1044, 1048 (2nd Cir, 1995).

21 Sir William Blackstone, *Blackstone's Commentaries on the Laws of England* (1768) vol 3, ch 23, 373; Jeremy Bentham, *Rationale of Judicial Evidence: Specially Applied to English Practice* (1827) 67–8; James H Chadbourne, *Evidence in Trials at Common Law* (revised ed, 1976) vol 6, [1834]; *Edmonton Journal v Alberta (A-G)* [1989] 2 SCR 1326, 1338.

be exposed and the witness rendered liable to prosecution for perjury than a falsehood uttered behind closed doors. The fact that proceedings are conducted openly also maximises the chance of unknown witnesses with relevant information hearing about the case and coming forward with that information.[22]

There are also perceived benefits that flow to the public as a result of having discharged their role as overseer of the participants in the administration of justice. Openness ensures that the public are educated about the workings of the courts and informed about how courts interpret and apply the law. If judges and witnesses are observed to have acted in a truthful and accountable manner and proceedings are accepted as having been properly conducted, this will create public confidence in the courts. As a result, members of the public will be willing to submit their own disputes to the courts when they arise, and to accept the outcome of the case, even if they lose. By contrast, any actions or decisions that are out of touch with prevailing community morality and standards will be subject to discussion and informed criticism,[23] which may ultimately provoke a change in the law.[24] As explained in the Introduction, the media act as a conduit for this exposure. Thus, the concept of open justice is somewhat circular – the public exercise oversight over those who participate in the administration of justice, but they are the beneficiaries of the improved performance that their oversight engenders.

More recently, there has been a tendency to regard open justice – in the form of the media's right to report the courts and the corresponding right of the public to receive those reports – as a stand-alone exercise of freedom of expression. Treating open justice as an adjunct of free speech has a number of consequences. First, unlike the traditional approach to open justice, it does not demand a link between open justice and the administration of justice. Rather, it posits that the right to distribute information about the courts is an emanation of the right to speak, irrespective of whether it yields positive benefits for the administration of justice. Second, viewing open justice in this manner effects an alteration in the perceived role of the media. The media are not a mere conduit through which the workings of the courts are relayed to the general public, but are perceived as exercising their own independent right of free speech. Whilst Australian judges have readily embraced the traditional purposes of open justice, most have tended to shy away from regarding open justice as an aspect of free speech *simpliciter*. For example, the New South Wales Court of Appeal has declared that the purposes of the principle are tied to the operation of the legal system, and 'do not extend to encompass issues of freedom of speech and freedom of the press'.[25] A wider perspective on open justice might attract more support as the pressure

22 Chadbourne, above n 21, [1834]; *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835, 883.

23 This is particularly true in respect of sentences meted out to persons found guilty of serious crimes that are perceived by the community to be too lenient.

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

25 *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 525. Similar sentiments were expressed in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, 303 and *The Herald & Weekly Times Ltd v The Magistrates' Court of Victoria* [1999] 3 VR 231, 248.

continues for Australia to adopt a Bill of Rights in line with other liberal democracies.[26]

The courts' traditional view of the role and purpose of open justice has had a considerable bearing on their attitude to non-party access to documents on the court record. Whilst it is clear that physical access to the courtroom gives effect to the traditional role of open justice as an aid to the administration of justice, the nexus between access to documents on the court record and the advancement of the administration of justice is more tenuous. The extent to which it exists will primarily depend on the time at which access is sought. Media organisations that wish to procure access to documents that have been deployed in judicial proceedings can readily establish a connection between access and the administration of justice, particularly in light of the aforementioned changes in the way court cases are now conducted.

The nexus between open justice and the administration of justice is less apparent in respect of documents that have been filed, but not yet been deployed, in judicial proceedings. At this stage, the court has not become involved in the matter, except to the extent that, in some courts, a judge might have assumed a case management role over the proceeding. Given the lack of judicial activity at this point in time, access cannot be justified on the basis that the public need to be able to 'judge the judge'. To justify a grant of access to documents at this stage, media organisations must argue that the administration of justice reaches back to an earlier point in time than when the case comes before the court. It is tantamount to arguing that a court proceeding is, 'in its entirety and by its very nature a matter of legal significance'.[27] However, the precise benefits to the administration of justice are harder to pinpoint. The only identifiable benefit that accrues from allowing public access to documents on the court file at this stage is that the public are made aware of the nature of the case from its inception. But in view of the fact that the precise issues in a proceeding often remain in dispute until the pleadings are settled, this may not necessarily be the case. Moreover, many of the documents that are placed on the court file are never used in the proceeding once it comes on for hearing.

Can the media base an argument for access to documents on the court record by reference to free speech *simpliciter*? In one sense, this approach is less demanding, as there is no need for the media to establish a link between access to documents on the court record and benefits to the administration of justice. However, media organisations cannot simply assert free speech as though it is an unassailable right. Even in countries such as the United States, where freedom of expression is protected as a constitutionally entrenched right, there are still

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26 The ACT has recently enacted the *Human Rights Act 2004* (ACT) which contains a right of free expression, and Victoria has enacted the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The matter is also under consideration in Tasmania and Western Australia. It should be noted that not all jurisdictions that expressly protect human rights do so through a constitutionally entrenched Bill of Rights along the lines of that which exists in the United States. Jurisdictions such as the ACT, Victoria, the United Kingdom (*Human Rights Act 1998* (UK) c 42) and New Zealand (*New Zealand Bill of Rights Act 1990* (NZ)) have all adopted a model whereby human rights are protected via an ordinary Act of Parliament, thereby retaining parliamentary sovereignty.

27 *Washington Legal Foundation v United States Sentencing Commission*, 89 F 3d 897, 906 (1996).

occasions on which it can be legitimately subjected to other competing and compelling values. Faced with an argument based solely on free speech, unconnected to its impact on the operation of the legal system, Australian courts are at liberty to permit other considerations to trump the 'right'. Indeed, it is suggested that the courts are more likely to do so if no benefits to the administration of justice can be demonstrated.

The significance of these differences in the perceived purposes of open justice and their application to the issue of access to documents on the court record will become apparent in the ensuing discussion of the sources of access to documents on the court record.

III NON-PARTY ACCESS TO THE COURT RECORD: THE POSITION UNDER FREEDOM OF INFORMATION LEGISLATION

The Commonwealth, States and Territories have each enacted freedom of information ('FOI') legislation, which is aimed at ensuring open and accountable government.[28] To that end, the legislation confers a legally enforceable right on individuals to access various types of information held by government agencies and puts in place procedures to enable this right to be exercised. The question that arises in the context of this article is whether FOI legislation provides members of the public, including the media, with a means of access to documents on the court record using FOI procedures.

Under the Commonwealth FOI legislation, court documents of a judicial or quasi-judicial nature – which include documents that relate to the hearing and determination of particular matters[29] – cannot be accessed. Similarly, the FOI legislation in all States and Territories,[30] except the Australian Capital Territory, does not permit courts to be subject to FOI applications in respect of their 'judicial functions'. Accordingly, documents filed in particular proceedings cannot be accessed using FOI procedures. In the Australian Capital Territory, the *Freedom of Information Act 1989* (ACT) does not expressly deal with its application to courts.[31] Whilst the wording of the legislation is wide enough to include the judicial functions of courts within its purview, certain provisions of

28 Roger Douglas, *Administrative Law* (2nd ed, 2004) 256.

29 For examples of documents that are judicial or quasi-judicial, see *Re Altman and Family Court of Australia* (1992) 15 AAR 236, 240.

30 *Freedom of Information Act 1989* (NSW) s 10, sch 1, cl 11. For a discussion of these provisions, see *N (No 2) v Director General Attorney-General's Department* [2002] NSWADT 33 (Unreported, O'Connor DCJ, 8 March 2002). See also *Information Act* (NT) ss 44, 49; *Freedom of Information Act 1992* (Qld) s 11; *Freedom of Information Act 1991* (SA) s 6, sch 1, cl 11; *Freedom of Information Act 1991* (Tas) s 6; *Freedom of Information Act 1982* (Vic) s 6; *Freedom of Information Act 1992* (WA) Glossary, cll 3, 5. See Moira Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State* (2005) 43.

31 The Act provides that certain bodies or agencies can be made exempt from the Act by regulations, but this power has not been exercised in respect of courts: *Freedom of Information Act 1989* (ACT) s 6(4).

the Act appear to have the effect of excluding access to documents on the court record by means of an FOI application in certain circumstances.[32]

In my view, the position taken in the FOI legislation concerning documents on the court record is correct. An FOI application is not an appropriate means by which to obtain access to such documents. As explained by the Senate Standing Committee on Constitutional and Legal Affairs:

> There is obviously very good reason for governments not imposing requirements which would interfere with the independence of the judiciary and the proper administration of justice. It would not be appropriate for freedom of information legislation to be the vehicle for obtaining access, where this was not otherwise available, to court documents filed by parties to litigation. Nor would it be appropriate for the legislation to operate in any way as a substitute or supplement for discovery procedures presently administered by the courts.[33]

Moreover, the length of time that it often takes for requested documents to be made available under FOI procedures makes it an unsuitable source of access for media organisations, as they wish to obtain information whilst a case is newsworthy. As argued in Part VIII of this article, the interests of justice demand that decisions pertaining to non-party access to the court record should remain with the courts.

IV NON-PARTY ACCESS TO THE COURT RECORD: THE POSITION UNDER THE COMMON LAW

A The Historical Position

The United Kingdom's position on non-party access to documents on the court record was reviewed in a seminal article published in the *Georgia Law Review* by William Ollie Key,[34] which has been frequently cited in both United Kingdom and Australian cases. The article explains that, prior to 1372, there was only 'a qualified right of access that protected the favoured position of the King in the courts'.[35] The position was that '[i]f judicial records or evidence damaged a

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32 See, eg, *Freedom of Information Act 1989* (ACT) ss 11(1) (a person is not entitled to obtain access to a document that is open to public access as part of a public register or otherwise, where that access is subject to a fee or other charge), 37 (a document is exempt if, inter alia, it would prejudice the enforcement or proper administration of the law in a particular instance, or prejudice a fair trial or the impartial adjudication of a case), 46(a) (a document is exempt if public disclosure would be in contempt of court). A similar conclusion regarding the effect of these provisions was reached by Anne Wallace, 'Courts Online: Public Access to the Electronic Court Record' (2000) 10 *Journal of Judicial Administration* 94.

33 Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978* (1979) [12.29]. The New Zealand Law Commission has recently expressed the same view, namely, that the framework for accessing information about the courts should not be exactly the same as the framework for accessing information about the executive government, as the administration of justice is not the same as the administration of public policy: New Zealand Law Commission, *Access to Court Records*, Report No 93 (2006) [7]–[9], [2.67]. This is not to say that the principles that underpin freedom of information legislation are irrelevant to access to information held by the courts: at [2.60].

34 William Ollie Key, 'The Common Law Right to Inspect and Copy Judicial Records: *In Camera* or on Camera' (1982) 16 *Georgia Law Review* 659.

35 Ibid 661.

prosecution in the name of the King or aided a suit against the King, courts would not allow the King's adversary to inspect or copy the material'.[36] However, in 1372 a statute was enacted which 'broadened this common law right to allow access to court records and evidence whether or not the material was used against the King'.[37] Opposing views were expressed as to the correct interpretation of this statute. The broadest view was taken by Lord Coke, who claimed that it conferred on persons an unrestricted right of access to judicial records.[38] He said:

> the records of the King's Courts, for that they contain great and hidden treasure, are faithfully and well kept (as they well deserve) in the King's Treasury. And yet not so kept but that any subject may, for his necessary use and benefit have access thereunto, which was the ancient law of England, and so is declared by an Act of Parliament, 46 E. 3.[39]

A considerably narrower interpretation of the statute was advanced by Sir Michael Foster, who stated that the statute 'plainly relateth to such Records in which the Subject may be Interested as *Matters of Evidence upon Questions of private Right*'.[40] On this view, 'only a party to a pending private action for the purpose of obtaining evidence for that litigation had the right to inspect and copy judicial records'.[41] In *Lord Preston's Case*,[42] the Court widened Sir Michael Foster's interpretation. It was suggested in *Browne v Cumming*[43] that *Lord Preston's Case* held that the statute applied 'to all records where copies or exemplifications are required for the purpose of being used as evidence',[44] not just litigation involving private rights.[45]

Key regarded the actual approach of the English courts to access as lying somewhere in between the views of Coke and Foster. He argued that in order to comprehend the English approach to access, it was necessary to distinguish between the right and the remedy. Key discerned from the early case law a common law right of access to judicial records that extended to all persons, but argued that 'only persons with evidentiary or proprietary interests in the court records could enforce their right if it were wrongfully denied'.[46] In other words, whilst the right of access itself was unrestricted, the enforcement of the right was restricted by the remedy. The remedy to enforce the right was mandamus, and mandamus would not be granted unless the person could show a personal

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36 Ibid.

37 Ibid. The statute was the *Knights of the Shire Act 1372*, 46 Edw 3.

38 Key, above n 34, 662.

39 Coke's position was enunciated in the preface to the third part of his reports: 2E Coke Reports pt 3, vi–vii as cited in *Browne v Cumming* (1829) 10 B & C 70, 72; 109 ER 377, 378. See also *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 3)* (2002) ATPR 41-873, 44955.

40 Sir Michael Foster, *A Report of Some Proceedings on the Commission of Oyer* (1762) 229 in Key, above n 34, 662 (capitalisation and italics in original).

41 Key, above n 34, 662.

42 12 State Trials 662 (n.d.) in *Browne v Cumming* (1829) 10 B & C 70, 72; 109 ER 377, 378.

43 (1829) 10 B & C 70; 109 ER 377.

44 Ibid 72; 378.

45 Ibid.

46 Key, above n 34, 666.

interest, namely, that the person wanted to use the records as evidence in a pending or prospective lawsuit, or had some proprietary interest in the documents. *Nixon v Warner Communications Inc*[47] is cited in support of this proposition. In that case, the United States Supreme Court described the English courts as having 'conditioned enforcement of [the common law right to inspect and copy judicial records] on a proprietary interest in the document or upon a need for it as evidence in a law suit'.[48] However, this concept of a naked right, for the enforcement of which the law provided no remedy, was rejected by the Supreme Court of Western Australia on the basis that it 'confuses the interest necessary for a citizen to enforce a public duty by way of mandamus with the interest necessary to enforce a private right'.[49]

The question of access to the court record again arose in the United Kingdom in 1829 in *Browne v Cumming*. The plaintiff had been tried on a felony indictment and acquitted. He wanted to obtain a copy of his felony indictment in order to sue for malicious prosecution. However, a resolution had been passed by judges at the Old Bailey which required a person to obtain a special court order granting access to the felony indictment by motion in open court.[50] As a result of a misunderstanding, the plaintiff managed to obtain a copy of his felony indictment from the Attorney-General without the required court order. The plaintiff had led the Attorney-General to understand that a particular judge had promised to make the order; in fact, no such promise had been made. When the plaintiff attempted to use the felony indictment in his malicious prosecution action, the Attorney-General obtained a rule nisi to restrain him from doing so on the basis that the indictment had been improperly obtained. The plaintiff argued that an accused person is entitled to a copy of his indictment in order that he might use it as evidence in proceedings for malicious prosecution. Moreover, he argued that the special resolution passed by the judges at the Old Bailey was at variance with what had been said by Lord Coke. Chief Justice Lord Tenterden seemed to recognise that the plaintiff had a right to a copy of the felony indictment, but stated that even if there was no such right, the matter would be one for the discretion of the Court, and as there was no evidence of any fraud or wilful misrepresentation on the part of the plaintiff, the Court would not interfere. The rule to restrain the plaintiff from using the copy of the record was, therefore, discharged. It is difficult to know how best to interpret *Browne v Cumming*. Some take the view that the Court adopted the wide approach of Lord Coke. For example, Key states that *Browne v Cumming* (and certain other malicious prosecution cases) 'illustrate the court's willingness to protect the vitality of'[51] the common law right of access.[52] Recent authorities have taken a different view

47 435 US 589 (1978).

48 Ibid 597. See also *Nowack v Auditor-General*, 243 Mich 200, 202–6 (1928).

49 *Titelius v Public Service Appeal Board* (1999) 21 WAR 201, 221.

50 The resolution was passed in an attempt to reduce the number of malicious prosecution suits because it was feared that people were being deterred from bringing prosecutions, even on just occasions.

51 Key, above n 34, 664.

52 Ibid 664.

of the case. In *Titelius v Public Service Appeal Board*,[53] it was held that *Browne v Cumming* simply established that accused persons are entitled to a copy of the indictment under which they are prosecuted in order to use it as evidence in proceedings for malicious prosecution; it did not endorse the broad approach to access advocated by Lord Coke.[54]

B Recent Cases

The uncertainty surrounding access to the court record has since been resolved by a number of more recent cases in Australia, New Zealand and the United Kingdom. These cases have emphatically concluded that there is no general common law right of access to judicial records.[55] The denial of a right of access is a logical extension of the proposition – accepted in all these cases – that the court file is 'not a publicly available register',[56] but 'a file collected and maintained by the court for the proper conduct of proceedings'.[57] In *Smith v Harris*,[58] an attempt was made to link access to the court record to the concept of open justice. In that case, counsel relied on the principle that courts must operate in public and be open to public scrutiny to support an argument that at common law all members of the public have a right to inspect court files unless the right is delimited by some statute or rule. The Court rejected the submission, explaining that the policy which demands that the judicial process be open to public scrutiny did not demand that the subject matter of that process be available, except insofar as this is necessary for the public to scrutinise the process itself.[59] That is, the Court drew a distinction between the events leading up to a court proceeding and the court proceeding itself; rights of access attach only to the latter, not to the former. Many other cases have eschewed a rigid connection between open justice and access to the court record, rejecting the notion that the latter must automatically flow from the former. For example, in *van Stokkum v Finance Brokers Supervisory Board*,[60] the Supreme Court of Western Australia stated that any proposition that the fundamental principle of open justice mandates the grant

53 (1999) 21 WAR 201.

54 Ibid 221. In other words, *Browne v Cumming* was simply a case in which a person was able to demonstrate a sufficient interest in the document to entitle him to obtain access to it. See also *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 3)* (2002) ATPR 41-873, 44955; Stuart Wilder, 'All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records' (1979) 52 *Temple Law Quarterly* 311, 338.

55 *R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289; *Dobson v Hastings* [1992] Ch 394; *Smith v Harris* [1996] 2 VR 335; *R v Clerk of Petty Sessions, Court of Petty Sessions Hobart; Ex parte Davies Brothers Ltd* (1998) 8 Tas R 283; *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd* [1999] 1 WLR 984; *The Herald & Weekly Times Ltd v The Magistrates' Court of Victoria* [1999] 3 VR 231; *The Herald & Weekly Times Ltd v The Magistrates' Court of Victoria* [2000] 2 VR 346 (Court of Appeal); *Television New Zealand Ltd v The Queen* [2000] NZCA 354; *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512; *Dian AO v Davis Frankel & Mead (a firm)* [2005] 1 All ER 1074.

56 *Dobson v Hastings* [1992] Ch 394, 401.

57 Ibid.

58 [1996] 2 VR 335.

59 Ibid 347.

60 [2002] WASC 192 (Unreported, McLure J, 9 August 2002).

of leave to inspect the court file would be both 'wrong in principle and contrary to the authorities'.[61] In a similar vein, in *Australian Securities and Investment Commission v Rich*,[62] the Supreme Court of New South Wales stated that 'free access by the media to the contents of a court file is not, in absolute terms, a proposition flowing from the principle of open justice'.[63] In *John Fairfax Publications Pty Ltd v Ryde Local Court*,[64] the New South Wales Court of Appeal stated:

> 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 form 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.[65]

The denial of a public right of access to documents on the court file applies irrespective of whether the document to which access is sought has been used in court or read by the judge.[66] However, it is clear that the media are free to report what has taken place in open court. Accordingly, to the extent that a document has been read aloud, referred to or discussed in open court, the document has entered the public domain and reporters are able to report what they have observed or heard in the courtroom.[67] This is not tantamount to saying that the media have a right of access to the document itself; but the fact that material has been used in open court will be very persuasive – perhaps even determinative – when a court is deciding whether to exercise a power to grant access.[68]

Although the weight of authority in Australia, New Zealand and the United Kingdom is against a broad common law right of access to the court record, there is at least one circumstance in which access *is* available as of right. In *Titelius v Public Service Appeal Board*, the Full Court of the Supreme Court of Western Australia recognised that there is a common law right to inspect a court order made in open court.[69] It was held that, unlike pleadings, evidence, affidavits and other documents filed in court, court orders are public documents which members of the public have a common law right to inspect, although there is no common law right to copy them.[70] Moreover, as explained earlier, there is a

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61 Ibid [11].

62 (2001) 51 NSWLR 643.

63 Ibid 649.

64 (2005) 62 NSWLR 512 ('*John Fairfax Publications Pty Ltd*').

65 Ibid 521.

66 *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd* [1999] 1 WLR 984, 995; *John Fairfax Publications Pty Ltd* (2005) 62 NSWLR 512, 520–1.

67 Given the decline in oral evidence and submissions, the extent to which documents are read aloud in court is rapidly diminishing. Therefore, the fact that they are free to report what they have heard in court is likely to be of little comfort to the media.

68 The courts' power to grant access to documents on the court record is discussed below in Parts VI and VII.

69 See also *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294, 301.

70 *Titelius v Public Service Appeal Board* (1999) WAR 201, 219–21, 223. According to Ipp J, this right can be curtailed only by a statute or by the court itself: at 223.

common law right of access where the person seeking access can establish a sufficient interest in the document to which access is sought.[71]

In line with the refusal of courts to recognise a common law right of access to court documents, in *The Herald & Weekly Times Ltd v The Magistrates' Court of Victoria*,[72] the Victorian Supreme Court refused to construe legislation that required the Magistrates' Court of Victoria to sit in open court as conferring on the media a right of access to documents contained in a hand-up brief that had been tendered in a committal proceeding held in open court.[73] The particular documents to which access was sought were the charge sheet and witness statements. At the nub of the case was Practice Direction 41/98,[74] which contained a direction by the Chief Magistrate that members of the media who requested access to briefs, statements and exhibits in respect of committal proceedings should direct their request to the Director of Public Prosecutions; the Court would no longer supply this information to the media. For its part, the Office of Public Prosecutions ('OPP') issued a document entitled 'Media Access to Statements and Materials in Magistrates' Court Proceedings' which explained that OPP staff had been authorised to allow the media to peruse statements and other material, including agreed summaries, tendered during proceedings only where the material in question had been tendered to the Court, where the prosecutor considered it appropriate to grant access to the material, and where the defence agreed to the media being granted access. The document confirmed the right of the media to go before the Court and argue the question of access.[75]

In *The Herald & Weekly Times*, four major media organisations[76] sought access to the aforementioned documents from the OPP but were refused because the defence did not agree to the media having access to them. These organisations then sought access from the Magistrate conducting the committal proceeding, but were again refused.[77] The main reason for the Magistrate's refusal was a distinction, described as 'vital', between access to materials tendered during a trial and the unique situation that applies in committal proceedings conducted with hand-up briefs.[78] The four media organisations then sought a declaration from the Supreme Court that the Practice Direction was beyond the power of the Chief Magistrate and orders quashing the Magistrate's decision refusing access. They argued that the Practice Direction impermissibly

71 *R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289, 306–7.

72 [1999] 3 VR 231 (Mandie J) ('*The Herald & Weekly Times*'); *The Herald & Weekly Times Ltd v The Magistrates' Court of Victoria* [2000] 2 VR 346 (Court of Appeal).

73 The Court accepted that the Magistrates' Court had no obligation to provide access independently of the statutory provision, that is, that there was no common law right of inspection.

74 Magistrates' Court of Victoria, Practice Direction 41/98, *Information Provided to Media in Committal Proceedings* (13 November 1998) ('Practice Direction 41/98').

75 Indeed, the document stated that it was the Director of Public Prosecution's preferred position that access be granted through the court or, at the least, by the agreement of the parties involved.

76 The four organisations were Herald & Weekly Times Ltd, Nine Network Australia Pty Ltd, Seven Network Ltd and 3AW Southern Cross Broadcasting Pty Ltd.

77 Several significant paragraphs of the Magistrate's reasons are reproduced by Mandie J in *The Herald & Weekly Times* [1999] 3 VR 231, 234–6.

78 For a discussion of a trend by magistrates to deny media organisations access to committal documents, see Warren Beeby, 'Threats to Press Freedom' (2002) 14(1) *Australian Press Council News* 10.

delegated the question of access to the OPP, with the result that access was effectively denied, since defendants in committal proceedings invariably refuse to consent to documents in the hand-up brief being made available to the media. They argued that in denying access to the charge sheet and the witness statements pursuant to the Practice Direction, the Magistrate had acted in breach of s 125 of the *Magistrates Court Act 1989* (Vic) which requires 'all proceedings to be conducted in open court, except where otherwise provided'. The Magistrate's denial of access to these documents was said to be equivalent to shutting the doors of the Court, since it meant that the public were unable to hear the case through their eyes and ears, the media.[79] Although not physically excluded, the media were excluded in the sense that they were unable to make a fair and accurate report of the case.[80] It is important to note that it was not contended that the Magistrate was under a positive obligation to provide the media with access to the charge sheet or witness statements. Rather, it was argued that once a request for access had been made, the proceeding could no longer be regarded as conducted in open court if reasonable access was refused by the Court.[81] From that time on, the Court would be acting without, or in excess of, jurisdiction. To ensure compliance with the principle of open justice, the Court was said to be under an obligation to implement procedures which would facilitate media access to documents in the hand-up brief.

The Attorney-General, as intervener, argued that the requirement in section 125 is met if the public have the right to attend court and listen to proceedings whilst they are in session.[82] Section 125 does not confer on the public or the media a right to be provided with materials which would enable them to comprehend or become fully acquainted with all the details of proceedings. In fact, it was put to the Court that committal hearings would become unworkable if members of the public were able to interrupt proceedings in order to demand the release of tendered documents. Thus, section 125 had not been breached by the Magistrate's refusal to provide the media with access to documents in the hand-up brief.

At first instance, Mandie J held that the principle of open justice did not oblige the Court to provide, upon request, reasonable access to copies of the charge sheet and witness statements. Thus, the validity of the Practice Direction was confirmed. A proceeding is conducted in open court if the public has a right of admission to that court which is reasonably and conveniently exercisable. Justice Mandie's view of the fundamental purpose of the principle of open justice is interesting in light of the discussion at the beginning of this article. According to his Honour, open justice does not exist to facilitate the provision of information to the public at large or to assist public discussion.[83] Rather, its purpose is to keep judges under scrutiny. The perception that the principle of open justice is a means

79 *The Herald & Weekly Times* [1999] 3 VR 231, 239–40; *The Herald & Weekly Times Ltd v The Magistrates' Court of Victoria* [2000] 2 VR 346, 354–5 (Court of Appeal)

80 *The Herald & Weekly Times* [1999] 3 VR 231, 240–2.

81 Ibid 244, 247.

82 Ibid 244.

83 Ibid 248.

of keeping the public informed of what is occurring in the courts was treated as belonging to a distinct and wider public policy. For Mandie J, these public policy considerations are more appropriately dealt with via rules of court or legislation, not by extending the meaning of section 125.[84] Nevertheless, Mandie J conceded that this wider policy was an important one, and that its implementation would be frustrated if the media were denied access to information about judicial proceedings.[85]

On appeal, the Court of Appeal agreed with Mandie J that section 125 did not confer on the media a *right* of access to documents in a committal proceeding, and that the open court rule had not yet been extended to acknowledge any such right.[86] Nevertheless, the Court of Appeal expressed the view that since the press is entitled to report on committal proceedings, it is desirable that reasonable access to the contents of the hand-up brief be afforded to enable fair and accurate reports to be prepared, unless there are countervailing considerations that would dictate otherwise.[87] An application for special leave to appeal was refused by the High Court.[88]

C Common Law Rights of Access to the Court Record in the United States

Courts in the United States recognise that members of the public (including the media) have a common law right to attend criminal and civil proceedings. However, unlike the position in the United Kingdom, Australia and New Zealand, they also regard judicial records as public records to which members of the public enjoy a common law right of access.[89] The seminal case on access to court records is *Nixon v Warner Communications Inc*. In that case, the United States Supreme Court held that '[i]t is clear that the courts of this country

84 Ibid 248, 249.

85 Ibid 249.

86 *The Herald & Weekly Times Ltd v The Magistrates' Court of Victoria* [2000] 2 VR 346, 361. The Court at first instance and on appeal dealt with whether the magistrate had power to grant access to documents in the hand-up brief, assuming that non-parties had no right of access. The power aspect of the case is discussed in Part VI(B) of this article.

87 Ibid 362.

88 Special Leave Application M7/2001, *Herald & Weekly Times Ltd v Magistrates Court of Victoria* (High Court of Australia, 10 April 2001).

89 *United States v Mitchell*, 551 F 2d 1252, 1257–8 (DC Cir, 1976); *Nixon v Warner Communications Inc*, 435 US 589, 597 (1978); *Brown & Williamson Tobacco Co v Federal Trade Commission*, 710 F 2d 1165, 1177–9 (6th Cir, 1983); *Re Continental Illinois Securities Litigation*, 732 F 2d 1302, 1308 (7th Cir, 1984); *Anderson v Cryovac Inc*, 805 F 2d 1, 13 (1st Cir, 1986); *Republic of the Philippines v Westinghouse Electric Corp*, 949 F 2d 653, 659 (3rd Cir, 1991); *United States v Amodeo*, 44 F 3d 141, 145–6 (2nd Cir, 1995). Access to documents on the court record is also affected by statutes, and by Federal and State rules of procedure, but a discussion of these is beyond the scope of this article.

recognize a general right to inspect and copy public records and documents, including judicial records and documents'.[90]

This common law right of access to judicial records antedates the *United States Constitution*[91] and is beyond dispute.[92] It is not premised on persons seeking to access judicial records being able to show a special interest in the particular record they wish to inspect.[93] The common law right of access normally involves a right of immediate and contemporaneous access.[94] This aspect of the right is particularly important to media organisations, which are interested in reporting cases whilst they are still newsworthy.

Numerous rationales have been advanced to support this common law right of access to the court record. Many of them are identical to the rationales that underlie the common law right of access to the courtroom.[95] They include the public's interest in seeing that the courts are fairly run and that judges are accountable to perform their duties in an honest and informed manner.[96] Thus, in *Re Continental Illinois Securities Litigation*,[97] the right was described as one which relates to the public's right to monitor the functioning of the courts, thereby ensuring quality, honesty and respect for the legal system.[98] This is of particular importance in a country where most State judges are elected to office.

Other cases have assessed the benefits of access from the standpoint of the public. Public access to court records has been described as fundamental to a democratic state.[99] Democracy operates on the tenet that the public have the right to know about the operations of their government, including the judiciary. Court

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90 *Nixon v Warner Communications Inc*, 435 US 589, 597 (1978). In other words, the right to inspect and copy judicial records is simply one species of the general public's common law right to inspect public documents: 66 Am Jur 2d *Records and Recording Laws* § 17, §22 (2001); *United States v El-Sayegh*, 131 F 3d 158, 160 (DC Cir, 1997). The earliest application by an American court of the common law right of access to judicial records in particular, as opposed to public records in general, was in *Ex parte Drawbaugh*, 2 App DC 404 (DC Cir, 1894).

91 *United States v Mitchell*, 551 F 2d 1252, 1260 (DC Cir, 1976); *United States v Criden*, 648 F 2d 814, 819 (3rd Cir, 1981); *Bank of America National Trust & Savings Association v Hotel Rittenhouse Associates*, 800 F 2d 339, 343 (3rd Cir, 1986); *Leucadia Inc v Applied Extrusion Technologies Inc*, 998 F 2d 157, 161 (3rd Cir, 1993); *The Associated Press v The State of New Hampshire*, 153 NH 120 (2005).

92 *Publicker Industries Inc v Cohen*, 733 F 2d 1059, 1066 (3rd Cir, 1984).

93 The requirement of a special interest along the lines of the English approach outlined in Part IV(A) of this article is regarded by American courts as 'repugnant to the spirit of our democratic institutions': *Nowack v Auditor-General*, 243 Mich 200, 202–6 (1928).

94 *Re Continental Illinois Securities Litigation*, 732 F 2d 1302, 1310 (7th Cir, 1984); *Republic of the Philippines v Westinghouse Electric Corp*, 949 F 2d 653, 660–1, 664 (3rd Cir, 1991).

95 These rationales were outlined in Part II of this article.

96 *Nixon v Warner Communications Inc*, 435 US 589, 598 (1978) (the right was described as founded on 'the citizen's desire to keep a watchful eye on the workings of public agencies'); *Crystal Grower's Corp v Dobbins*, 616 F 2d 458, 461 (10th Cir, 1980); *United States v Amodeo*, 71 F 3d 1044, 1048 (2nd Cir, 1995); *Re Providence Journal Co*, 293 F 3d 1, 9 (1st Cir, 2002).

97 732 F 2d 1302 (7th Cir, 1984).

98 Ibid 1308; *Bank of America National Trust & Savings Association v Hotel Rittenhouse Associates*, 800 F 2d 339, 345 (3rd Cir, 1986); *Globe Newspaper Co v Superior Court for the County of Norfolk*, 457 US 596, 606 (1982).

99 *Nowack v Auditor-General*, 243 Mich 200, 202–6 (1928); *United States v Mitchell*, 551 F 2d 1252, 1258 (DC Cir, 1976).

records are 'rich with democracy's indispensable raw material: information'.[100] Access to such documents aids citizens in understanding disputes that are presented to a public forum for resolution.[101] The following statement, in *United States v Amodeo*,[102] encapsulates the purposes served by access from the perspective of the citizen:

> 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.[103]

Other cases have fashioned a link between access to judicial records and the promotion of public health and safety.[104] The reasoning is that if members of the public are not able to inspect court records, they will be prevented from unearthing valuable information that may affect their health and wellbeing.[105] This might include information about the health risks of food, drugs, defective products, dangerous substances, stock manipulations, insurance scams, election fraud, corruption perpetrated by government officials, anti-trust violations, and the illegal dumping of toxic waste. The common law right of access has also been said to promote equality between those who were able to attend the proceedings and those who were not.[106]

Whilst the common law right of access to court records has been primarily developed and honed in the context of criminal cases, there is no doubt that it also applies in respect of civil cases, since the policy reasons for granting public access apply with equal force to all types of proceedings.[107] In respect of civil cases it has been said that:

> The public's exercise of its common law access right in civil cases promotes public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dispensed by the court. ... As with other branches of government, the bright light cast upon the judicial process by public observation diminishes possibilities for injustice, incompetence, perjury and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness.[108]

One commentator has expressed the view that the right to inspect court records is of greater importance than the right to be present in the courtroom, as it gives greater effect to the policies that underlie these rights of access. Wilder maintains

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100 Lloyd Doggett and Michael J Mucchetti, 'Public Access to Public Courts: Discouraging Secrecy in the Public Interest' (1991) 69 *Texas Law Review* 643, 653.

101 *Crystal Grower's Corp v Dobbins*, 616 F 2d 458, 461 (10th Cir, 1980).

102 71 F 3d 1044 (2nd Cir, 1995).

103 Ibid 1048.

104 *Republic of the Philippines v Westinghouse Electric Corp*, 949 F 2d 653, 664 (3rd Cir, 1991).

105 See Doggett and Mucchetti, above n 100, 648–50; James M Chadwick, *Access to Electronic Court Records: An Outline of Issues and Legal Analysis* (2001) <http://www.courtaccess.org/legalwritings/chadwick2001.pdf> at 12 September 2006.

106 *United States v Mitchell*, 551 F 2d 1252, 1258 (DC Cir, 1976).

107 *Brown v Williamson Tobacco Corp v Federal Trade Commission*, 710 F 2d 1165, 1179 (6th Cir, 1983); *Re Continental Illinois Securities Litigation*, 732 F 2d 1302, 1308 (7th Cir, 1984); *Publicker Industries Inc v Cohen*, 733 F 2d 1059, 1066–7 (3rd Cir, 1984).

108 *Littlejohn v BIC Corp*, 851 F 2d 673, 678 (3rd Cir, 1988).

that court documents portray a more complete picture of the official development and resolution of the case, and constitute a permanent record of why a court acted in a particular manner in a particular case.[109]

The common law right to inspect and copy court records is not absolute.[110] Courts in the United States clearly regard themselves as retaining a supervisory power over their records and files, and as possessing a discretion to deny access in appropriate circumstances.[111] For this reason, it is more accurate to describe the public as having a common law presumption of access to judicial records rather than an unfettered common law right of access.[112]

Determining whether the presumption of access applies in any given case breaks down into a three-step process, at least in the federal courts. The first step is to determine whether the document to which access is sought is a 'judicial' document or record. This is important because the common law presumption of access is limited to judicial documents and records.[113] There is disagreement between the various federal courts of appeals regarding the test that should be used to resolve this issue. Some cases adopt the view that the mere physical act of filing a document in a proceeding renders that document a 'judicial document' which, in turn, raises the presumption of access.[114] Other cases have stated that the presumption of access is raised only in respect of those physically filed documents that play a role in the adjudication process.[115] For example, in *United States v Amodeo*,[116] it was held that 'the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access'.[117] In order to be designated a judicial document the item filed must be 'relevant to the performance of the judicial function and useful in the judicial process'.[118] In short, many cases insist on a proximate connection between the document and the court's determination, confining the right of access to 'material on which a court (has relied) in determining the litigants'

109 Wilder, above n 54, 338, 343.

110 *Nixon v Warner Communications Inc*, 435 US 589, 598 (1978); *Bank of America National Trust & Savings Association v Hotel Rittenhouse Associates*, 800 F 2d 339, 344 (3rd Cir, 1986).

111 *Nixon v Warner Communications Inc*, 435 US 589, 598 (1978).

112 *Littlejohn v BIC Corp*, 851 F 2d 673, 678 (3rd Cir, 1988). See also Key, above n 34, 670.

113 *Re Boston Herald Inc*, 321 F 3d 174, 180–1 (1st Cir, 2003).

114 *Crystal Grower's Corporation v Dobbins*, 616 F 2d 458, 460–1 (10th Cir, 1980); *Bank of America National Trust & Savings Association v Hotel Rittenhouse Associates*, 800 F 2d 339, 344–5 (3rd Cir, 1986) (settlement documents and post settlement motion seeking to interpret and enforce the agreement filed with the Court held to be judicial documents); *Federal Trade Commission v Standard Financial Management Corporation*, 830 F 2d 404, 409 (1st Cir, 1987); *Leucadia Inc v Applied Extrusion Technologies Inc*, 998 F 2d 157, 161–2 (3rd Cir, 1993); *Pansy v Borough of Stroudsburg*, 23 F 3d 772, 782 (3rd Cir, 1994) (settlement agreement not filed with the Court held not to be a judicial document subject to a public right of access).

115 *United States v El-Sayegh*, 131 F 3d 158, 163 (DC Cir, 1997).

116 44 F 3d 141 (2nd Cir, 1995).

117 Ibid 145.

118 Ibid. See also *Anderson v Cryovac Inc*, 805 F 2d 1, 13 (1st Cir, 1986); *United States v Gonzales*, 150 F 3d 1246, 1255 (10th Cir, 1998).

substantive rights'.[119] This approximates the approach taken in many Australian courts, whether in rules of court or in the exercise of judicial discretion. This test presents some difficulty where a member of the public seeks access to a document that has been filed but which has not yet come before the court. It seems that in this case, some documents will be presumed to have relevance and utility to the judicial function.[120] The demand for a link between the document and the adjudication arises out of a concern that the temptation to leave no stone unturned in the search for evidence inevitably unearths a vast amount of irrelevant and unreliable material. To grant unlimited access to this material simply because it had been filed would be 'unthinkable'.[121]

It is beyond the scope of this article to review the numerous cases in which American courts have considered the status of particular documents to which members of the public have sought access. Suffice it to say that the common law presumption of access is not limited to court records that contain evidence.[122] Cases have extended the right of access to transcripts; exhibits in the custody of the court; settlement documents filed with the court; documents submitted to a court in support of or in opposition to a motion for summary judgment;[123] and motions and material filed in connection with motions, even if the motion is ultimately denied.[124] Documents held not to be 'judicial documents' include grand jury records[125] and documents submitted by a criminal defendant to show financial eligibility for government funding for a portion of his attorney's fees and legal expenses.[126] Courts have disagreed over the status of affidavits

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119 *Anderson v Cryovac Inc*, 805 F 2d 1, 12–13 (1st Cir, 1986). See also *United States v El-Sayegh*, 131 F 3d 158 (DC Cir, 1997) (a plea agreement filed to enable a court to rule on the Government's motion to seal the agreement, which was later withdrawn when the plea agreement fell through, was held to be not subject to the common law right of access as it had played no role in the adjudicatory process). This issue is discussed in greater detail in Robert Deyling, 'Privacy and Public Access to Federal Court Case Files' (Paper presented at the Courts for the 21st Century: Public Access, Privacy and Security Conference, Queensland, 6 November 2003).

120 Timing issues were discussed in *Lugosch v Pyramid Company of Onondaga*, 435 F 3d 110 (2nd Cir, 2006). The District Court had decided that it was premature to make a ruling on whether sealed documents filed in connection with a motion for summary judgment were judicial documents pending the outcome of the summary judgment motion. However, the United States Court of Appeal for the Second Circuit held that the documents, by virtue of having been submitted to the Court as supporting material in connection with a motion for summary judgment, were unquestionably judicial documents under the common law and were, therefore, documents to which there was a presumption of immediate public access. The matter was remanded to the District Court to make immediate findings as to whether the presumption of access was overcome by countervailing considerations.

121 *United States v Amodeo*, 71 F 3d 1044, 1048 (2nd Cir, 1995).

122 *United States v Martin*, 746 F 2d 964, 968 (3rd Cir, 1984). The evidence to which there is a right of public access includes video and audio evidence, not just documentary evidence: *Nixon v Warner Communications Inc,* 435 US 589 (1978).

123 *Joy v North*, 692 F 2d 880 (2nd Cir, 1982); *Lugosch v Pyramid Company of Onondaga*, 435 F 3d 110 (2nd Cir, 2006).

124 *Republic of the Philippines v Westinghouse Electric Corp*, 949 F 2d 653, 660–1 (3rd Cir, 1991). It should be noted that there are differing approaches among the different circuits.

125 *Douglas Oil Co v Petrol Stops Northwest*, 441 US 211, 218 (1979). See also Rex S Heinke, *Media Law* (1994) 12–49.

126 *Re Boston Herald*, 321 F 3d 174 (1st Cir, 2003). These documents were regarded as being in the nature of administrative paperwork generated as part of a ministerial process ancillary to the trial and which could have been assigned to an institution other than the judiciary. Accordingly, access was denied.

pertaining to search warrants,[127] wiretapped conversations, pre-sentence reports[128] and materials produced during the discovery process.[129]

Once a court has determined that a document is a 'judicial document', the common law presumption of access attaches ipso facto. The court must then proceed to the second step, which is to determine the weight to be accorded to the presumption, as not all presumptions of access are equal.[130] According to *United States v Amodeo*, the weight of the presumption is governed by the role of the material at issue in the exercise of judicial power and the resultant value of such information to those monitoring the courts.[131] The presumption is at its strongest when the document in question has been submitted as a basis for judicial decision making.[132]

Finally, the fact that a document is a judicial document to which the common law presumption of access applies does not mean that access cannot be restricted. Having decided that the presumption of access applies to the document or record in question, a court has to balance the public interest underlying the presumption of access against other competing public interests.[133] These countervailing factors include the right to a fair trial (for example, public access might create a potential for prejudicial pre-trial publicity); privacy interests[134] (especially if the privacy of third parties is affected by access); confidentiality considerations (such as a party's interests in protecting trade secrets); the safety of an informant; unwarranted reputational injury; the danger of impairing law enforcement or judicial efficiency; and whether access is sought for improper purposes, such as to gratify private spite or to promote public scandal.[135]

A number of points can be made about this balancing exercise. First, it is a case specific exercise. In *Nixon v Warner Communications Inc*, the Supreme Court acknowledged the difficulty of identifying all the factors to be weighed in determining whether access is appropriate, and concluded (in conformity with the few cases on the topic at that time), that the decision as to access is one 'best left to the sound discretion of the trial court … to be exercised in light of the relevant facts and circumstances of the particular case'.[136] Second, owing to the fact that

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127 *Times Mirror Co v Copley Press Inc*, 873 F 2d 1210, 1213–19 (9th Cir, 1989); *Baltimore Sun Co v Goetz*, 886 F 2d 60, 64–5 (warrant materials not accessible to the public); *Re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F 2d 569, 572–5 (8th Cir, 1988) (documents filed in support of search warrant applications held accessible to the public).

128 *United States v Corbitt*, 879 F 2d 224, 228 (7th Cir, 1989).

129 *Seattle Times Co v Rhinehart*, 467 US 20 (1984); *Anderson v Cryovac Inc*, 805 F 2d 1, 13 (1st Cir, 1986); *Leucadia Inc v Applied Extrusion Technology Inc*, 998 F 2d 157 (3rd Cir, 1993).

130 *Re Boston Herald*, 321 F 3d 174, 198 (1st Cir, 2003); *Lugosch v Pyramid Company of Onondaga*, 435 F 3d 110, 119 (2nd Cir, 2006).

131 *United States v Amodeo*, 71 F 3d 1044, 1049 (2nd Cir, 1995).

132 *Greater Miami Baseball Club Ltd Partnership v Selig*, 955 F Supp 37, 39 (NY, 1997); *Re Boston Herald*, 321 F 3d 174, 198 (1st Cir, 2003).

133 *United States v Criden*, 648 F 2d 814 (3rd Cir, 1981); *United States v Criden*, 681 F 2d 919 (3rd Cir, 1982); *Re Continental Illinois Securities Litigation*, 732 F 2d 1302, 1313 (7th Cir, 1984).

134 The fact that a document on the court record can be accessed via the internet may affect the balance between access rights and privacy rights.

135 *Nixon v Warner Communications Inc*, 435 US 589, 598 (1978).

136 Ibid 599.

the person seeking to secure access enjoys the benefit of the common law presumption, the onus of proof rests with the person seeking to displace the presumption of access.[137] Third, the cases differ in their estimate of how compelling a competing public interest must be before it will be held to displace the presumption of access. For example, in *Re Providence Journal Co Inc*,[138] the Court stated that only the most compelling reasons can justify non-disclosure of judicial records that come within the scope of the common law right of access.[139] In *Publicker Industries Inc v Cohen*,[140] the Court held that the party seeking to deny access must show that disclosure will work a clearly defined and serious injury to him or her, which is more substantial than embarrassment or damage to public image or reputation. Other cases have been less stringent in their assessments.[141] Much will depend on the strength of the presumption in favour of access: the stronger the presumption, the more compelling the countervailing consideration must be to outweigh it. Finally, decisions to seal the record can be reviewed for abuse of the discretion.[142]

V NON-PARTY ACCESS TO THE COURT RECORD: THE POSITION UNDER THE *CONSTITUTION*

A First Amendment Rights of Access in the United States

In the United States, the issue of access to judicial proceedings and records is not the sole province of the common law. In 1980, in *Richmond Newspapers Inc v Virginia*,[143] the United States Supreme Court held that the First Amendment[144] guarantees to the public and the press a qualified right to attend criminal trials and pre-trial proceedings.[145] This right has been confirmed in numerous

137 *United States v Mitchell*, 551 F 2d 1252, 1261 (DC Cir, 1976); *Bank of America National Trust & Savings Association v Hotel Rittenhouse Associates*, 800 F 2d 339, 344 (3rd Cir, 1986); *Federal Trade Commission v Standard Financial Management Corp*, 830 F 2d 404, 408–10 (1st Cir, 1987).

138 293 F 3d 1 (1st Cir, 2002).

139 Ibid 11. See also *City of Hartford v Chase*, 942 F 2d 130, 135 (2nd Cir, 1991).

140 733 F 2d 1059, 1071 (3rd Cir, 1984).

141 For example, in *Federal Savings and Loan Insurance Corp v Blain*, 808 F 2d 395, 399 (5th Cir, 1987) the Court simply stated that the power to limit access should be exercised 'charily'.

142 *United States v McVeigh*, 119 F 3d 806, 811 (10th Cir, 1997).

143 448 US 555 (1980).

144 The First Amendment of the *United States Constitution* states: 'Congress shall make no law … abridging the freedom of speech, or of the press …'.

145 The case is discussed in G Michael Fenner and James L Koley, 'Access to Judicial Proceedings: To *Richmond Newspapers* and Beyond' (1981) 16 *Harvard Civil Rights – Civil Liberties Law Review* 415 (1981).

subsequent cases.[146] The public and the press also enjoy a First Amendment right to attend civil proceedings.[147] In recent years, courts have recognised that the presumption of public access to court records is also of constitutional magnitude.[148] Whilst the Supreme Court is yet to consider the application of the First Amendment to judicial documents, several of the federal courts of appeal have held that the First Amendment, independent of the common law and in addition to it, secures to the public and the media a right of access to records of criminal[149] and civil proceedings.[150]

The First Amendment does not guarantee the press or the public an automatic constitutional right of access to every document on the court record. To be capable of attracting the First Amendment, the document in question must be a 'judicial document', which is the same requirement that applies to the common law right of access.[151] However, whilst characterising a document as a judicial document is sufficient to raise the presumption of access at common law, it is a necessary but not a sufficient condition for establishing a presumption of access under the First Amendment.

Having characterised a document as judicial, it is then necessary to examine two complementary considerations to determine if a First Amendment right of access applies to the document. These considerations – often referred to respectively as the 'experience prong' and the 'logic prong' – were laid down in *Press-Enterprise Co v Superior Court of California for the County of*

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146 *Globe Newspaper Co v Superior Court for the County of Norfolk*, 457 US 596 (1982) (a Massachusetts statute providing for the mandatory exclusion of the press and the public from trials of sexual offences involving a victim under the age of 18 held to violate the First Amendment); *Press-Enterprise Co v Superior Court of California, Riverside County*, 464 US 501 (1984) (rationale extended to a voir dire examination of potential criminal trial jurors); *Press-Enterprise Co v Superior Court of California for the County of Riverside*, 478 US 1 (1986) (preliminary hearing in a criminal case held to be presumptively open to the public); *El Vocero de Puerto Rico v Puerto Rico*, 508 US 147 (1993) (a requirement to hold preliminary hearing privately unless defendant requests otherwise held to violate First Amendment); *ABC Inc v Stewart*, 360 F 3d 90 (2nd Cir, 2004) (rationale applied to voir dire examination of potential jurors in a high profile criminal trial).

147 *Publicker Industries v Cohen*, 733 F 2d 1059 (3rd Cir, 1984); *Westmoreland v Columbia Broadcasting System Inc*, 752 F 2d 16 (2nd Cir, 1984) (First Amendment right to attend civil proceedings recognised, but not a First Amendment right to televise them); *NBC Subsidiary (KNBC-TV) Inc v The Superior Court of Los Angeles County*, 20 Cal 4th 1178 (1999).

148 *United States v Dorfman*, 690 F 2d 1230, 1233–4 (7th Cir, 1982); *Associated Press v United States District Court*, 705 F 2d 1143, 1145 (9th Cir, 1983); *Re Continental Illinois Securities Litigation*, 732 F 2d 1302, 1308 (7th, 1984). The Constitutions of a few American States explicitly confer a right of access to judicial records: see, eg, *New Hampshire Constitution* Pt 1 art 8.

149 *Re New York Times*, 828 F 2d 110 (2nd Cir, 1987); *Re National Broadcasting Co*, 828 F 2d 340 (6th Cir, 1987); *United States v Haller*, 837 F 2d 84 (2nd Cir, 1998); *Globe Newspaper Co v Pokaski*, 868 F 2d 497 (1st Cir, 1989); *Re Providence Journal Co*, 293 F 3d 1 (1st Cir, 2002). But see *United States v McVeigh*, 119 F 3d 806 (10th Cir, 1997) (Court not prepared to recognise a First Amendment right of access to documents in Oklahoma City bombing trial due to dearth of Supreme Court authority on the issue).

150 *Rushford v New Yorker Magazine Inc*, 846 F 2d 249, 253 (4th Cir, 1988); *Copley Press Inc v The Superior Court of San Diego County*, 6 Cal App 4th 106 (1992); *Re Continental Illinois Securities Litigation*, 732 F 2d 1302 (7th Cir, 1984); *Grove Fresh Distributors Inc v Everfresh Juice Co*, 24 F 3d 893 (7th Cir, 1994); *Lugosch v Pyramid Company of Onondaga*, 435 F 3d 110 (2nd Cir, 2006).

151 *El Dia Inc v Hernandez Colon*, 963 F 2d 488, 495 (1st Cir, 1992); *Re Boston Herald*, 321 F 3d 174, 180 (1st Cir, 2003); Marc A Franklin, David A Anderson and Fred H Cate, *Mass Media Law* (6th ed, 2000) 770.

Riverside.[152] The experience prong requires the court to consider whether access to a document has been historically open to the press and the general public, as 'a tradition of accessibility implies the favourable judgment of experience'.[153] Courts applying this test have generally invoked the common law right of access to judicial documents to support a finding of a history of openness.[154] However, the mere fact that a document is connected with a criminal case does not link the document to a history of public access. Where the particular document in question is of recent origin, it may suffice to show that analogous documents have been open to the public in the past, provided the analogy is solid enough to serve as a reasonable proxy;[155] although, in this situation, some cases have dispensed with the experience prong and have found a right of access based on the logic prong alone.[156] The logic prong requires the court to consider whether public access plays a significant positive role in the functioning of the particular judicial process in question.[157] This involves identifying the policy reasons underlying access, and ascertaining their degree of relevance to the document in question. It also involves a consideration of the functional drawbacks of access – would the judicial process in question be frustrated if it were conducted openly? If so, would this procedural frustration justify removing the document from First Amendment scrutiny? For example, if access to a pre-sentence report is being sought, the court would ask whether pre-sentence reports have generally been available to the public (the experience prong) and whether publicity would help to ensure that the pre-sentence investigation is properly conducted (the logic prong).[158] Access to grand jury proceedings and records serves as an example of a process that has failed to meet the experience and logic tests. Grand jury proceedings have a history of not being open to the public and the operation of

152 478 US 1 (1986). The case did not concern access to court records, but whether the media had a First Amendment right to attend a preliminary hearing in a trial involving the murder of 12 patients by a nurse. However, the test is general and has been applied to documents: *Globe Newspaper Co v Pokaski*, 868 F 2d 497, 502–4 (1st Cir, 1989).

153 *Richmond Newspapers Inc v Virginia*, 448 US 555, 589 (1980); *Globe Newspaper Co v Superior Court for the County of Norfolk*, 457 US 596, 605 (1982); *Press-Enterprise Co v Superior Court of California for the County of Riverside*, 478 US 1, 8 (1986). In *The Natural Parents of JB v Florida Department of Children and Family Services*, 780 So 2d 6, 8–9 (Fla, 2001), the First Amendment was held not to attach to juvenile proceedings because such proceedings were not historically open.

154 *Hartford Courant Co v Pellegrino*, 380 F 3d 83, 92 (2nd Cir, 2004). See also *Re Providence Journal Co*, 293 F 3d 1, 10 (1st Cir, 2002) (the jurisprudence concerning the First Amendment right of access to criminal proceedings was said to be derived in large measure from the jurisprudence that has shaped the common law right of access).

155 *Re Boston Herald*, 321 F 3d 174, 184 (1st Cir, 2003).

156 *United States v Suarez*, 880 F 2d 626, 631 (2nd Cir, 1989). There was no long tradition of access to the *Criminal Justice Act of 1964*, 18 USC § 3006A (1964) ('*Criminal Justice Act*') forms on which judicial officers approved payments to attorneys who provided services to criminal defendants because the *Criminal Justice Act* was itself a fairly recent development. Nevertheless, the lack of tradition was held not to detract from the public's strong interest in how public funds are being spent in the administration of criminal justice, thus, there was held to be a First Amendment right of access to *Criminal Justice Act* forms after payment had been approved.

157 *Globe Newspaper Co v Superior Court for the County of Norfolk*, 457 US 596, 606 (1982); *Press-Enterprise Co v Superior Court of California for the County of Riverside*, 478 US 1, 8 (1986).

158 *United States v Corbitt*, 879 F 2d 224 (7th Cir, 1989).

the grand jury system would be frustrated if proceedings were conducted openly.[159]

Some cases have eschewed the experience/logic test altogether when establishing whether there is presumptive openness under the First Amendment, choosing instead to consider the extent to which the judicial document in question is derived from, or is a necessary corollary of, the capacity to attend the relevant proceeding. Such cases have found that if the judicial proceeding in respect of which the document was filed implicates a right of access, then the First Amendment applies to documents submitted in connection with that proceeding. This has been described as the 'necessary corollary' approach.[160]

A determination by a court that a qualified First Amendment right of access has arisen in relation to certain documents through the application of these tests does not end the inquiry. A First Amendment right of access can be overridden, since it is a qualified right, not an absolute right, despite the fact that it is expressed in absolute terms.[161] The test applied by the courts in determining whether to deny access is stricter and less flexible than the broad balancing 'countervailing factors' test that is applied under the common law pursuant to the 'sound discretion of the trial judge'.[162] This denial of access test requires that two stringent criteria are met.[163] First, there must be specific, compelling, 'on the record' reasons for the denial which are supported by specific evidence and which demonstrate that closure is essential to higher values that serve an important governmental interest. A prime example is the right to a fair trial. Second, any denial of access or sealing order must be narrowly tailored to serve that interest, and there must be no other, less restrictive, ways of serving that interest other than closure of the court or sealing of documents.[164] If there is an alternative that would serve the interest well and intrude less on First Amendment values, a denial of public access cannot stand. The upshot of this requirement is that a First Amendment right of access, having arisen, generally cannot be removed pursuant to a broad policy. This makes it very hard for legislation which mandates closure of a court or a court record to withstand a legal challenge.[165] Restrictions on access are more likely to be acceptable if they are imposed by judges on a case-by-case basis rather than if they are categorical or pre-emptive.[166]

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159 *Douglas Oil Co v Petrol Stops Northwest*, 441 US 211 (1979).

160 *Hartford Courant Co v Pellegrino*, 380 F 3d 83, 93 (2nd Cir, 2004).

161 *United States v Simone*, 14 F 3d 833, 840 (3rd Cir, 1994).

162 *Nixon v Warner Communications Inc*, 435 US 589 (1978).

163 *Globe Newspaper Co v Superior Court for the County of Norfolk*, 457 US 596, 606–7 (1982); *Press-Enterprise Co v Superior Court of California, Riverside County*, 464 US 501, 510 (1984); *Re New York Times Co*, 828 F 2d 110, 116 (2nd Cir, 1987); *Baltimore Sun Co v Goetz*, 886 F 2d 60, 64 (4th Cir, 1989).

164 Lesser alternatives include sequestration of the jury, change of trial venue, postponement of the trial, questioning of potential jurors etc.

165 Where possible, courts prefer to interpret a statute as authorising, rather than requiring, mandatory closure, thereby avoiding the constitutional question.

166 *Globe Newspaper Co v Superior Court for the County of Norfolk*, 457 US 596 (1982); *Press-Enterprise Co v Superior Court of California, Riverside County*, 464 US 501 (1984); *Press-Enterprise Co v Superior Court of California for the County of Riverside*, 478 US 1 (1986).

The onus of proving that a First Amendment right has been overborne by higher values is borne by the party seeking nondisclosure. It has been explained that, under the First Amendment, there is a higher burden on the party seeking to prevent disclosure than under the common law presumption, as the court's discretion is far more constrained. Accordingly, the common law right of access is not coextensive with the First Amendment right of access.[167] The common law right has been described as 'broader but weaker' than the constitutional right.[168] It is broader in that the presumption under the common law attaches to all 'judicial documents', whereas the First Amendment right attaches only if the 'experience and logic' test is satisfied or the document is a 'necessary corollary' to attending the proceeding. But having attached, the common law presumption is easier to displace and, thus, does not afford as much substantive protection to the interests of the press and the public as the First Amendment.[169]

B The Position in Australia

Unlike the United States, Australia lacks an express constitutional right of free speech on which to base an argument that the court record must be open to inspection by the public.[170] However, there are two sources of implied constitutional rights that have the potential to impact on non-party access to documents on the court record.

1 *Implied Freedom of Communication Concerning Political and Government Matters*

The first is the implied freedom of communication in respect of government and political matters, which was first discerned by the High Court in 1992,[171] and which has since been refined in subsequent High Court decisions.[172] The following general propositions can be made about the nature and scope of the implied freedom of political communication.

First, the implied freedom is not a general freedom of communication of the kind accorded by the First Amendment in the United States.[173] Rather, the source of the implied freedom is sections 7, 24, 64 and 128 of the *Commonwealth Constitution*, which establishes Australia's system of responsible and representative government. These provisions deal specifically with the requirement for direct elections of the Houses of Parliament, executive

167 *Re Providence Journal Co*, 293 F 3d 1, 10 (1st Cir, 2002).

168 *United States v El-Sayegh*, 131 F 3d 158, 160 (DC Cir, 1997).

169 *Rushford v New Yorker Magazine Inc*, 846 F 2d 249, 253 (4th Cir, 1988).

170 The exceptions are the ACT, which has enacted the *Human Rights Act 2004* (ACT), and Victoria, which has enacted the *Charter of Human Rights and Responsibilities Act 2006* (Vic). These Acts contain a right of free expression, but it is too early to tell whether they will have an impact on policies pertaining to access to court documents.

171 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

172 The two most significant High Court decisions which appear to have settled the basic nature and parameters of the implied freedom are *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*') and *Coleman v Power* (2004) 220 CLR 1.

173 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 219 ALR 403, 412–13, 419.

responsibility to Parliament and the referendum procedure for amending the *Constitution*.[174] Although these provisions of the *Constitution* do not mention speech or communication, the High Court has implied a freedom to communicate, on the basis that such a freedom is an indispensable incident of the system of representative and responsible government established by these provisions. The Court has reasoned that people can exercise a free and informed choice as electors only if they possess a freedom to communicate and receive communications concerning political and government matters. However, because this implied freedom is grounded in the text of the *Constitution*, its scope is limited to what is necessary for the effective operation of that system of representative and responsible government provided for in these sections.[175] Recent judgments have been quick to quell earlier suggestions that the implied freedom is a freestanding right arising from some general notion of popular democracy or representative government.[176]

Second, the implied freedom operates in a negative fashion, not a positive one. Unlike the First Amendment, it does not confer on individuals a personal right to communicate about government or political matters. Rather, it creates an immunity from laws that impermissibly burden communication about such matters.[177]

Third, the test for determining whether a Commonwealth, State or Territory law is invalid because it infringes the implied freedom involves asking two questions.[178] The first question is whether the law under consideration effectively burdens freedom of communication about government or political matters either in its terms, operation or effect. If it does not, the impugned law does not infringe the implied freedom. If it does, it is necessary to proceed to consider whether the impugned law is reasonably appropriate and adapted to serve a legitimate end. This end must be served in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the referendum procedure prescribed by section 128. If the answer to this second question is 'yes', the law is valid, even though it burdens freedom of communication. If the answer is 'no', the impugned law is invalid.

Fourth, if the law in question is common law, rather than legislation, and the law is found to infringe the implied freedom, the common law must be changed so as to be brought into conformity with the implied freedom.[179]

Fifth, the person invoking the implied freedom (that is, the communicator) bears the onus of establishing the necessity of the communication; the State or

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174 Ibid 420.

175 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561. See also *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 219 ALR 403, 419, 520.

176 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566–7.

177 Ibid 560, 567.

178 This twofold test was propounded by a unanimous High Court in *Lange* and reformulated slightly in *Coleman v Power*.

179 This is what occurred in *Lange* in the context of defamation. A new qualified privilege defence had to be created to accommodate the requirements of the implied freedom because the existing law restricted freedom of communication to an unacceptable extent insofar as it required defendants to pay damages for the publication of defamatory material concerning government or political matters.

Federal government whose law is being impugned need not demonstrate the necessity of the measure that burdens the communication.[180] This can be compared with the approach taken in the United States, where the burden of proof is borne by the person or entity who is seeking to abridge freedom of speech as protected by the First Amendment.

One of the more difficult issues that courts have been called upon to determine is whether communications about the judiciary are communications about 'political or government matters' that attract the protection of the implied freedom. Standing alone, the phrase is wide enough to encompass communications concerning judges, courts or the exercise of judicial power, since the judiciary is the third arm of government. Indeed, this view was expressed by some judges in cases decided before *Lange v Australian Broadcasting Corporation*.[181] However, since *Lange* authoritatively determined that the implied freedom is entrenched in sections of the *Constitution* which deal with the legislative and executive branches of government, the prevailing view is that to attract the protection of the implied freedom, the communication must have a connection with legislative and executive acts and omissions.[182] In *APLA Ltd v Legal Services Commissioner (NSW)*,[183] McHugh J stated that, when used in the context of the implied freedom, the phrase 'government and political matters' describes acts and omissions of the kind that fall within Chapters I, II and VIII of the *Constitution* and does not encompass communications about the reasoning or conduct of courts and judges, the exercise of judicial power or the results of cases. This does not mean that communications about the administration of justice and the courts are incapable of attracting the implied freedom; however, in order to do so, they must have a bearing on legislative or executive acts or omissions.[184] Communications about the administration of justice that do not implicate the legislative and executive arms of government will not attract the freedom.[185]

To date, very few cases have specifically considered whether the implied freedom of political communication has any impact on non-party access to documents on the court record. One case that has dealt with this issue – *John*

180 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 219 ALR 403, 422. This assumes that the law is otherwise within the power of the state or federal Parliament.

181 (1997) 189 CLR 520 ('*Lange*'). See, eg, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 74 (Deane and Toohey JJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 179–82 (Deane J); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 298 (Mason CJ).

182 See, eg, *John Fairfax Publications Pty Ltd v A-G (NSW)* (2000) 181 ALR 694; *Conservation Council of South Australia Inc v Chapman* (2003) 87 SASR 62; *The Herald & Weekly Times Ltd & Bolt v Popovic* (2003) 9 VR 1 (Winneke ACJ and Warren AJA, cf Gillard AJA); *O'Shane v John Fairfax Publications Pty Ltd* (2004) Aust Torts Reports 81-733; *John Fairfax Publications Pty Ltd v O'Shane* [2005] NSWCA 164 (Unreported, Giles and Ipp JJ, Young CJ in Eq, 17 May 2005).

183 (2005) 219 ALR 403.

184 Examples given by McHugh J include communications that deal with the appointment and removal of judges, the prosecution of offences, the withdrawal of charges, the provision of legal aid and the funding of courts: *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 219 ALR 403, 421.

185 For a discussion of the impact of the implied freedom on criticisms of members of the judiciary, see Justice Ronald Sackville, 'How Fragile Are the Courts? Freedom of Speech and Criticism of the Judiciary' (2005) 31 *Monash University Law Review* 191.

Fairfax Publications Pty Ltd – suggests that its impact is quite limited in this context. In that case, Magistrate O'Shane was the object of an interim apprehended domestic violence order ('ADVO'), which was later made final by consent. Certain media organisations sought access to documents on the court record relating to the ADVO proceeding, in particular, the complaint. Access was refused by the Magistrate, whereupon the media organisations sought relief against the order. These media organisations also challenged an order made by another Magistrate that the court be closed during a hearing at which orders were sought making the interim ADVO final, and extending it to other persons, including a person under the age of 16. The Court was closed pursuant to section 562NA of the *Crimes Act 1900* (NSW) which applies when children are involved. The media organisations submitted, inter alia, that both decisions violated the implied freedom of political communication.

The New South Wales Court of Appeal held that, unlike the First Amendment, the implied freedom does not furnish the public or the media with a personal and positive right of access to documents, whether legislative, executive or judicial.[186] Rather, the Court reiterated that the implied freedom is a negative freedom which creates an immunity rather than any freestanding right. There must be a burden on a freedom that exists independently of the law; however, the Court of Appeal found that there was none in that case. It has already been explained that since the implied freedom creates an immunity from laws that infringe the freedom, a common law doctrine which is inconsistent with the implied freedom must be changed to be brought into conformity with the implied freedom. The New South Wales Court of Appeal, whilst affirming this proposition, held that there is no requirement that the common law must be developed to create new rights where none exist.[187]

2 *Implications Derived from Chapter III of the* Constitution

The second potential source of constitutional rights that may impact on public access to the court file is Chapter III of the *Constitution*, and in particular, section 71, which vests the judicial power of the Commonwealth in the High Court, and such other federal courts as the Commonwealth Parliament creates or invests with federal jurisdiction. The High Court has historically drawn two propositions from section 71: first, that no body, tribunal or organisation which is not a Chapter III court can exercise the judicial power of the Commonwealth and, second, that only federal judicial power, or powers incidental or ancillary to federal judicial power, can be vested in Chapter III courts.[188] A number of more recent High Court decisions contain suggestions from some members of the Court that the concept of judicial power in section 71 should be interpreted to contain a 'process' requirement. In other words, there is some judicial support for the notion that Chapter III of the *Constitution* contains an underlying assumption

186 *John Fairfax Publications Pty Ltd* (2005) 62 NSWLR 512, 532. See also *Titelius v Public Service Appeal Board* (1999) 21 WAR 201, 222.

187 *John Fairfax Publications Pty Ltd* (2005) 62 NSWLR 512, 532.

188 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 497.

that it is an essential feature of the judicial power of Chapter III courts that it be exercised in accordance with the judicial process. To date, most of the support for this proposition has been voiced in dissenting judgments.[189] However, some commentators have expressed the view that it is 'both logical and likely' that a majority of the High Court will eventually accept an implication of a constitutional guarantee of judicial process from Chapter III.[190] The concept of judicial process focuses on the manner in which Chapter III courts must exercise their judicial power.[191] It has been suggested that an essential feature of judicial process is open and public inquiry. In *Grollo v Palmer, Commissioner of the Australian Federal Police*,[192] for example, McHugh J stated that open justice is 'the hallmark of the common law system of justice and an essential characteristic of the exercise of federal judicial power'.[193] Justice Gaudron has expressed the view on a number of occasions that open justice may have constitutional status under Chapter III.[194] More recently, Kirby J has stated that the *Constitution* is 'not silent on the issue of the openness of the courts in this country',[195] and has indicated that openness is an essential characteristic of a Chapter III court. Similar statements have also been made by Spigelman CJ both judicially[196] and extrajudicially.[197] If open justice is ultimately held to be constitutionally entrenched, Parliament would be constrained in its ability to enact legislation that infringes the requirement, and aberrant common law doctrines would have to be brought into conformity with the requirement.

However, even if the High Court was to hold that Chapter III of the *Constitution* contains an implied guarantee of openness as an aspect of judicial process, the Court would still have the task of determining who can claim the protection of such a guarantee, and to which aspects of a case a constitutional requirement of openness would apply. Would it be regarded as a right accorded to non-parties such as the media, or would it only protect the right of an individual to a public trial? Even if a guarantee of openness could be claimed by non-parties, it is suggested that the High Court would confine it to a right to be present in the courtroom (with a concomitant right to report what has taken place

189 Judges who have expressed a willingness to imply fundamental rights and freedoms into Ch III of the *Constitution* include Deane, Toohey and Gaudron JJ, all of whom have now retired from the High Court.

190 Christine Parker, 'Protection of Judicial Process as an Implied Constitutional Principle' (1994) 16 *Adelaide Law Review* 341, 342. See also Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees under Ch III of the *Constitution*' (2003) 31 *Federal Law Review* 57.

191 Parker, above n 190, 347, 357.

192 (1995) 184 CLR 348.

193 Ibid 379.

194 See *Harris v Caladine* (1991) 172 CLR 84, 150; *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496.

195 Transcript of Proceedings, *Re Application by the Chief Commissioner of Police (Victoria)* (High Court of Australia, Kirby J, 10 August 2004). These comments were made in the context of an application for leave to appeal against the Victorian Court of Appeal's refusal to issue a non-publication order in respect of a police method that had been successfully employed by Victorian police to obtain confessions.

196 *John Fairfax Publications Pty Ltd v A-G (NSW)* (2000) 181 ALR 694, 703, 704, 707.

197 Chief Justice James Jacob Spigelman, 'Seen to Be Done: The Principle of Open Justice – Part 1' (2000) 74 *Australian Law Journal* 290, 292; Chief Justice James Jacob Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (Speech delivered at the Media Law Resource Centre Conference, London, 20 September 2005) <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_290404> at 12 September 2006.

in open court), rather than interpret it as conferring a right to inspect documents on the court record, as it is highly unlikely that the Court would discern a constitutional right of access to documents on the court record as an aspect of open justice where a common law right of access has been so vehemently denied. To do so would be a complete reversal of the prevailing view that a court file is not a public register. In *John Fairfax Publications Pty Ltd*, Spigelman CJ, with whom Mason P and Beazley JA agreed, indicated that he could see no incompatibility between an ability to refuse access to court documents and the exercise of judicial power.[198] After reaffirming Parliament's power to create exceptions to the principle of open justice, his Honour stated that '[o]nly the most intrusive legislative intervention in this regard could give rise to an issue of institutional integrity of the courts'.[199]

Finally, very few constitutional guarantees, whether express or implied, are absolute.[200] Consequently, in the unlikely event that the High Court did find that Chapter III contains an implicit requirement that court files must be open for public inspection, it would have the task of determining the circumstances in which the right could be validly overridden.[201] This would have to be worked out in specific contexts where other public interests are also at stake.

The recent decision of the High Court in *APLA Ltd v Legal Services Commissioners (NSW)* signals a retreat on the part of the majority from the proposition that Chapter III should be construed as implying rights and freedoms in the judicial context. In that case, an argument was put to the High Court that Chapter III of the *Constitution* necessarily contained what might be called an 'implied freedom of judicial communication' in respect of legal rights, which is analogous to the implied freedom of communication regarding government or political matters. The argument based on Chapter III was only one of a number of alleged grounds of invalidity of regulations made under the *Legal Profession Act 1987* (NSW).[202] The nub of the argument was encapsulated by Gummow J:

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198 *John Fairfax Publications Pty Ltd* (2005) 62 NSWLR 512, 533. It should be noted that only passing reference was made in this case to the relationship between open justice and the exercise of judicial power. Indeed, the argument had been 'barely pressed': at 533. Accordingly, it would be unwise to read too much into the Court's comments.

199 *John Fairfax Publications Pty Ltd* (2005) 62 NSWLR 512, 533.

200 Even the First Amendment, which is expressed in unqualified terms, is not construed as conferring an absolute right of free speech.

201 Presumably, any test for determining the circumstances in which open justice could be validly abridged would be along the same lines as that devised by the High Court in *Lange*.

202 It was also argued, inter alia, that the Regulation in question, which banned lawyers from advertising their services to the public in respect of personal injury claims, infringed the implied freedom of political communication in *Lange*. However, six members of the Court – Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ – found that the Regulation did not prohibit communications about political or government matters. Rather, the Regulation prohibited lawyers from communicating with the general public in the hope of enticing them to engage their services in respect of personal injury claims. Most of the Judges treated this form of communication as commercial in nature – in short, as advertising – and as lacking the required nexus with the system of representative and responsible government laid down in ss 7, 24, 64 and 128 of the *Constitution*. Since the Regulation did not prohibit communication about government or political matters, it did not attract the implied freedom. The position may have been otherwise had the law prohibited a discussion of tort law reform or the policy underlying the Regulation.

> The plaintiffs began with the proposition that Ch[apter] III authorises the bringing before courts exercising federal jurisdiction of controversies about existing legal rights ... to be quelled in the exercise of the judicial power of the Commonwealth. … [T]his requires that the people of the Commonwealth have the capacity, ability or freedom to ascertain their legal rights and to assert them by approaching courts exercising federal jurisdiction. It is then submitted that this requires the same people, litigants or potential litigants, to have the capacity or ability to receive such information or assistance as may be necessary in a practical sense for them to assert their legal rights and approach courts exercising federal jurisdiction. Then it is said that Ch[apter] III implicitly prohibits any law of the Commonwealth or of a State or Territory which unjustifiably, in the sense of the second limb of *Lange*, burdens that freedom.[203]

Five of the seven judges – Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ – rejected the argument.[204]

Both McHugh and Kirby JJ dissented.[205] However, it is the judgment of Kirby J that has most relevance to the issue the subject of this article. Justice Kirby re-expressed *Lange* so that it applies to the judicial branch of government. He held that just as the *Constitution* contains implications that are defensive of the legislature and the executive, so it contains implications that protect the integrity and efficient operation of the judicial branch of government. In particular, Kirby J regarded an implication of a high level of unimpeded communication as essential to the operation of Chapter III. Where a law is said to infringe this implication, the dual test laid down in *Lange* must be applied to ascertain its validity. The regulation in question impermissibly infringed this implied freedom and was invalid.[206] Justice Kirby postulated a number of laws that would burden this implied freedom of communication concerning the judiciary and would, as a result, have to run the gauntlet of the twofold test in *Lange*. They included a State law:

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203 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 219 ALR 403, 457–8. Under the second limb of *Lange*, an impugned law can permissibly burden freedom of communication provided it is 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. An analogous argument was put in the context of Ch III of the *Constitution*.

204 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 219 ALR 403, 413–14 (Gleeson CJ and Heydon J), 457–64 (Gummow J), 498–501 (Hayne J), 524–526 (Callinan J). These judges could find nothing in the text or structure of Ch III of the *Constitution* or in the nature of judicial power which requires that lawyers must be able to advertise their services. Had the Regulation restrained or inhibited the provision of legal services, as opposed to the marketing of legal services by legal practitioners, the matter might have infringed the principle of the rule of law as given effect in Ch III of the *Constitution*.

205 Justice McHugh held that the provision of legal advice and information concerning federal law is indispensable to the exercise of the judicial power of the Commonwealth and is protected by Ch III of the *Constitution*, though not by the freedom identified in *Lange*. Thus the Regulation, which targeted communications between lawyers and litigants and potential litigants, could not validly apply to advertisements that concerned causes of action in federal jurisdiction: *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 219 ALR 403, 426.

206 Justice Kirby held that the Regulation burdened freedom of communication insofar as it placed obstacles in the way of communications concerning the existence of federal causes of action, their availability in particular cases, how advice might be obtained about their application, and support given to render them a reality. The Regulation was not reasonably and appropriately adapted to serve a legitimate end in a manner compatible with the maintenance of a constitutionally prescribed system of courts, nor was it proportional to the operation of such courts as Ch III of the *Constitution* implies they will operate: *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 219 ALR 403, 492–3.

> that prohibited, or disproportionately impeded, the publication or availability of federal statutory or subordinate legislation. Similarly, a State law attempting to interfere with, or restrict, the availability of judicial reasons of federal courts or rulings of federal tribunals would trigger the twofold test. So would a State law purporting to impose restrictions on the open performance by the courts of their functions, or on communications by news media, civil society organisations and individuals of information on all such courts (or tribunals) and their doings. In every case, laws of such a kind, to the extent that they effectively burdened freedom of communication about the Judicature, its performance and the laws it applies, would have to run the dual constitutional gauntlet. They would have to pass the tests of compatibility with the constitutional prescription and the proportionality of any burden imposed.[207]

These comments indicate that Kirby J might be prepared to regard legal impediments to non-party access to documents on the court record as constituting an impermissible burden on the implied freedom of communication concerning the judiciary. It remains to be seen whether the majority's rejection of the idea that Chapter III contains an implied freedom of legal communication scotches any argument that Chapter III contains implications about open justice.

VI NON-PARTY ACCESS TO THE COURT RECORD: THE POSITION UNDER THE INHERENT OR IMPLIED POWERS OF A COURT

The fact that Australian courts have refused to recognise the existence of a common law right of non-party access to documents on the court record does not mean that courts cannot or do not grant access to such documents. This section is concerned with whether, on what basis, and in what circumstances, courts can grant access to documents on the court record pursuant to their inherent or implied powers. The answer to this question varies according to the particular court in question, and the nature and extent of that court's inherent or implied powers.

A Inherent Powers

Superior courts of record of unlimited jurisdiction have both an inherent jurisdiction and also a 'well of undefined powers'[208] called inherent powers.[209] Such are the Supreme Courts of each Australian State.[210]

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207 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 219 ALR 403, 488–9. For a critique of the decision, see David Bennett, '"Damn It, Let 'Em Do It!" The High Court and Constitutional Law: The 2005 Term' (2006) 29(2) *University of New South Wales Law Journal* 167; Nicholas Aroney, 'Lost in Translation: From Political Communication to Legal Communication?' (2005) 28 *University of New South Wales Law Journal* 833.

208 *Grassby v The Queen* (1989) 168 CLR 1, 16.

209 Sir Jack I H Jacob, 'The Inherent Jurisdiction of the Court' (1970) *Current Legal Problems* 23; Keith Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 *Australian Law Journal* 449. Although the inherent jurisdiction of a superior court is different from its inherent powers, it has been noted that the two terms are persistently confused: Rosara Joseph, 'Inherent Jurisdiction and Inherent Powers in New Zealand' (2005) 11 *Canterbury Law Review* 220, 220.

The inherent powers enable superior courts to act effectively within their jurisdiction.[211] They exist independently of any statutory authority, express or implied, and are exercised in a multiplicity of circumstances to enable the court to regulate its own procedure, to ensure fairness in trial and investigative procedures, and to prevent abuse of its processes.[212]

It seems that the inherent powers of the Supreme Courts include a power to grant non-parties access to documents on the court record.[213] This arises out of the fact that the court is always in control of its own processes and records.[214]

This inherent power can be displaced by rules of court or legislation which make express provision for access to court documents, but will not be construed as having been displaced unless there is a clear intention to that effect.[215] Thus in most cases, the inherent power to grant access to documents on the court record will coexist with any provision for access that is made in rules of court. This was made clear in *Hammond v Scheinberg*.[216] In that case, the Supreme Court of New South Wales granted representatives of the media access to some affidavits that had been formally read in court without giving the parties notification of the application for access. Two of the parties objected to the fact that they had not been notified. They argued that access had been granted without power, since it had not been granted in accordance with the relevant rules of court and accompanying Practice Note. However, Hamilton J held that a judge of the Supreme Court has inherent power to determine all matters relating to non-party access to evidence during a trial, independent of the rules of court.[217] Supreme Court judges who have been willing to exercise their inherent power to grant

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210 By reason of the federal nature of the Australian legal system, it is not strictly accurate to describe the State Supreme Courts as having unlimited jurisdiction. However, subject to this qualification, their powers are identified by reference to the unlimited powers of the courts at Westminster: *Medical Board of South Australia v N, JRP* (2006) 93 SASR 546, 553.

211 *Connelly v DPP (UK)* [1964] AC 1254, 1301; *Taylor v A-G (NZ)* [1975] 2 NZLR 675, 682; Joseph, above n 209, 233.

212 *A-G (NZ) v Otahuhu District Court* [2001] 3 NZLR 740, 746; Joseph, above n 209, 232.

213 *R v Williams* (2003) 86 SASR 289, 293. See also *Hammond v Scheinberg* (2001) 52 NSWLR 49, 52; *Australian Securities and Investment Commission v Rich* [2002] NSWSC 198 (Unreported, Barrett J, 18 March 2002) [6].

214 Whether a superior court has inherent power to make orders, binding on the public at large, prohibiting the publication of material revealed in open court is a more vexed question. A recent Privy Council case – *Independent Publishing Company Ltd v A-G of Trinidad and Tobago* [2005] 1 All ER 499 – insists that such power cannot be found in the common law. However, there are a number of Australian cases which incline to the view that superior courts do have inherent power to make non-publication orders, thus the matter must be regarded as unsettled. By contrast, the issue of whether superior courts have inherent power to determine matters relating to access does not appear to have been a contentious one. This is probably because, in the latter case, a court is purporting to control access to documents under its control; it is not purporting to affect public conduct outside the courtroom.

215 *Zaoui v A-G (NZ)* [2005] 1 NZLR 666, [26]–[70]. This case was not concerned with whether legislation ousted the inherent power of a superior court to grant access to court documents, but with whether legislation should be construed as precluding the exercise of a court's inherent power to grant bail.

216 (2001) 52 NSWLR 49.

217 Ibid 52–3. Justice Hamilton also held that he had power to grant non-party access under s 23 of the *Supreme Court Act 1970* (NSW).

non-parties access to documents on the court record have frequently done so on the basis that access advances the principle of open justice.[218]

B Implied Powers

In contrast to the State Supreme courts, courts created by statute – such as the Family Court of Australia, Magistrates' (or Local) Courts, and District (or County) Courts – do not bear any responsibility for the administration of justice beyond the confines of their constitution and, accordingly, do not possess an inherent jurisdiction or inherent powers.[219] Courts answering this description only have the jurisdiction and powers that are granted to them by statute. Nevertheless, the powers of such courts are not confined to those which are expressly conferred, but are taken to include such additional powers – called 'implied powers' – as are 'necessary' to enable the court to act effectively within its express jurisdiction.[220] The express and implied powers are determined through statutory construction.[221] Although implied powers are derived from a different source than inherent powers and are limited in their extent, in many instances, they serve a similar function to that served by inherent powers.[222]

It now falls to consider whether, as an incident of their implied powers, inferior courts can entertain applications by non-parties for access to documents on the court record. It is unclear whether these courts can rely on their implied powers to *prevent* persons from inspecting documents on the court file in order to protect the administration of justice. The Queensland Supreme Court tentatively claimed such an inherent power in *Ex parte the Queensland Law Society Incorporated*,[223] but, in *John Fairfax Publications Pty Ltd*, the New South Wales Court of Appeal stated that to ask whether an inferior court has the power to prevent access to material in the court file is to wrongly assume the existence of a common law right of access which can be displaced by the court.[224] The correct question to pose is whether, in the absence of statutory authority, the implied powers of a court can support a *grant* of access to material in the court file as an incident of the power of the court to control its own processes or to create its own records and disseminate them.[225]

Although the test for assessing the existence of implied powers is one of 'necessity', according to the New South Wales Court of Appeal the test can be

218 See, eg, *R v Williams* (2003) 86 SASR 289, 293.

219 *Grassby v The Queen* (1989) 168 CLR 1, 16; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 476; *Medical Board of South Australia v N, JRP* (2006) 93 SASR 546, 563.

220 *Connelly v DPP (UK)* [1964] AC 1254, 1301; *Taylor v Taylor* (1979) 143 CLR 1, 5–6; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 476; *A-G (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342, 346; *Grassby v The Queen* (1989) 168 CLR 1, 17; *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1, 7; *Parsons v Martin* (1984) 5 FCR 235, 241; *DJL v The Central Authority* (2001) 201 CLR 226, 240–1, 268, 288–9.

221 It has already been explained that the inherent jurisdiction and powers of the Supreme Courts are not derived by implication from statutory provisions.

222 *Grassby v The Queen* (1989) 168 CLR 1, 16–17 (Dawson J).

223 [1984] 1 Qd R 166, 168.

224 *John Fairfax Publications Pty Ltd* (2005) 62 NSWLR 512, 520–1.

225 Ibid 520–1, 522.

implied with varying levels of strictness.[226] Where the implication of a power would conflict with the principle of open justice, the test will be strictly applied. Thus, in the context of determining whether an inferior court has implied power to sit in camera or to issue non-publication orders, 'necessary' is taken to mean 'essential'.[227] By contrast, when determining whether an inferior court has power to grant access to documents on the court record, the principle of open justice is not engaged to the same extent as when a court is being asked to close its doors or suppress publication of its proceedings. Accordingly, the necessity test is applied in a less exacting manner, and is 'subjected to the touchstone of "reasonableness"'.[228] That is, a power to grant access to documents will be implied if it is 'reasonably necessary to the circumstances of the case' rather than 'essential to the fairness of the case'. But the concept clearly does not stretch to encompass what is merely desirable or useful.[229]

It is interesting to speculate on how an argument based on 'reasonable necessity' might be constructed in the context of an application for access to documents that have been used in court. Should it be framed in general terms – since it is reasonably necessary that courts have the power to determine applications for access to documents, the power should be necessarily implied in all cases? Or, should an application address the issue of whether it is reasonably necessary that a court have power to grant access to a particular document in a particular case? In *John Fairfax Publications Pty Ltd*, the New South Wales Court of Appeal adopted the latter approach. As explained in Part V(B), the case concerned a request by some media organisations ('the claimants') for access to a complaint that had been used in the Ryde Local Court in respect of an interim ADVO made final by consent. Since the Local Court had no express statutory power to allow access to the document in question, the resolution of the matter turned on the extent of the Court's implied powers. From the perspective of the Local Court, a grant of access to the media, a non-party, was clearly not necessary to render effective the Court's express jurisdiction to make ADVOs.[230] Accordingly, the claimants were forced to argue that access to these documents was reasonably necessary in aid of the principle of open justice to enable them to prepare a fair and accurate report of those proceedings so that the public might have a fair understanding of what had transpired in the case.[231] Whilst conceding that these objectives are desirable of attainment, the Court of Appeal concluded

226 Ibid 522.

227 Ibid 522–3.

228 Ibid 523. The concept of 'necessity subjected to the touchstone of reasonableness' was attributed to *State Drug Crime Commission of NSW v Chapman* (1987) 12 NSWLR 447, 452, which was cited with approval by the High Court in *Pelechowski v The Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435, 452. See also *A-G v Walker* (1849) 3 Exch 242, 255–6; 154 ER 833, 838.

229 *John Fairfax Publications Pty Ltd* (2005) 62 NSWLR 512, 523. See also *Herald & Weekly Times Ltd v Magistrates Court of Victoria* [2004] VSC 194 (Unreported, Whelan J, 20 May 2004) where, in the context of a non-publication order made pursuant to s 126 of the *Magistrates' Court Act 1989* (Vic), the concept of necessity was contrasted with what is merely desirable or appropriate.

230 *John Fairfax Publications Pty Ltd* (2005) 62 NSWLR 512, 523.

231 Ibid.

that they did not satisfy the test of 'necessity'.[232] Thus, the Magistrate was held to have erred in holding that the Local Court had power to grant access to the document.

Aware that the matter might be taken further, the Court of Appeal proceeded to consider whether, on the assumption that the Magistrate *did* have implied power to grant access to the complaint, she had exercised that power properly in refusing access. Since the Court of Appeal's supervisory jurisdiction was being invoked, the claimants had to establish that the Magistrate had committed a jurisdictional error, as opposed to making factual or legal errors. Many of the arguments advanced by the claimants relied on the principle of open justice. The Court of Appeal agreed that the principle of open justice was relevant to the Magistrate's decision whether to grant access to the content of the complaint, but could detect no error in the Magistrate's reasons for rejecting the application for access that would entitle it to intervene in its supervisory jurisdiction.[233] Whilst confirming that open justice is a fundamental axiom of our legal system, the Court of Appeal stated that the principle is not engaged at the time of the filing of the proceedings. Rather, the principle only assumes relevance in respect of documents that have been used in court or which have been put before the court in such a manner as to make them public.[234] At this point, the Court conceded that there is a strong argument that any express or implied power to grant access is relevantly invoked.[235] On the facts, the Court of Appeal held that the purposes of open justice were fully served by the fact that the media organisations had access to the existence of an ADVO complaint, the existence of a consent order and the terms of the order made. Nothing more was required to permit a fair and accurate report of what the Court did.[236]

The scope of the implied power to grant access to documents also arose in *The Herald & Weekly Times*. The approach taken in this case provides an interesting contrast to that taken in *John Fairfax Publications Pty Ltd*. The facts of the case were outlined in Part IV(B). Having rejected the argument that section 125 of the *Magistrates' Court Act 1989* (Vic) operated to confer on the media a right of access to the materials in a hand-up brief, the Supreme Court, both at first instance[237] and on appeal,[238] considered the existence and extent of the Magistrate's power to grant access to such documents.

At first instance, Mandie J held that the Magistrate lacked power to grant access to these documents. Within the courtroom, the Magistrate had no power to grant access because no express power to do so was conferred by the *Magistrates' Court Act 1989* (Vic), and no such power could be implied, since it was not necessary to enable the Court to effectively exercise its statutory

232 Ibid.
233 Ibid 527.
234 One example is a document which has been taken as read, although not actually read aloud in open court.
235 *John Fairfax Publications Pty Ltd* (2005) 62 NSWLR 512, 526.
236 Ibid 525, 527.
237 *The Herald & Weekly Times* [1999] 3 VR 231.
238 *The Herald & Weekly Times Ltd v The Magistrates' Court of Victoria* [2000] 2 VR 346.

jurisdiction.[239] Outside of the courtroom, the position was no different. Once tendered in court, the contents of the hand-up brief became part of the court register[240] and, pursuant to section 18(3) of the *Magistrates Court Act 1989* (Vic), the only documents on the court register that can be inspected by members of the public are final orders.

The Court of Appeal disagreed with Mandie J on the power issue. First, all three judges found that section 18(3) had no relevance to the Magistrate's supervisory control of the hand-up brief or to her power to grant or limit access to the brief by the media, since the hand-up brief is not required to be entered in the register or otherwise made part of it.[241] Second, the Court of Appeal held that the fact that the Magistrate lacked an express power to grant access to the hand-up brief did not compel the conclusion that she had no power to do so. The Court held that the Magistrate's power to control proceedings at a committal included an implied power to grant non-parties access to documents in the hand-up brief. The Court of Appeal took the view that any lack of implied power to grant access to the contents of a hand-up brief would seriously evade the principle of open justice because in practical terms it would render the reporting of committal proceedings impossible.[242] Finally, the Court of Appeal held that the Magistrate's implied power to permit non-parties to inspect the hand-up brief was not excluded by section 126 of the *Magistrates' Court Act 1989* (Vic) or by Practice Direction 41/98.[243]

VII NON-PARTY ACCESS TO THE COURT RECORD: THE POSITION UNDER RULES OF COURT AND LEGISLATION

Since the court record is not a public register to which members of the public have a common law right of inspection, non-parties have *rights* of inspection only to the extent that such rights are conferred on them by legislation or rules of court.[244] Today, rules of court are the primary repository for the policy on non-party access to documents on the court record, although in some jurisdictions, access is governed by legislation.

239 *The Herald & Weekly Times* [1999] 3 VR 231, 249. Justice Mandie proceeded to hold that even if, contrary to his view, a magistrate did have power, in court, to grant access to the charge sheet and witness statements, such power could not be countermanded by a Practice Direction: at 249.

240 The judgment of Mandie J in this respect proceeded on the assumption that the register includes all documents kept by or filed or lodged with the court.

241 [2000] 2 VR 346, 360–1.

242 Ibid 361.

243 The Court of Appeal held that Practice Direction 41/98 was neither issued by the Chief Magistrate nor directed to magistrates and did not require magistrates to refuse access to interested parties to the hand-up brief. Had it imposed such a requirement, it would probably have been beyond power: ibid 361–2 (Court of Appeal).

244 It may be a misnomer to describe rules of court as conferring a 'right' of access, as non-parties only have a right of access to those documents and records that the judiciary determines should be released to them.

A The Nature of Rules of Court

The power to make rules governing the practice and procedure of a court can come from either of two sources. Courts possessing inherent or implied powers can make and enforce rules of practice for regulating their own proceedings.[245] Today, the primary source of a court's power to make rules of court is legislation. The Act of Parliament that establishes a court or recognises its existence will almost always delegate power to that court to make rules. In some instances, courts are given a broad, general grant of power to make rules; in other cases, the matters in respect of which rules of court can be made are specified with precision.[246] In order to be valid, a rule of court must be within the scope, purpose and nature of the rule making power conferred on the court by its enabling Act. Moreover, particular rules of court must not be inconsistent with the enabling legislation. These are essentially questions of statutory interpretation. Rules of court made pursuant to a legislative conferral of power create legally enforceable rights, obligations and duties.

The fact that a superior court has been delegated power to make rules of court does not ipso facto destroy or exhaust its inherent jurisdiction or powers.[247] A statute may oust a court's inherent powers, but will not be construed as having done so unless a clear intention to this effect can be found. Rules of court that are promulgated pursuant to delegated legislative power cannot restrict or oust inherent powers unless this is authorised by the primary legislation.[248] This means that the mere fact that a statute or rule of court makes specific provision for non-party access to documents on the court record – as is often the case – does not ordinarily exclude or detract from a superior court's inherent powers relating to access. This was made clear in *Hammond v Scheinberg*, discussed in Part VI. Although the powers conferred by rules of court usually coexist with a court's inherent powers, such that a court is able to proceed under either or both heads of jurisdiction,[249] where a matter is made the subject of detailed and precise legislation, courts will rarely choose to exercise their inherent powers, which are then regarded as residual.[250] In this case, the inherent powers are most likely to be relied on to fill in gaps left by the rules of court since they 'apply to all proceedings at all stages'.[251] Thus, the problems of confusion and inconsistency that might otherwise arise are not overly likely to eventuate in practice.

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245 *Connelly v DPP (UK)* [1964] AC 1254, 1347.

246 See, eg, *Federal Court of Australia Act 1976* (Cth) s 59 (a general grant of rule making power is followed by a particularised list of matters in respect of which rules can be made); *Magistrates' Court Act 1989* (Vic) s 16; *County Court Act 1958* (Vic) s 78; *Supreme Court Act 1935* (WA) ss 167, 168.

247 Jacob, above n 209.

248 Martin S Dockray, 'The Inherent Jurisdiction to Regulate Civil Proceedings' (1997) 113 *Law Quarterly Review* 120, 128 citing *Gupta v Comer* [1991] 1 QB 629.

249 Jacob, above n 209, 25.

250 Dockray, above n 248, 128.

251 Jacob, above n 209, 50–1.

B Approaches to Non-Party Access under Rules of Court and Legislation

The fact that each court can promulgate its own rules has produced a miscellany of approaches to non-party access between the various Australian jurisdictions and between courts within the one jurisdiction. Even within a particular court, a different approach may be taken to documents in civil and criminal proceedings. It is beyond the scope of this article to reproduce the access rules of each court. Rather, this article will attempt to catalogue the various approaches to non-party access to documents on the court record and provide some examples of each approach. The approaches fall into six loose categories.

First, some courts confer an unqualified right of access to documents on the court file. The rules governing access to documents filed in the High Court serve as an example. In that Court, any person is permitted to inspect and copy any document filed in the Registry except for affidavits and exhibits to affidavits which have not been received in evidence in court, and documents containing information disclosing the identity of a person where such disclosure is prohibited by Act, order of the Court or otherwise.[252] This liberal position on access can be attributed to the nature of the High Court's work. The Court does not conduct trials as such, and almost never examines witnesses. Its work is primarily appellate in nature and cases at first instance are often public law cases which involve no disputed facts or elements of secrecy.

Second, some rules of court permit non-parties to access documents on the court file, but invest the court or the registrar with a discretion to depart from this prima facie position where appropriate. For example, the general position in Victoria in respect of civil proceedings is that when the office of the Supreme Court is open, any person may inspect and obtain a copy of any document filed in a proceeding.[253] There are two exceptions. First, no person may inspect or obtain a copy of a document which the Court has ordered remain confidential. Second, a non-party may not, without leave of the Court, inspect or obtain a copy of a document which, in the opinion of the Prothonotary, ought to remain confidential to the parties.[254] It has been held that it would be a very rare case where every document in the court file leads the Prothonotary to form the belief that the whole file should remain confidential.[255]

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252 *High Court Rules 2004* (Cth) r 4.07.

253 *Supreme Court of Victoria General Rules of Procedure in Civil Proceedings 1996* (Vic) Order 28.05(1), Order 28.05(2)(a), Order 28.05(2)(b).

254 For a list of confidential files and confidential documents on files, see *Practice and Procedure: Prothonotary's Office – File Searches* (2006) Supreme Court of Victoria <http://www.supremecourt.vic.gov.au/CA256CC60028922C/page/Practice+and+Procedure-Prothonotarys+Office-File+Searches?OpenDocument&1=20-Practice+and+Procedure~&2=30-Prothonotarys+Office~&3=80-File+Searches~> at 9 September 2006. The rules of the Northern Territory Supreme Court in relation to non-party access to documents in criminal proceedings are expressed in almost identical terms: *Supreme Court Rules* (NT) r 81A.09. The position in Queensland is also very liberal: *Uniform Civil Procedure Rules 1999* (Qld) r 981; *Criminal Practice Rules 1999* (Qld) r 57.

255 *XYZ 1 v State of Victoria* [2001] VSC 233 (Unreported, Gillard J, 16 July 2001). Since the court has a discretion under the second exception, it is open to a party opposing an application for access to argue that conditions should be attached to the inspection and copying.

Third, some rules of courts do not lay down a prescriptive approach at all, and simply leave wide scope for the discretion of the court by requiring leave of the court in all cases. This describes the position in the New South Wales Supreme Court.[256] Non-party access to documents in the Court of Appeal, the Court of Criminal Appeal and each of the Divisions of the Supreme Court is governed by Practice Note No SC Gen 2.[257] Paragraph 5 of the Practice Note provides that a person may not search in a registry for or inspect any document or thing in any proceedings except with the leave of the court. Paragraph 6 provides that access to material in any proceedings is restricted to parties, except with the leave of the court. However, paragraph 7 proceeds to state that access will normally be granted to non-parties in respect of the following documents, unless the judge or registrar dealing with the application considers that the material or portions of it should be kept confidential:[258]

- pleadings and judgments in proceedings that have been concluded, except insofar as an order had been made that they or portions of them be kept confidential;
- documents that record what was said or done in open court;
- material that was admitted into evidence; and
- information that would have been heard or seen by any person present in open court.

Access to other material will not be allowed unless a registrar or judge is satisfied that exceptional circumstances exist.[259]

Affidavits and witness statements filed in proceedings are often never read in open court. This can occur because they contain matter that is objected to and rejected on any one of a number of grounds or because the proceedings have settled before coming on for hearing.[260] The reason why access to material is not normally allowed prior to the conclusion of a proceeding is that material that is ultimately not read in open court or admitted into evidence would otherwise be seen.[261] Paragraph 16 explains that even where material has been read in open court or is included in pleadings, there may be good reason for refusing access:

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256 See also *Uniform Civil Procedure Rules 2005* (NSW) r 36.12 with respect to copies of judgments and orders.

257 Supreme Court of New South Wales, Practice Note No SC Gen 2, *Access to Court Files* (1 March 2006). It replaced the Supreme Court of New South Wales, Practice Note No SC Gen 2, *Access to Court Files* (17 August 2005), which in turn replaced *New South Wales Supreme Court Rules 1970* (NSW) Order 65 r 7 and Supreme Court of New South Wales, Practice Note No 97, *Access to Court Files by Non-Parties* (9 March 1998).

258 This paragraph is of fundamental importance to the administration of justice in NSW, as it reflects the principle of open justice.

259 'Other material' includes documents which are only partly read out in court, or which are not read out but merely referred to, or which are simply handed up to the judicial officer without being admitted into evidence, for example, hand-up briefs: New South Wales Law Reform Commission, *Contempt by Publication*, Report No 100 (2003) [11.6].

260 Affidavits, statements, exhibits and pleadings may contain matter that is scandalous, frivolous, vexatious, irrelevant or oppressive. Such matter can be struck out of a document.

261 New South Wales Supreme Court, Practice Note No SC Gen 2, *Access to Court Files* (1 March 2006) [15].

material that has been rejected or not used or struck out as being scandalous, frivolous, vexatious, irrelevant or otherwise oppressive may still be legible; or the material may contain matters that are required to be kept confidential by statute (for example, the *Criminal Records Act 1991* (NSW)) or by public interest immunity considerations (for example, applications to authorise listening devices, affidavits in support of suppression orders).

Applications by non-parties for access to material held by the court in a proceeding must be made to the registrar of the appropriate Division at least one day prior to inspection. Doubtful cases can be referred to the Chief Justice or to a judge nominated by the Chief Justice. The registrar or judge may notify interested parties before dealing with the application. The applicant must demonstrate that access should be granted in respect of the particular documents and state why access is desired.

Fourth, some access rules adopt a combination of these approaches. An example of an approach that variously provides for permission as of right and the need to obtain leave is that of the Federal Court. The *Federal Court Rules 1979* (Cth) permit a member of the public to search for, inspect and copy certain enumerated documents in a proceeding as of right unless the Court or a judge has ordered that the document is confidential.[262] They include: an application or other originating process; a notice of appearance; a pleading; a notice of motion or other application; a judgment; an order; a written submission; a notice of appeal; a notice of discontinuance; a notice of change of solicitors; a notice of ceasing to act; and reasons for judgment. The Rules then proceed to list a number of documents which cannot be inspected by a non-party without the leave of the Court or a judge. They are: affidavits; an unsworn statement of evidence filed in accordance with a direction given by the Court or a judge; interrogatories or answers to interrogatories; a list of documents given on discovery; an admission; evidence taken on deposition; a subpoena or document lodged with the registrar in answer to a subpoena for production of a document; and a judgment, order or other document that the court has ordered is confidential.[263] The effect of this rule, when combined with section 50 of the *Federal Court Act 1976* (Cth) is that evidence that is given orally is publicly available, but evidence given by affidavit is not.[264] Documents forming part of the court record that do not fall within either of these categories cannot be inspected by a non-party except with the leave of the Court or a judge, or with the permission of the Registrar.[265] Moreover, neither a party nor any other person can search in the Registry for, or inspect a transcript of, a proceeding except with the leave of the Court or judge.[266]

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262 *Federal Court Rules 1979* (Cth) Order 46 rr 6(1), 6(2).

263 *Federal Court Rules 1979* (Cth) Order 46 r 6(3). Leave will normally be granted where the document has been received into evidence or read out in open court: Federal Court of Australia, *Media Access to Court Documents* (2006) <http://www.fedcourt.gov.au/courtdocuments/mediadocuments.html> at 12 September 2006 ('*Media Access to Court Documents*').

264 Willheim, above n 4, 199.

265 *Federal Court Rules 1979* (Cth) Order 46 r 6(4).

266 *Federal Court Rules 1979* (Cth) Order 46 r 6(5).

Fifth, in some jurisdictions, documents on the court record are not open for inspection unless the court or registrar so directs. Presumably, the court or the registrar would ordinarily act in response to an application from persons wishing to inspect the file. However, a provision of this nature is not expressly predicated on an application for leave, so it would seem that a judge or registrar could open up the file on his or her own volition. This approach is exemplified in criminal proceedings in Victoria through the *Supreme Court (Criminal Procedure) Rules 1998* (Vic). Documents filed in proceedings to which these Rules relate are not open for inspection unless the Court or the Prothonotary, Deputy Prothonotary or Registrar (as the case requires) so directs.[267] Thus, criminal files in the Supreme Court cannot normally be searched. The reason for this restrictive position is that inspection and publication by the media of documents in a criminal proceeding could be detrimental to a trial, given the potential for tainting jurors.[268] The publication of such documents might also obstruct or hinder ongoing investigations.

Sixth, some rules of court forbid all access to documents on the court file. The most notorious example is records in adoption cases, which are completely closed,[269] and the Victorian *Magistrates' Court Act 1989* (Vic), which allows non-party inspection only of that part of the Register that contains the final orders of the Court.[270]

Finally, it should be noted that in most cases rules of court which govern non-party access to documents on the court record are expressed in general terms and do not make specific provision for the media. However, there are some exceptions. In New South Wales, legislation makes special provision for media access to documents relating to criminal proceedings. Section 314 of the *Criminal Procedure Act 1986* (NSW) provides that on application to the Registrar, a media representative is entitled to inspect certain documents[271] relating to a criminal proceeding,[272] at any time from when the proceeding commences until the expiry of two working days after it is finally disposed of, for the purpose of compiling a fair report of the proceeding for publication.[273] The documents that a media representative is entitled to inspect under this section are copies of the indictment, court attendance notice or other document commencing the proceedings; witnesses' statements tendered as evidence; briefs of evidence; police fact sheets (in the case of a guilty plea); transcripts of

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267 *Supreme Court (Criminal Procedure) Rules 1998* (Vic) r 1.11(4).

268 *DPP (Cth) v Ling* [2003] VSC 447 (Unreported, Habersberger J, 15 October 2003) [15]–[16].

269 *Adoption Act 1993* (ACT) s 114; *Adoption Act 2000* (NSW) ss 143, 194; *Adoption of Children Act* (NT) s 60; *Adoption of Children Act 1964* (Qld) s 59; *Adoption Act 1988* (SA) s 24; *Adoption Act 1988* (Tas) ss 71, 100, 101; *Adoption Act 1984* (Vic) ss 76, 83; *Adoption Act 1994* (WA) s 84.

270 *Magistrates' Court Act 1989* (Vic) s 18(3). But see the earlier discussion as to the relationship between s 18(3) and a Magistrate's implied power to grant access: see above Part VI(B).

271 Despite the reference to 'any document' in s 314(1) of the *Civil Procedure Act 1986* (NSW), only those documents listed in s 314(2) can be inspected under this provision.

272 A criminal proceeding is defined to include committal proceedings and proceedings for summary and indictable offences.

273 Section 314 is expressed not to limit the operation of any other Act or law under which a person may be permitted to inspect documents relating to criminal proceedings: *Civil Procedure Act 1986* (NSW) s 314(4A).

evidence; and any records of a conviction or an order.[274] The Registrar must not make documents available for inspection if the proceedings are subject to an order prohibiting their publication or a suppression order, or if the documents are prohibited from being published or disclosed by or under another Act or law.[275] The Registrar is not obliged to make available for inspection documents that are not in his or her possession or control.[276]

Some courts express their access rules in general terms but have issued a memorandum which sets out how a media representative may obtain access to documents. This has been done by the Federal Court in respect of those documents to which leave to inspect is required.[277] Basically, a media representative must fill out a form and submit it to the associate of the presiding judge. The form asks for a number of particulars and requires the media representative to undertake that the documents will be used only for the purpose of reporting the proceeding and that no part of the document will be copied or made available to any other person except for that purpose. The judge can refuse the request for access, approve the request in whole or in part, or ask the media representative to send a copy of the request to the parties with an invitation to them to comment. As a general rule, leave to inspect will be granted in respect of documents which have been admitted into evidence or read out in open court. However, there may be cases where leave to access a document may be refused on the basis that only parts of the document have been admitted into evidence or read in open court, and it would be unduly burdensome for court staff to provide a redacted version of the document showing only those parts that are in evidence or have been read out. If approval is given, the media representative must make arrangements with the Registry to inspect and copy the documents and pay any prescribed fees. If the request is not approved, the media representative may make an application to the court for leave, depending on the documents in question.

VIII SHOULD AUSTRALIAN COURTS RECOGNISE A RIGHT OF ACCESS TO DOCUMENTS ON THE COURT RECORD?

Should Australian courts persist in regarding the court record as a file of documents that are collected and maintained by the court for the proper conduct of proceedings,[278] or would it be preferable to adopt the American approach and treat the court record as a public register to which there is a common law or even a constitutional right of access? In my view, the position that currently prevails in Australia is to be preferred. Australian courts should continue to retain control

274 *Civil Procedure Act 1986* (NSW) s 314(2).
275 *Civil Procedure Act 1986* (NSW) s 314(4).
276 *Civil Procedure Act 1986* (NSW) s 314(3).
277 See Federal Court of Australia, *Media Access to Court Documents*, above n 263. The Federal Court has also issued a protocol on media access to transcripts: see Federal Court of Australia, *Media Access to Transcript* (2006) <http://www.fedcourt.gov.au/courtdocuments/mediatranscript.html> at 12 September 2006.
278 *Dobson v Hastings* [1992] Ch 394, 401.

over the court record and regulate access to documents under rules of court, as supplemented by their inherent or implied powers. There are a number of reasons why Australian courts should maintain their current stance on public access to the court record.

First, despite the fact that American cases and academic commentary take a contrary view, an open court record does not *necessarily* serve 'the same societal needs'[279] as open trials and proceedings. In Part II, it was explained that, historically, the open courtroom has been primarily valued for its positive effect on the performance of judges and witnesses. In the context of access to documents on the court record, this purpose is not fulfilled in circumstances where access is sought before the documents in question have been deployed in judicial proceedings because, at this stage, the judge has not become involved in the case.[280] Since there is no judicial activity to subject to the 'cathartic glare of publicity',[281] giving the public a right of access to such documents is not capable of having any effect on the conduct of a judge. The position may be otherwise once the case has commenced, particularly if a judge has made rulings in respect of documents on the file or in reliance on them. Indeed, in light of the modern emphasis on documentary evidence and argument, explained in the Introduction, the principle of open justice may demand that the public be given access to documents that have been deployed in a proceeding; otherwise, it may not be possible to gain an understanding of what has transpired in the case. However, it is simply unnecessary to confer a common law right of access to documents on the court file in the interests of open justice where the purpose for which open justice is accorded may or may not be affected at the time access is sought. Rather, it is preferable to allow the courts to make decisions pertaining to access, either by requiring a non-party to seek the leave of the court to inspect a document or by formulating rules of court to govern access. In making such decisions or formulating such rules, the stage which the case has reached will be a critical, perhaps decisive, factor.

From the perspective of the public, it has been explained that the discipline that the public gaze brings to bear on the conduct of those involved in the administration of justice is likely to create public confidence in the courts. However, the ability to peruse documents that have been lodged with the court in respect of a proceeding does not promote understanding of the judicial system or create confidence in it, if the documents have not yet seen the light of day in open court. Most documents on the court record are created by the parties and often contain bald assertions and exaggerated allegations or claims which are completely untested and which may even be ruled inadmissible. For these

279 Anne Cohen, 'Access to Pretrial Documents under the First Amendment' (1984) 84 *Columbia Law Review* 1813, 1827.

280 In courts that proactively manage cases, the judge to whom the case has been assigned may have read the documents on the file but not made any adjudications in respect of them.

281 *R v Brady* (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Street CJ, Sheppard and Ash JJ, 29 July 1977) in *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294, 300.

reasons, access by the media to the contents of a court file 'is not in absolute terms, a proposition flowing from the principle of open justice'.[282]

In Part II, it was noted that, quite apart from its positive effects on the administration of justice, open justice can also be regarded as a facet of free speech; in particular, as an aspect of the media's right to report judicial proceedings and the public's right to receive those reports. However, it was explained that Australian judges have generally been unwilling to 'detach' open justice from its effect on the administration of justice and view it as a stand-alone aspect of free speech. In any event, it is not immediately evident why the public should be treated as having a 'right to know' about the contents of documents on the court record in circumstances where such knowledge has no connection with the administration of justice. Such a conclusion can only come from a perception that from its very inception, a legal proceeding can be properly regarded as the public's case. However, Australian courts do not view proceedings this way, preferring to maintain a distinction between the judicial process and the events leading up to it.[283] In the words of the New South Wales Court of Appeal, 'the principle of open justice is not engaged at the time of the filing of the proceedings'.[284]

There is a second reason why access to the court record should not be equated with access to the courtroom. If the two are treated as complementary rights which give effect to the same policies – the case in the United States – then logically, the circumstances in which it is permissible to derogate from these rights should correspond. Yet, this is not a desirable outcome. Access to the courtroom is at the heart of the meaning of open justice and it is entirely appropriate to regard entry into the courtroom as an axiomatic common law right. This is not to say that access to the courtroom can never be denied. Courts have inherent or implied power and, in many cases, statutory power to sit in camera or to make non-publication orders suppressing aspects of a case from being reported.[285] The rationale is that since an open court is primarily valued for its propensity to enhance the administration of justice, it must yield to the overriding obligation of a court to deliver justice according to law in the unlikely event that an open hearing would operate to the detriment of the administration of justice.[286] However, closure of a court and, to a lesser extent, the making of non-publication orders have always been regarded as wholly exceptional. Courts exercising inherent or implied power can make such orders only if they are necessary in the

282 *Australian Securities and Investment Commission v Rich* (2001) 51 NSWLR 643, 649 (Austin J). See also *Macquarie Radio Network Pty Ltd v Australian Broadcasting Authority* [2002] FCA 1408 (Unreported, Sackville J, 15 November 2002) [19].

283 *Smith v Harris* [1996] 2 VR 335.

284 *John Fairfax Publications Pty Ltd* (2005) 62 NSWLR 512, 526.

285 Legislation aside, the power to sit in camera is an inherent power of the superior courts and an implied power of inferior courts. The power to make non-publication orders pursuant to common law powers is more contentious, and is particularly unclear in respect of inferior courts, insofar as such orders purport to affect what persons who are not parties to the case can do outside the courtroom. If such power does exist, it is an aspect of the inherent power of superior courts and the implied powers of inferior courts.

286 *Scott v Scott* [1913] AC 417, 437.

interests of the administration of justice.[287] In this context 'necessary' means 'essential'.[288] Courts exercising statutory powers of closure or suppression can make such orders whenever the terms of the legislation permit, but in many cases, the legislation adopts 'necessity' as the touchstone. The concept of necessity is employed in the context of court closures and suppression orders to abridge a right of access that already exists. If courts were to recognise a common law right of access to documents on the court record as an aspect of open justice, then it would seem logical that such a right could be abridged only in circumstances of 'necessity'. Whilst this would create parity with the position that prevails in relation to access to the courtroom, it would inhibit the ability of the court to weigh up the pros and cons of access and would ultimately lead to a loss of control over the case on the part of the judges.

Third, the concept of a relatively unfettered common law right of access to documents on the court record does not appear to be a sustainable one. Although courts in the United States speak in terms of a 'right of access', it is more aptly described as a 'presumption of a right of access'. Moreover, many courts take the view that the mere filing of a document does not raise the presumption of access; in order to attract the presumption, the documents must be 'relevant to the performance of the judicial function and useful in the judicial process'.[289] Furthermore, American courts reserve to themselves the right to balance the public interest underlying the presumption of access against other competing public interests in a case specific manner, and do not appear to regard themselves as restricted to derogations that satisfy a strict necessity test of the type applied by Australian courts when determining whether to sit in camera or issue a non-publication order. This is not to criticise the American approach. Indeed, I would argue that it is desirable that the courts retain an overriding discretion regarding non-party access to the court record and remain free to pit the advantages of access against any disadvantages on a case by case basis. My criticism concerns the nomenclature, not the approach. Can a right of access that can be overridden by the discretion of the court be aptly described as a right? It seems that the main difference between Australia and the United States is that in the United States persons who wish to prevent non-party access bear the onus of displacing a presumption in favour of access, whereas in Australia the courts engage in a freestanding balancing exercise.

Rights of access based on the First Amendment are much harder to displace. However, given the unlikelihood that public access to documents on the court record would be accorded constitutional status in Australia, there is no real point of comparison between the jurisdictions.

Finally, the absence of a common law right of access may prove to be particularly advantageous to Australian courts in the emerging era of electronic filing ('efiling') and electronic searching ('esearching') of court documents.

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287 For a list of these exceptional situations, see Des Butler and Sharon Rodrick, *Australian Media Law* (2nd ed, 2004) 173–86.

288 *John Fairfax Publications Pty Ltd* (2005) 62 NSWLR 512, 522–3.

289 *United States v Amodeo*, 44 F 3d 141, 145 (2nd Cir, 1995); *Anderson v Cryovac Inc*, 805 F 2d 1, 13 (1st Cir, 1986); *United States v Gonzales*, 150 F 3d 1246, 1255 (10th Cir, 1998).

Many Australian courts are in the process of considering the implications of efiling and esearching on non-party access to court documents as they move towards an electronic court record. At present, the public cannot electronically search the contents of documents that have been filed with Australian courts. By contrast, in the United States, some states permit full text searching of court documents. However, courts in the United States are finding that content esearching is posing a real threat to the privacy of American citizens, and are in a quandary as to how privacy issues can be accommodated within the framework of the common law and constitutional rights of access that have been accorded to the public.[290] Under a paper regime, it is necessary for persons who wish to search a document to attend, during office hours, the registry of the court at which the document is located. Moreover, persons conducting a hard copy search need to know in advance which documents they wish to inspect. The inconvenience and expense involved in physical attendance has acted as a disincentive to all but the most eager searchers. Therefore, although court files are regarded as public records, documents filed with the court have been described as enjoying a 'practical obscurity'.[291] By contrast, documents that can be esearched are available at the touch of a button. There are no barriers of time, distance or convenience. Moreover, searches can be indiscriminate. Whilst this undoubtedly broadens the concept of open justice, the downside is that content esearching has enabled searchers to create dossiers on people, and to acquire knowledge of personal information on a wide range of matters. It should be of comfort to Australian courts that they have never recognised rights of access, as they are in the position of being able to balance competing demands for access without having to retract or qualify rights that have already been conferred.

IX CONCLUSION

This article has identified five potential avenues through which non-parties, including the media, might theoretically gain access to documents on the court record. The first avenue – an application made under freedom of information legislation – is not a fruitful source of access rights, as the FOI legislation of most jurisdictions does not apply to court documents, with the exception of those that relate to matters of an administrative nature. Moreover, in Australia, non-

290 See, eg, National Centre for State Courts and the Justice Management Institute, *Draft for Comment: Model Policy on Public Access to Court Records* (2002) <http://www.courtaccess.org/modelpolicy/modelpolicy.pdf> at 9 October 2006; Alan Carlson and Martha Wade Steketee, *Public Access to Court Records: Implementing the CCJ/COSCA Guidelines, Final Project Report* (2005) <http://www.courtaccess.org/modelpolicy/PublicAccessFinalReport%20.pdf> at 9 October 2006; Daniel J Solove, 'Access and Aggregation: Public Records, Privacy and the *Constitution*' (2002) 86 *Minnesota Law Review* 1137; Peter Winn, 'Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information' (2004) 79 *Washington Law Review* 307; Committee on Privacy and Court Records, *Final Report of the Committee on Privacy and Court Records* (2005) Florida State Courts Strategic Planning <http://www.flcourts.org/gen_public/stratplan/bin/privacy3.pdf> at 12 September 2006.

291 *United States Department of Justice v Reporters Committee for Freedom of the Press*, 489 US 749 (1989).

parties do not, and should not, enjoy a common law or constitutional right of access to documents generated by, or filed with, the court.[292] In appropriate circumstances, courts can grant non-parties access to their records as an exercise of their inherent or implied powers. However, the extent of a court's inherent or implied powers is limited; such powers can be exercised only in certain circumstances. They would not, for example, support a grant of unlimited access to any document at any time.

The remaining means of gaining access to documents on the court record – through rules of court made pursuant to a legislative grant of power[293] – has proven to be the most profitable. Rights of access that can be conferred by rules of court are not as circumscribed as grants of access made pursuant to the exercise of inherent and implied powers. The rules of most Australian courts embody a variety of approaches to non-party access. They range from rules which accord to non-parties unqualified rights of access to certain documents, to rules which require non-parties to seek the leave of the court to gain access to court documents, to rules which prohibit access altogether. It has been argued that it is entirely appropriate that decisions about access should be resolved by the courts, as they are best placed to balance all the competing interests and claims in the context of the work of that particular court. Competing factors that might militate against non-party access to the court file include considerations of privacy, the protection of reputation, the need to ensure a fair trial, and the dangers of trial by media.[294]

The proper role for the principle of open justice in the context of access to documents on the court record is not as a harbinger of common law rights, but as an important factor to be considered in the exercise of the court's discretion whenever access is sought. The relevance of the changing nature of court proceedings and the increased reliance on documentary evidence and argument is not that it should generate a common law right of access, but that it should render the principle of open justice a more weighty consideration in the balancing process. In most cases, it is entirely appropriate that the lack of information that can now be gleaned from sitting in the courtroom should be tempered by a greater preparedness on the part of the courts to extend the principle of open justice to what occurs in the court registry. I agree with the way in which the New South Wales Court of Appeal applied the following statement of Professor Ronald Dworkin to open justice, holding that, as a principle and not a right, open justice:

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292 The exception is court orders to which there is a common law right of access.

293 In some jurisdictions, access issues are addressed in a court's enabling legislation rather than left to the court to determine via rules made pursuant to its enabling act.

294 A more detailed list can be found in *Australian Securities and Investment Commission v Rich* (2001) 51 NSWLR 643.

> argues in one direction but does not necessitate a particular decision. … There may be other principles or policies arguing in the other direction … If so, our principle may not prevail, but that does not mean that it is not a principle of our legal system, because in the next case, when these contravening considerations are absent or less weighty, the principle may be decisive.[295]

The weight that should be accorded to the principle of open justice in the context of particular documents and a detailed description of the countervailing considerations that might militate against access are subjects for another article. Suffice it to say that a number of jurisdictions and/or courts are in the process of reconsidering their approach to non-party access to court documents. They include New South Wales,[296] the Victorian County Court[297] and New Zealand.[298] Interestingly, the tentative position taken in many recent discussion and consultation papers that deal with access to documents on the court record is that such documents should be made available to the public in the interests of open justice, unless there are compelling reasons to deny access.[299] If this trend continues, it may herald a more generous approach to access. If so, it remains to be seen whether this liberalisation will come about through legislative intervention or whether it will be left to the courts to revisit the question of access.

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295 Ronald Dworkin, *Taking Rights Seriously* (1977) 26 in *John Fairfax Publications Pty Ltd* (2005) 62 NSWLR 512, 521.

296 Attorney-General's Department of New South Wales, *Review of the Policy on Access to Court Information* (2006) <http://www.lawlink.nsw.gov.au/Lawlink/Corporate/ll_corporate.nsf/vwFiles/Access_to_Court_Information.pdf/$file/Access_to_Court_Information.pdf> at 9 October.

297 County Court of Victoria, *Access to Court Records Discussion Paper* (2005) <http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Publications_Reports/$file/Access%20to%20Court%20Records%20DP.pdf> at 9 October 2006.

298 New Zealand Law Commission, above n 33.

299 Non-party access to documents in civil cases has been recently liberalised in the United Kingdom in the interests of procuring greater openness in the court system: *Civil Procedure Rules* (UK) r 5.4C. See Chris Tryhorn, 'Court Files Opened Up to Media', *The Guardian*, 2 October 2006 <http://www.guardian.co.uk/uk_news/story/0,,1884285,00.html> at 26 October 2006.