2

Aspects of Citizen Access to Court Archives

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Introduction

The openness of judicial proceedings is a fundamental constitutional and common law principle. It ensures that citizens and the media can come in to the courtroom and observe and report on the administration of justice. In 2015, the Federal Court won a National Archives of Australia award for digital excellence for its implementation of electronic court files. In accepting the award, the Principal Registrar and Chief Executive of the Federal Court said:

Court records provide a snapshot of Australia's evolving social and legal history. A digital version of them will ensure their long-term preservation so future generations can understand the legal questions and concerns of the day and the Court's role in the Australian community.¹

The public availability of court records as a means of reinforcing the Federal Court's role arose in discussion in *Grollo v Palmer*.² *Grollo* was a challenge to legislation authorising 'eligible judges'³ to issue warrants for

1 Warwick Soden, 'Federal Court Wins National Archives Award' (Media Release, 4 May 2015).

2 *Grollo v Palmer* (1995) 184 CLR 348.

3 A person who is a judge of a court created by the Parliament (*Telecommunications (Interception) Act 1979* (Cth) s 6D).

phone tapping on the grounds that the function was incompatible with judicial office. The warrants were issued *ex parte* and in secret. No records were kept in the court's registry. Justice McHugh dissented from other members of the High Court on the incompatibility issue and made this powerful observation on the importance of open justice in the Federal Court:

Open justice is the hallmark of the common law system of justice and is an essential characteristic of the exercise of federal judicial power. Participation in secret, *ex parte*, administrative procedures by those who hold federal judicial office contravenes the spirit of the requirement that justice in the federal courts should be open; it weakens the perception that the federal courts are independent of the federal government and its agencies. Much of the litigation in the Federal Court is between the ordinary citizen and the federal government and its agencies. The maintenance of public confidence in the independence and impartiality of the Federal Court judges in hearing disputes between the citizen and the government and its agencies is contingent upon the public perception that the judges of the federal courts are impartial and entirely independent of the executive arm of government. That public perception must be diminished when the judges of the Federal Court are involved in secret, *ex parte* administrative procedure.⁴

What both the Principal Registrar and Justice McHugh emphasise is the importance of open justice as an essential characteristic of federal judicial power.

Openness was identified as an important feature of the common law in early classical English writings. Hale, Blackstone and Bentham all attached importance to oral evidence, submissions and rulings in open court.⁵ In this respect, the common law is in sharp contrast with the secret practices of the ecclesiastical courts, and the investigative and inquisitorial processes of the civil law system.

4 Grollo (1995) 184 CLR 348, 379–80.

5 Matthew Hale, *The History of the Common Law of England* (University of Chicago Press, 3rd ed, 1971) 163–4; William Blackstone, *Commentaries on the Law of England* (Strahan & Woodfall, 11th ed, 1791) vol 3, 372–4; Jeremy Bentham, *Draft for the Organisation of Judicial Establishments Compared with that of the National Assembly, with a Commentary on the Same, Works of Jeremy Bentham* (William Tait, 1843) vol 4, 305, 316–7; Ernst Willheim, 'Are Our Courts Truly Open?' (2002) 13 *Public Law Review* 191.

The snapshot to which the Federal Court's Chief Executive refers is taken with a narrow lens, with much of the subject-matter obscured from view. The Federal Court, by its practices and rules, appears to be seeking to shield some of its most important records from public scrutiny. Far from assisting researchers to understand the legal and factual questions raised in its proceedings, the Federal Court appears to be seeking to obstruct genuine research. The policy considerations that lie behind the Federal Court's practices and rules are unclear. This chapter argues that the relevant provisions of the court's rules may be of uncertain constitutional validity.

The chapter also draws a distinction between records of judicial proceedings and records relating to the internal administration of the Federal Court. In relation to records of court administration, *prima facie* they should be subject to the same sorts of access provisions as the records of the executive government.

Openness

Successive decisions in England and Australia have confirmed openness as an essential feature of the common law judicial system.⁶

In *Scott v Scott*,⁷ a House of Lords decision, Lord Shaw emphasised 'publicity in the administration of justice' as 'one of the surest guarantees of our liberties'.⁸ He went on to criticise 'encroachments by way of judicial procedures in such a way as to impair the rights, safety and freedom of the citizen and the open administration of the law'.⁹ Those remarks are especially apposite. It is through 'encroachments by way of judicial procedures' adopted by the Federal Court in the interests of efficiency that open administration of the law is impaired. Arguably, the principles so eloquently espoused by Justice McHugh are regularly breached.

6 *Scott v Scott* (1913) AC 417, 476, 478; *Dickason v Dickason* (1913) 17 CLR 50, 51; *Russell v Russell* (1976) 134 CLR 495, 520 and 532; *Grollo* (1995) 184 CLR 348, 379–80.

7 *Scott* (1913) AC 417.

8 *Ibid* 476.

9 *Ibid* 478.

In *Dickason v Dickason*,¹⁰ in a short but succinct judgment, Acting Chief Justice Barton wrote, 'one of the normal attributes of a court is publicity, that is, the admission of the public to attend the proceedings'.¹¹

In *Russell v Russell*,¹² the High Court held invalid section 97 of the *Family Law Act 1975* (Cth) requiring proceedings under that Act to be heard in closed court. Referring to the openness rule, Justice Gibbs wrote: '[t]his rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected'.¹³ He continued:

the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure'.¹⁴

In *John Fairfax Publications Pty Ltd v District Court of NSW*,¹⁵ Chief Justice Spigelman said:

It is well established that the principle of open justice is one of the most fundamental aspects of the system of justice in Australia. The conduct of proceedings in public is an essential quality of an Australian court of justice. There is no inherent power of the Court to exclude the public.¹⁶

Of course, the openness principle is not absolute. In *Hogan v Hinch*,¹⁷ a case concerning orders prohibiting publication of names of convicted sex offenders, Chief Justice French said:

It has long been accepted at common law that the application of the open justice principle may be limited ... where it is necessary to secure the proper administration of justice. In a proceeding involving a secret technical process, a public hearing of evidence of the secret process could 'cause an entire destruction of the whole matter in dispute'. Similar considerations

10 *Dickason* (1913) 17 CLR 50.

11 *Ibid* 51. The other members of the court concurred.

12 *Russell* (1976) 134 CLR 495.

13 *Ibid* 495.

14 *Ibid* 520, citing *McPherson v McPherson* [1936] AC 177, 200.

15 *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344.

16 *Ibid* [18]. See also James Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (2006) 29 *University of New South Wales Law Journal* 147.

17 *Hogan v Hinch* (2011) 243 CLR 506.

inform restrictions on the disclosure in open court of evidence in an action for injunctive relief against an anticipated breach of confidence. In the prosecution of a blackmailer, the name of the blackmailer's victim, called as a prosecution witness, may be suppressed because of the 'keen public interest in getting blackmailers convicted and sentenced' and the difficulties that may be encountered in getting complainants to come forward 'unless they are given this kind of protection'. So too, in particular circumstances, may the name of a police informant or the identity of an undercover police officer. The categories of case are not closed, although they will not lightly be extended.¹⁸

Openness in judicial proceedings is well established in common law systems. More recently, it has been incorporated in international human rights instruments. Article 14 of the *International Covenant on Civil and Political Rights* and Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* establish an entitlement to 'a fair and public hearing by an independent and impartial tribunal established by law'.¹⁹

The importance of openness is not confined to protection of the rights of the parties. By exposing the judicial process to public scrutiny, courts are publicly accountable. Openness is a prerequisite for public confidence in the integrity of the judicial system. Practices to the contrary, sometimes adopted in the interests of administrative efficiency, breach the openness principle and may well be unconstitutional.

Chief Justice French has referred to public adjudication, or adherence to the open court principle, as one of the essential and defining features of courts.²⁰ He went on to observe that the defining characteristics of courts are of constitutional significance and emphasised the need to maintain the distinctiveness of the public function of courts as the third branch of government and the special character of public adjudication.

18 Hogan (2011) 243 CLR 506, 531–2. The references in the passage have been omitted.

19 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948), art 10; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 14 and 38; *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*European Convention on Human Rights*'), opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), art 6. The *European Convention on Human Rights* omits the word 'competent', included in the ICCPR.

20 Robert French, 'Essential and Defining Characteristics of Courts in an Age of Institutional Change' (Speech delivered at Supreme and Federal Court Judges Conference, Adelaide, 21 January 2013).

Openness and Court Records

Most of the principles relating to open justice were developed in the context of physical access to the courtroom. In an article provocatively titled ‘Are Our Courts Truly Open?’,²¹ I explained, with particular reference to the High Court and the Federal Court, that in light of modern procedures adopted by most superior courts—written pleadings, requirements for written submissions to which counsel and judges refer but that are not read out in open court, and evidence on affidavit ‘taken as read’²² but not in fact read out orally—cases are determined on the basis of material not freely available to the public.

For example, the Federal Court’s *Central Practice Note* explains that written submissions are now a ‘useful way of shortening addresses’.²³ The ‘usual orders’ now made by the Federal Court at the first directions hearing of a case often include orders that evidence in chief be by way of affidavit and that deponents to affidavits be called for cross-examination only by leave. It follows that issues of fact are determined by reference to evidence that is not publicly available.

The openness principle is, of course, fundamental to public confidence in the judiciary—but it is not so confined. Witnesses are also exposed to public scrutiny. Few would dispute that the expectation of public scrutiny, including scrutiny by the media, can constitute an important deterrent to false evidence. As Blackstone wrote, ‘a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal’.²⁴ In consequence of procedures adopted in the interests of efficiency, public scrutiny and public understanding of the judicial process is inhibited. It is difficult to argue that court processes now fully comply with the openness principle.²⁵

21 Willheim, above n 5.

22 That is, admitted into evidence. I do not contend that affidavits that are filed but not admitted into evidence should be publicly available.

23 Federal Court of Australia, *Central Practice Note: National Court Framework and Case Management (CPN-1)* 25 October 2016 <<http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/cpn-1>>.

24 Blackstone, above n 5.

25 In the case of the High Court, written submissions are now available on the court’s website.

When the openness principle was developed, the emphasis was indeed on physical access to the courtroom. Nowadays, physical access remains important but most of us rely on the media to report what is happening in the courts. The ability of the media to provide a proper report of court proceedings is, therefore, an important aspect of the principle of open justice.²⁶ Where a newspaper reporter is seeking to prepare an article on a Federal Court proceeding, if a written submission is read out in full or an affidavit is read out in full, the reporter is able to report on them. However, where the case is heard on the basis of written submissions and affidavits that are, in the contemporary jargon, ‘taken as read’ but not read out in fact and not publicly available, can the reporter prepare a meaningful account of the case for her or his newspaper? Open justice requires the opportunity for the media to publish fair and accurate reports of submissions and of evidence. The same considerations apply to researchers and commentators. An academic commentator seeking to analyse a case may wish to analyse the written submissions by the parties and the evidence as well as the actual judgment. Critical scrutiny may well involve analysis of whether, and to what extent, a judgment appropriately reflects the submissions and the evidence. For example, a researcher with an interest in public administration or corporate fraud may have a special interest in the evidence in cases falling within the field of interest. It is very much in this context that access to the court’s records, to the written submissions and to the affidavits that have been ‘taken as read’, but not in fact read out in open court, is crucial. In the absence of any specific orders made by the court in relation to sensitive documents, those records should be treated as public records open to the public to inspect and copy. The same principles that apply to the public’s right of access to the physical courtroom should apply to access to the court’s records of the proceedings. In the modern world, where few have the opportunity to attend the court and most of us rely on media reports of court proceedings, access to the court’s records is of greater practical importance than physical access to the courtroom itself.

Many Australians learn more about the law through watching American television and American films. For example, in the American film *Spotlight*, a *Boston Globe* reporter walks into a court registry and asks to see a court file. When the clerk refuses the request, the reporter runs upstairs, walks into the chambers of a judge and is able to obtain access to the court file. In the film, the file turns out to include damning evidence that a Cardinal had been aware of sexual abuse of a child by a priest.

26 *Hogan* (2011) 243 CLR 506, 532; *John Fairfax & Sons Ltd* (1986) 5 NSWLR 465, 476–7.

In Australia, we cannot storm into a judge's chambers in the manner that appears to be possible in the United States. But can we obtain access to court records on matters of public interest? Could an Australian academic researcher or investigative reporter obtain access to submissions and evidence in Federal Court proceedings? In the broader community, there would be a general presumption that, just as judicial proceedings are open, so the records of those proceedings will also be open. In particular, submissions and evidence²⁷ should be freely available to the public.

The Importance of Public Access

The Federal Court's Chief Executive correctly identified the importance of the court's records as providing 'a snapshot of Australia's evolving social and legal history'.²⁸ Records of commercial litigation relating to competition policy may include important evidence and submissions relating to economic and social conditions. Records of litigation relating to Indigenous heritage protection and native title may include significant anthropological and other historical material not available elsewhere. Records of challenges to government decisions may cast light on public administration. Therefore, court records are a rich resource relating to Australian society.

Some years ago, I was urged by some Aboriginal leaders to make a submission (as a private citizen) to a joint committee of the Commonwealth Parliament inquiring into the findings of the Committee on the Elimination of Racial Discrimination (CERD) that the *Native Title Amendment Act 1998* (Cth) was inconsistent with Australia's international legal obligations, in particular, the *Convention on the Elimination of All Forms of Racial Discrimination*.²⁹ One of the joint committee's key terms of reference was whether CERD's finding was 'sustainable on the basis of informed opinion'.³⁰ 'Informed opinion' was, therefore, critical to the inquiry by the joint committee.

27 Naturally, only evidence that has been admitted.

28 Soden, above n 1.

29 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

30 The full terms of reference are set out in the Commonwealth *16th Report: CERD and the Native Title Amendment Act 1998*, Parl Paper No 134/2000 (2000) iv.

Provisions of the Australian legislation criticised by CERD included those validating titles over pastoral leases that had been granted by state governments after the date of commencement of the *Native Title Act 1993* (Cth) ('*Native Title Act*') and before the High Court's subsequent decision in *Wik Peoples v Queensland*,³¹ where the court held that pastoral leases did not necessarily extinguish native title. In light of the *Wik* decision, the validity of pastoral leases granted without compliance with the *Native Title Act* procedures was doubtful, hence the perceived need for validation of those leases—the 'bucketloads of extinguishment' provision. Validation of leases that had been granted without compliance with the *Native Title Act* and consequential extinguishment of native title was highly controversial.

What was the state of 'informed opinion'? How could 'informed opinion' be established?

In response to criticism of the legislation—criticism that in light of the known uncertainty of whether pastoral leases did in fact extinguish native title—and that the relevant state governments should have complied with the *Native Title Act* requirements, officials of the Attorney-General's Department submitted that, at the relevant time, the weight of legal opinion had supported the view that native title could no longer subsist on pastoral lease land.³² On that view, there would have been no need to comply with the *Native Title Act* requirements.

Were the submissions of the officials soundly based?

Legal submissions made by the Commonwealth in proceedings in the Federal Court and the High Court, were, in my view, inconsistent with the evidence given by the departmental officers to the joint committee.³³ While the justification for the validation provisions was a matter for political judgment, in my view, the committee's consideration should have

31 *Wik Peoples v Queensland* (1996) 187 CLR 1.

32 Commonwealth Attorney-General's Department, Submission No CERD 24.

33 It was not appropriate for me to disclose to the joint committee that my own legal advice to the government had expressed the contrary view that pastoral leases did not necessarily extinguish native title. The advice was given at a time when I was a senior officer of the Commonwealth and counsel for the Attorney-General in the key Federal Court proceedings raising the question whether pastoral leases extinguish native title. I feel able to disclose the substance of my advice now. First, with the passage of time, it is now in the 'open' period; and second, the relevant Commonwealth Minister has agreed to me disclosing that I had advised that pastoral leases did not necessarily extinguish native title.

proceeded on a factually correct historical record. I sought to obtain for the joint committee the legal submissions made by the Commonwealth to the Federal Court and the High Court.

In the case of the High Court, there was no difficulty. A summary of the argument was reported in the *Commonwealth Law Reports*.³⁴ Copies of the Commonwealth's submissions were obtained from the High Court's registry upon payment of a modest fee and provided to the joint committee.

However, in the case of the Federal Court, the registry refused access, relying correctly on what was then Order 46 rule 6 of the *Federal Court Rules*. That rule prevented a person not a party to proceedings from inspecting a wide range of court documents, including affidavits and written submissions. I had a copy of the submissions made by counsel for the Attorney-General in the leading case and was able to provide a copy to the committee. I would have preferred to have provided the joint committee with a copy of the Commonwealth's submissions obtained from and authenticated by the Federal Court.

When I explained to the joint committee that the copy I was providing was from my personal records (as I was Counsel for the Commonwealth in the case), authenticity was not called into question. Five members of the joint committee rejected the evidence given on behalf of the government that the balance of legal opinion was that pastoral leases extinguished native title. They cited the Commonwealth's legal submissions to the High Court and the Federal Court. They concluded that these submissions to the High Court and the Federal Court demonstrated that the Commonwealth did not believe that the question of whether pastoral leases extinguished native title was settled.

Access by a private citizen to court records—in this case, access to submissions made on behalf of the executive government—was important to enable evidence subsequently given by officials of the executive government to a joint committee of the Commonwealth Parliament to be corrected. It was fortuitous that the citizen had a personal copy of the relevant submissions to the Federal Court. In other circumstances, the Federal Court rule would have inhibited consideration by a committee of the Australian Parliament of an important public issue.

34 *North Ganalanja Aboriginal Corporation v State of Queensland* (1996) 185 CLR 595, 602.

Further, as McHugh J pointed out in *Grollo v Palmer*,³⁵ one of the Federal Court's most important areas of jurisdiction concerns challenges to the lawfulness of administrative decisions of the executive government, generally by way of proceedings brought under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*Administrative Decisions (Judicial Review) Act*'). Access to court records is of particular importance in relation to Federal Court proceedings challenging decisions of the executive government. The court's practice, that evidence in chief is introduced by way of affidavit, has meant that issues of fact were determined by reference to evidence that was not publicly available. Judicial review of executive action was clothed in secrecy.

The *Federal Court Rules* were remade in 2011. Custody and inspection of documents is now dealt with in Division 2.4. Rule 2.32 enables a person who is not a party to inspect a range of documents in Federal Court proceedings. The list covers a number of formal documents such as an originating application, an address for service and a pleading. Significantly, the list does not include written submissions or affidavits. Rule 22.32(5) enables a person to apply to the court for leave to inspect a document that the person is not otherwise entitled to inspect.

Does the former O 46 r 6 or Division 2.4 of the current rules give effect to the worthy objectives articulated in the media statement by the Federal Court's Chief Executive?

Are those provisions consistent with the constitutional principles articulated by Justice McHugh?

Would the former or current rules be open to challenge on the basis that they breach the principle of open justice?

Does the opportunity to apply to the Federal Court for leave to inspect a document rectify possible constitutional invalidity?

In relation to key Federal Court records, such as submissions and affidavits, the rules in effect establish a presumption *against* access. While that presumption can be set aside by the court, the approach should be the very reverse: a presumptive right of access, which can be denied on appropriate grounds by order of the court.

35 *Grollo* (1995) 184 CLR 348.

There would appear to be no published explanation of the court's rule. The purpose of the rule, the policy considerations behind it, the reasons for a *prima-facie* exclusion of submissions and affidavit evidence from open access are not known. If the reason relates to cost, this could surely be addressed by imposition of an appropriate fee. In any event, in the digital age it should be possible to post submissions and affidavits admitted into evidence on the court's website.

The rules inhibit free access to basic details of Federal Court proceedings. That constraint on open justice may give rise to constitutional invalidity. The inability to freely access submissions and evidence may inhibit public understanding of litigation before the court and public debate concerning public policy issues arising in Federal Court litigation.

Proceedings under the *Administrative Decisions (Judicial Review) Act* are an obvious example of litigation that may give rise to questions of public concern. This Act enables individuals to challenge the lawfulness of administrative decisions made by officers of the executive government, including Ministers and senior officials. Submissions made on behalf of officials and the evidence given by officials may be critical. The public must be entitled to know the submissions and the evidence given by officials in defence of challenged decisions. Assume it becomes apparent during the hearing of a challenge to an administrative decision or from a reading of the judgment that serious impropriety is alleged, or is found to have taken place, on the part of an officer of the executive government. Allegations and findings of executive impropriety are matters of public interest and public debate. If, by reason of the court's rules, the written submissions made on behalf of the government defendant, or affidavits filed by the government defendant and 'taken as read' but not in fact read in open court, are not available, the inability to access these documents burdens or impairs the implied freedom of communication about the affairs of the executive government.

The High Court has recently confirmed that 'the implied freedom (of political communication) is essential to the maintenance of the system of representative and responsible government for which the Constitution provided'.³⁶ The public interest in fair reporting of court proceedings is not in dispute. If the public is not able to access what public officials have put to the court, if the media is not able to report on the submissions

36 *Brown v Tasmania* [2017] HCA 43, [88].

made on behalf of the executive and the evidence given by an officer of the executive, then the opportunity for political comment on the conduct of the executive is seriously impaired.

The first question in the analytical framework for determining whether a law contravenes the implied freedom of political communication³⁷ is whether the rules burden the implied freedom. This must be answered in the affirmative.

It is appropriate to interpose here that the implied freedom of political communication is usually seen as a constraint on the exercise of legislative and executive power.³⁸ That constraint may or may not apply to the exercise of judicial power. While the rule-making function is conferred on the court, the court is not exercising judicial power in the strict or narrow sense in the exercise of that function.

On the basis that the first arm of the constitutional test is established, further questions arise:³⁹ whether the purpose of the law or the burden on the implied freedom is justified or legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, and whether the law is reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government.

In implied freedom of political cases determined by the High Court, the court has been able to identify the purpose of the relevant legislation, and to analyse whether the burden is justified. However, in the case of the Federal Court's rules, there is a threshold difficulty. Neither the court itself nor the court's rules identify the purpose of the restriction. There is no obvious identifiable legitimate legislative purpose. Therefore, it is difficult to discern a case that the restriction is justified, legitimate and reasonably appropriate and adapted to advance a legitimate purpose.

37 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560; *Wotton v Queensland* (2012) 246 CLR 1; *McCloy v NSW* [2015] HCA 34. Slightly different frameworks were applied in *Brown* [2017] HCA 43, [90]–[104] (Kiefel CJ, Bell and Keane JJ), [156] (Gaegler J) and [271] (Keane J).

38 *Lange* (1997) 189 CLR 520, 560; *Hogan v Hinch* (2011) 243 CLR 506, 554; *Unions NSW* (2013) 252 CLR 530, 554; *Tajjour* (2104) 254 CLR 508, 558; *Brown* [2017] HCA 43, [90].

39 *Brown* [2017] HCA 43, [93], [96], [102], [104], [156] and [318]–[325].

Cost and administrative convenience would scarcely provide an appropriate justification. How can a burden on public access to the submissions and evidence put to the court by officers of the executive government in litigation challenging the decisions of the executive government be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? Simply put, there is no obvious justification. Where the answer to one or both of the further questions is ‘no’, a case for invalidity is made out.

A further question arises whether the opportunity to apply to the court for leave to inspect⁴⁰ cures the apparent invalidity. Why the rule is cast in this way, rather than in the form of open access subject to any specific orders, is not apparent. Is this an attempt to save the rule from potential invalidity? A question arises of whether potential invalidity arises from the rules themselves or from the manner of their exercise. I emphasise that the invalidity argument relates to impairment of political communication about the executive. To establish this argument, it is not necessary to establish that the implied freedom extends to communications about the judiciary. Of course, if Justice McHugh is, in effect, saying that openness is constitutionally entrenched,⁴¹ it may not be necessary to rely on these additional arguments.

Sensitive Documents

Federal Court archives will obviously include a wide range of sensitive documents. Chief Justice French identified a range of circumstances where the application of the open justice principle may be limited.⁴² Those circumstances related to sensitivity arising in the judicial process. The most common circumstances are likely to be in litigation involving Indigenous issues such as heritage protection and native title; commercial litigation; and litigation involving national security issues. Sensitivity can also arise in the internal administration of the court.

40 Rule 22.32(5).

41 *Grollo* (1995) 184 CLR 348, 379–80.

42 *Hogan* (2011) 243 CLR 506.

Examples from the Administration of Justice

For example, the unreported proceedings in *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs*⁴³ brought on at short notice arose out of a challenge by the State of Western Australia to the validity of declarations made by the Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs under the *Aboriginal and Torres Strait Islander Heritage (Protection) Act 1984* (Cth) ('*Aboriginal and Torres Strait Islander Heritage (Protection) Act*'). The Minister's declarations related to a site claimed by the Yawuru people to be a traditional Aboriginal area associated with male initiation ceremonies.

In the course of giving discovery, the Minister disclosed a number of anthropological reports (referred to in the proceedings as the Sullivan Report) and affidavits provided to the Minister on condition that they not be reproduced or be seen by women or by uninitiated Aboriginal men. Late on Wednesday, 27 July 1994, the state made application to the Federal Court for orders requiring the production of the Sullivan Report to its counsel and solicitor (who were both women). I was briefed on 28 July and flew to Perth that evening. The matter was heard the next day. Justice Carr ordered that the Sullivan Report be produced for inspection by the state's counsel and solicitors save that only one of such persons should be female. In his reasons, he explained that the interests of justice required that at least one of the state's counsel and solicitor have access to the report. By excluding one of them, there should be no real prejudice to the applicant's case and the interests of the Yawuru people were protected to the fullest extent possible.

Similar issues arise in a wide variety of cases. In *Tickner v Chapman*,⁴⁴ another challenge to a declaration under the *Aboriginal and Torres Strait Islander Heritage (Protection) Act*, the Aboriginal women claimed gender-sensitive documents filed with the court related to a women's birthing site and should not be seen by men (these documents were labelled 'secret women's business' in the media). In the *Broome Crocodile Farm* case,⁴⁵ the gender-sensitive material related to a male initiation track.

43 The unreported decision of Carr J, 29 July 1994 cf the later different decision *Western Australia, Minister of Lands of Western Australia and Another v Minister of Aboriginal and Torres Strait Islander Affairs of the Commonwealth of Australia* [1995] FCA 1052.

44 (1995) 57 FCR 451.

45 *Minister for Aboriginal and Torres Strait Islander Affairs v State of Western Australia* (1996) 67 FCR 40.

These issues will undoubtedly also arise in native title cases.

Evidence in heritage protection and native title cases is a rich resource, especially in relation to Indigenous history and culture. Often, it is only when a sacred site comes under serious threat that intensive anthropological work is undertaken, and stories are recorded. Sometimes those stories are culturally sensitive. According to Aboriginal tradition, some stories may only be disclosed to elders, or to initiated men, or the stories may be gender-sensitive and must only be told to those of a particular gender. Obvious questions arise in relation to access to evidence that was given on conditions of confidentiality.

Other confidentiality issues can arise in other types of cases, such as those identified by Chief Justice French and now especially national security issues. In those cases, it is likely that the court will have issued appropriate orders during the hearing protecting the confidentiality of records. If, in the future, access to court records including submissions and evidence is opened up, it may be necessary for the parties in those matters to apply to the court for orders that relevant confidentiality orders extend as appropriate to the records, following the disposition of the proceedings and for the court to adopt appropriate procedures to ensure that relevant documents are appropriately identified and protected.

Examples from Internal Administration

The *Freedom of Information Act 1982* (Cth) and the *Privacy Act 1988* (Cth) apply to the Federal Court only in relation to matters ‘of an administrative nature’,⁴⁶ an expression that has been held to be ‘incapable of precise definition’.⁴⁷ However, these Acts would not apply to functions that are ‘truly ancillary to an adjudication by the court’,⁴⁸ but would apply to, for example, employment records, contractors, travel expenses and property management.

46 *Freedom of Information Act*, s 5(1), *Privacy Act*, s 7(1)(b).

47 *Hamblin v Duffy* (1981) 34 ALR 333, 338–9; *Evans v Friemann* (1981) 35 ALR 428, 433.

48 *Kotsis v Kotsis* (1970) 122 CLR 69, 92.

Any large organisation will have the occasional administrative problem. The court, like any body funded by monies appropriated by the Parliament, is accountable for its expenditure. The Chief Justice is formally responsible for managing the administrative affairs of the court.⁴⁹ On a day-to-day basis, court administration is handled by the Registrar.⁵⁰

But what sorts of files should be available to the public?

For example, what if furniture from a retiring Justice's chambers could not be found? Assuming the District Registrar opened a file on this matter, should that file be accessible?

What about details of Comcar usage by Justices that may appear unnecessarily high? A former Speaker of the Commonwealth Parliament found himself in a lot of trouble for using a Comcar to visit a Canberra district winery. Assuming the District Registrar opened a file on Comcar usage by a judge, should that file be accessible?

What about 'unusual' adjournments. An order to adjourn a matter is undoubtedly made in the exercise of the judicial function of the court—but the order may be controversial. Assume that a judge is required to sit in a remote but attractive location, for example, a tropical location in the middle of winter. Assume also that the judge's personal staff, who travel with him, are family members. The judge sits on a Monday morning but after hearing argument for only a few minutes and over objections from counsel adjourns to the following Monday. The judge and his staff remain in the remote location until the hearing the following Monday. Legal representatives make complaints to the Chief Justice and to the Attorney-General and court files and departmental files are created. The departmental file would be accessible under the normal rules. Should the court's file be accessible?

Other examples relate to spouse travel. Judges have entitlements to spouse travel. Assume that a judge is to hear a matter in another registry and the matter is scheduled for a lengthy hearing. The judge arranges to take their spouse in accordance with standard spouse travel entitlements. It becomes apparent that the parties are negotiating and that the parties are likely to announce a settlement on the first day of hearing. The judge had been looking forward to an extended stay in the other location and the spouse

49 *Federal Court of Australia Act 1976* (Cth), s 18A.

50 *Ibid* s 18B.

travels with the judge notwithstanding the anticipated settlement. It was necessary for the judge to travel. Should the spouse travel have been cancelled? Subsequently, the Chief Justice questions the appropriateness of the spouse travel and a court file is created.

Should court records relating to travel and accommodation costs incurred by a judge and a judge's spouse and their staff be publicly accessible? Would anyone ever want access to these sorts of records? A researcher preparing a biography of a judge may wish to access all records relating to the judge. A student of court administration may wish to identify difficulties and how they were handled—for example, whether they were handled by the Chief Justice or by the Chief Executive, and whether the Attorney-General or the Attorney-General's Department were involved. Any relevant records would have been Commonwealth records.

In relation to records in the possession of the Federal Court, the main provisions of the *Archives Act 1983* (Cth) (*'Archives Act'*) would not apply. The *Archives Act* would presumably apply to records of the department itself.

Conclusion

The records of the Federal Court constitute a rich resource covering enormous fields of public interest, including Australia's economic and financial affairs, public administration and Indigenous issues. Many of those records are of great public and historical importance. In the same way as justice is administered in open court, so should the records of the court be open. Only in special circumstances—for example, where the court has made orders restricting access—should access be denied.

Insofar as the Federal Court's current rules restrict access to legal submissions and evidence, the rules should be reviewed.

The preferable approach would be to allow unrestricted access to both legal submissions and evidence unless orders have been made restricting access. Ideally, legal submissions should be available on the court's web site. Affidavit evidence should also be available after the evidence has been admitted.

Where confidentiality orders are made in the course of hearings, those orders should be expressed to extend to the relevant records of the proceedings in the court's archives. Registry procedures should ensure that records that are the subject of confidentiality orders are appropriately identified and protected.

If, contrary to this suggestion, the court prefers to maintain its current approach, the purpose of the restriction should be explained to ensure constitutional validity.

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