

**JOHN FAIRFAX HOLDINGS LIMITED  
RESPONSE TO THE ATTORNEY GENERAL'S DEPARTMENT REVIEW OF THE  
POLICY ON ACCESS TO COURT INFORMATION APRIL 2006  
("REVIEW")**

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This submission is made on behalf of John Fairfax Holdings Limited ("Fairfax") and its subsidiaries which publish newspapers, magazines and websites in Australia. We are grateful for this opportunity to comment on the Review.

The fundamental principle of open justice and the common law's repugnance of closed Courts goes back centuries. The modern position was enunciated by the House of Lords in *Scott v Scott* [1913] AC 417. Quoting Bentham, Lord Shaw of Dunfermline (at 477-8) put the position thus:

*"Where there is no publicity there is no justice". "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial". "The security of securities is publicity." But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this Kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise"*

The High Court recognised the principle expressed in *Scott* in *Russell v Russell* (1976) 134 CLR 495.

The natural extension of this principle is that the media should be allowed to fully report in a fair and accurate manner matters heard in open court as the "entitlement to report to the public at large what is seen and heard in open court is a corollary of the access to the court of those members of the public who choose to attend" (*Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, per Kirby P at 55). In relation to Federal Court proceedings, in *R v David* (1995) 57 FCR 512 (a criminal prosecution), the Full Court (at 514) said:

*Whatever [the media's] motives in reporting, their opportunity to do so arises out of a principle that is fundamental to our society and method of government: except in extraordinary circumstances the courts of the land are open to the public. This principle arises out of the belief that exposure to public scrutiny is the surest safeguard against any risk of the courts abusing their considerable powers. As few members of the public have the time, or even the inclination, to*

*attend courts in person, in a practical sense this principle demands that the media be free to report what goes on in them.*

This authoritative statement recognises the important role which the media plays in Court reporting.

There is an increasing trend in all courts for hearings to be conducted and decisions made on the basis of affidavit evidence and written submissions. Often affidavits are not read in open court before being admitted into evidence. Given the complexity of a lot of modern litigation and the inability of the media to cover all of the proceedings all of the time, Fairfax believes it is vital that the media have access to transcripts, submissions, statements, affidavits, exhibits and evidence used by the court to make its determination.

Without such access, the media's ability to present the public with well-informed and intelligible reports of court proceedings will be significantly restricted. This difficulty was referred to by Finklestein J in *Australian Competition Commission v ABB Transmission (No 3)* [2002] FCA 609 at 5:

*To the bystander who has not read the affidavits, this evidence (cross-examination of key witnesses whose evidence-in-chief was given by affidavit) will be largely meaningless. Counsel's arguments will be limited to expanding points already made in the written submissions, and will make little sense to any person not familiar with the detail. One unintended result is that the rule of open justice will not fully expose what has taken place in court. Much of what now occurs is no different from a court sitting in private.*

While reporters can take notes of the proceedings, without access to the documents which form the basis of the proceedings and which are relied on in evidence or in submission, their task of reporting fairly and accurately what is happening is made more difficult. Given the vast changes that have occurred in the conduct of litigation to which Finkelstein J referred, there needs to be a similar change in the way in which the public and media can gain access to court documents.

The Review makes brief references to the court information access regimes in the United Kingdom (considerably more advanced than what is proposed for NSW) and the United States (light years ahead of what is proposed for NSW).

Unaccountably, it makes no reference to the regimes that apply in the Supreme Courts of Victoria, the ACT and Queensland and in the Federal Court of Australia. In the Supreme Courts of Victoria, the ACT and Queensland non-parties can inspect the following material without leave, an order of the court or a decision of the registrar (subject of course to any confidentiality orders): originating motions and pleadings, affidavits entered into evidence, transcripts, notices of motion or other applications, judgments, orders and reasons for judgment. These regimes have been operating successfully and without controversy for many years. It is a major weakness of the

Review that it fails even to mention them and fails to address the obvious question: why should NSW be subjected to a regime of access to court information which is considerably more inhibited than the regimes operating in the Supreme Courts of Victoria, the ACT, and Queensland as well as the Federal Court of Australia?

The introduction of uniform defamation laws throughout Australia in 2006 underlines the importance of the States and Territories taking a more uniform approach to access to court documents. Under the uniform defamation law there is a defence of a fair summary of a public document. Public document is defined in section 28 (4) (iii) of the NSW Defamation Act 2005 as “any record or other document open to inspection by the public that is kept by an Australian court”. Because of the more restrictive approach proposed by the Review, this defence is likely to be less useful to defendants in NSW than in Victoria, the ACT or Queensland. There is no justification for this.

The Review notes that the current legislative framework governing access to court information is a composite of statutory provisions, rules of court and practice notes. In so doing, it neglects to place much, if any weight, on common law principles. In Fairfax’s view, this is a serious oversight. The potential benefits which the Review believes may flow from a “one size fits all” approach need to be weighed against the accumulated experience of the common law with its flexibility and responsiveness to particular cases.

Except in certain limited circumstances, proceedings before courts in NSW are open to the public. The principle of open justice is fundamental in ensuring that Courts remain transparent and accountable for their decisions. Public access to decisions and the processes of the Court promotes public respect for, and confidence in, the Court system. A vital corollary of the principle of open justice is the ability of the media to make fair and accurate reports of court proceedings. Fairfax believes that any review of the current regime of access to court information should aim to improve, not hinder, the media’s ability to report court proceedings fairly and accurately.

### **Proposal 1**

Fairfax has no objection to points a, b and e. c is unnecessary. Fairfax endorses the usual approach of courts and registrars that they are not bound by the Privacy and Personal Information Protection Act and is opposed to any legislated interference with this approach. It could produce more confusion than it resolves. d is better left to the common law.

### **Proposal 2**

Although Fairfax generally supports this proposal, it is important to continue to recognise the special role the media plays in reporting court proceedings and its role in contributing to public confidence in the administration of justice. The proposal

appears to import a higher standard of satisfaction by substituting “sufficient cause” for the more usual “sufficient interest”. Any attempt to impose a higher standard in this way should be acknowledged and justified.

### **Proposal 3**

The Review appears to model some of its proposals upon Supreme Court Practice Note SC Gen 2 (“SCPNSCG2”), which states that there is a presumption in favour of the release of certain documents. The Review notes that circumstances in which access to these documents should be refused are to be exceptional. There is nothing objectionable in that.

The Review also anticipates that with the future development of CourtLink, improved search options will be available. In general, this proposal seems reasonable, except insofar as it states that under the existing system access will usually be determined upon considerations of confidentiality or privacy attaching to the information, or its potentially prejudicial nature. Except as regards confidentiality, Fairfax does not regard this as an accurate statement of principle.

So far as proposed CourtLink search facilities are concerned, Fairfax suggests that public searches should also be available by last appearance or listing date.

### **Proposal 4: Open access - Criminal**

The statement that the media are only able to obtain fact sheets from the Court where they are tendered at a sentencing hearing highlights a serious flaw in the current system, and one identified in the Review. As a matter of principle, the practice which has apparently grown up of handing up a fact sheet, which is read silently by the presiding judicial officer before being handed back, is antithetical to the principle of open justice. This practice results in a situation whereby the ability of the media (and, through them, the public at large) to understand proceedings of the judicial arm of government is at the grace and favour of the police, being an arm of the executive. This practice is inappropriate, and needs to be addressed. No empirical evidence is given in the Review to substantiate its assertions about the prejudice to subsequent jury trials caused by publishing details from fact sheets handed up in court. A similar argument was described as “mere conjecture or speculation” by Mason CJ and Toohey J in *The Queen v Glennon* (1992) 173 CLR 592 at 603. See also Spigelman CJ in *John Fairfax Publications Pty Ltd & Anor v District Court of NSW & Ors* [2004] NSWCA 324 particularly at par 105 and the following where he sets out authorities acknowledging the robustness of the jury system. Fairfax believes that fact sheets handed up to the court should be made available to the media in all but the most exceptional circumstances.

Fairfax also disagrees with that part of this proposal which would not allow open access to any exhibits other than statements and affidavits, as to which see comments below in relation to proposal 15. It seems particularly odd that the

question of access to exhibits should be governed by questions of form rather than content.

### **Proposal 5: Open access - Civil**

Together with proposal 14 and 15, this proposal forms the heart of the review. Except for exhibits, this proposal largely reflects UCPR 36.12(2) and Practice Note SC Gen 2, which commenced operation on 1 March 2006..

So far as this proposal restricts access to originating processes and pleadings, it is antithetical to the principle of open justice. It also inhibits fair and accurate court reports. Fairfax opposes that aspect of it.

As previously discussed, the Supreme Court of Victoria and the Federal Court of Australia provide for a right of open access to initiating processes and pleadings immediately upon filing. The relevant Federal Court rule was recently examined by Rares J in *Llewellyn v Nine Network Australia Pty Limited* [2006] FCA 836. His Honour described the reasoning often presented to justify refusing access to such court documents as “fundamentally erroneous”.

*It misunderstands the function of fair reports of proceedings and the availability to all persons of the right to be able to make fair reports of proceedings that have been initiated in courts. Ordinary members of the public are well aware of the difference between allegations made in courts and findings made by courts...The proposition that untested allegations in civil proceedings are somehow to be shielded from public view merely because they are untested allegations and could only possibly be properly understood in the context of a fully contested hearing is, in my opinion, not one that can sit with the principle of open justice or the right of anyone fairly to report proceedings in a court of justice. (Paragraphs 23 and 27)*

It is hard to reconcile the Review’s proposal that open access should only be granted to pleadings and judgments in proceedings which have been concluded with the notion of open justice. The justification in the Review for such a radical restriction appears to draw upon PNBSCG2 paragraph 14, in which it is suggested that affidavits, statements, exhibits and pleading may contain matter that is scandalous, frivolous, vexatious, irrelevant or otherwise oppressive. Importantly however, PNBSCG2 continues as follows: “UCPR 4.5 allows the Court to order this type of matter to be struck out of a document”. Plainly, this is the appropriate remedy. In addition, as is well known, severe sanctions can apply to a party or counsel who advances or pleads allegations in the nature of fraud without sufficient factual foundation.

The Review goes on to make the obvious point that pleadings “often” (you could say “invariably”) contain untested allegations, and to reason from there that access should therefore be denied, until proceedings have been concluded. By parity of

reasoning it would follow that contemporaneous reporting of oral evidence should be prohibited – clearly an unacceptable proposition in a democratic system based on open justice.

As the law of defamation recognises, members of the public are aware, in general terms, of the fundamentally adversarial nature of our jurisprudence. They appreciate that our court system depends, in both the civil or criminal sphere, upon the public weighing and testing of conflicting evidence in an open forum. The fact that some transitory damage to reputation may result, as a by-product, from the exposure of evidence or submissions from one side or the other is an entirely reasonable price to pay for a system of open and transparent justice.

To adopt the Review's recommendations, and tilt the balance substantially away from open justice, based in turn on a concern that in a minority of cases pleaders may not abide by the rules, is to pay insufficient attention to the positive contribution the ability to provide fair and accurate reports of court proceedings makes to the due administration of justice. The proposal is also likely to lead to inaccuracy in court reports.

This proposal should not be supported. Instead, serious consideration should be given to harmonising the NSW provisions with those which currently operate in the Federal Court and Supreme Court of Victoria.

So far as this proposal restricts access to exhibits, to which a right of access presently exists under PNBSCG2, it is not good policy. Our reasons for saying this need are set out in relation to proposal 15 below.

### **Proposal 6 – Personal information**

This unworkable proposal provides wide avenues for abuse, in that parties wishing to avoid scrutiny might file documents in such form that it is not practicable for the information in question to be redacted, such that the Court will then refuse access.

This is an onerous proposal which, if accepted, will increase court costs, the cost of litigation and the cost and complexity of obtaining access to otherwise open access documents. It also introduces the precise element of discretionary uncertainty which the proposals are designed to avoid.

### **Proposal 7**

This proposal illustrates the problems inherent in attempting to codify a system which currently operates quite well on the basis of specific and precise statutory non-publication regimes coupled with an overriding discretion in the courts. The logistical problem of redacting such information from transcripts and other open access documents is obvious.

One of the arguments advanced in support of open justice principles in relation to the names of witnesses is that:

*“If it is published up and down the country other witnesses may discover that they can help in regard to the case and come forward. That, of course, is not unusual, and if the witnesses names are not given, it may tend to prevent other witnesses coming forward in that way”*

*R v Socialist Worker; ex-parte AG [1973] QB 637 per Lord Widgery CJ*

Birth dates and addresses are often used to distinguish the person charged from those with similar names, thus avoiding collateral damage to the reputation of those unconnected with the case. In general, though, the proposal concerning birth dates and addresses is not a major concern.

The identity of an informer may often be a live issue in proceedings, in which a jury is told of the identity of an informer and that such person has been provided with immunity from prosecution in return for giving evidence. The remarks made above in relation to the naming of witnesses generally apply. The naming of well-known police informers such as Richard Seary and Danny Shakespeare in open court produced essential evidence by way of contradiction. A blanket prohibition like that proposed is unnecessary and has the potential to cause an injustice. In any event, the identity of police informers is a well-established exception to the open justice rule, such that a suppression, pseudonym or non-publication order will invariably be granted. The proposal would mean that judgements in which such information is published in open court would have to be redacted, or rendered restricted closed access.

Confidential information is presently a category of exception to the open justice principle, in which courts can and do make appropriately tailored orders. Attempting to deal with it by way of a broad exclusionary principle is an unnecessary fetter on open justice.

The confidentiality of tax file numbers, Medicare numbers, juvenile offenders, sexual assault victims and health information are already the subject of specifically targeted provisions. This proposal is unnecessary. To take but one example, it is open to the Court in sentencing a juvenile offender to order that, pursuant to section 11 of the Children (Criminal Proceedings) Act, the identity of the offender may be published. The proposal would have the practical effect of entirely frustrating such an order.

### **Proposal 8 – Restricted access documents**

It is arguable that at least some of the documents falling within categories 2, 3, 5, 8 and 9 ought not to be automatically subject to an open access regime. Provision should be made, however, for the person most affected to voluntarily allow the document's publication.

The Review's assertion that "the inherent privacy, confidentiality or welfare concepts" which attach to documents falling within any of the categories identified in this proposal "will normally outweigh the principle of open justice or not significantly detract from the adherence of (sic) open justice" it is wrong both as a statement of fact and a proposition of law. There is no right of privacy, inherent or otherwise, known to Australian law: *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1. There is, in any event, no legal principle which states that that privacy, confidentiality or "welfare concerns" (whatever they might be) will "outweigh the principle of open justice". The law is, in fact, all the other way: *John Fairfax and Sons Ltd v Police Tribunal (NSW)* (1986) 5NSWLR 465.

As regards antecedents, it is hard to understand how the suppression of a defendant's criminal record, tendered in court on sentencing, on the basis that it may otherwise lead to community victimisation or impact on his employment and commercial dealings can co-exist with the principles of open justice and an understanding by the public of judicial sentencing decisions. This proposal is also in tension with proposal 5 insofar as that proposal refers to statements tendered in open court.

As regards documents in support of suppression and non-publication orders it is self-evident that in the event that such an application fails, the documents relied on in making it should not achieve a higher level of protection than the underlying application itself.

### **Proposal 9 – Leave to access restricted documents**

Fairfax agrees with this proposal.

### **Proposal 10 - Privacy Act**

This proposal has potentially very serious ramifications for access to documents classified as restricted access. There is no discussion at all in the Review of its scope, how it would work in practice, or how it would operate with proposal 9. Fairfax believes the position should remain as it presently is, namely that documents relating to court proceedings fall outside the scope of this legislation.

### **Proposal 11 – Electronic compilation of open access documents**

The implications of this proposal need to be considered further. Would, for example, the inclusion of hypertext links to transcript or judgments from articles retrievable via a search web-based news archive amount to electronic compilation of open access information?

It seems that this proposal would catch legal information retrieval systems such as austlii.

It is hard to see the reasonable purpose of the first, general part of the proposal. So far as data-mining is concerned, the provisions needs to be the subject of further detailed analysis.

### **Proposal 12 - Electronic searches**

An approved agency has not been defined. The potential impact upon legal information retrieval systems using full text search techniques may be very serious and serve no reasonable purpose.

### **Proposal 13 – Time limits on access**

Fairfax agrees with this proposal.

### **Proposal 14 – Restricted records of conviction**

This mischief to which proposal is directed is far better dealt with by an amendment to section 13 of the Criminal Records Act, so as to provide protection to the court or registrar releasing the information.

### **Proposal 15 – Exhibits**

Once exhibits are admitted into evidence, the principle of open justice requires that access be provided to them in the absence of an order to the contrary. The existing practice notes recognise this.

This proposal diametrically opposed to Hulme J's observations in *R v O'Grady* [2000] NSWSC 1256 (6 December 2000) on the importance of courts being conducted publicly, even though those observations are quoted in the Review. The Review fails to distinguish between civil and criminal proceedings. The basis for the proposal appears to be that open access to, say, video or audio recordings, might lead to disproportionate and unfair emphasis being placed upon them in the context of court reports.

That line of reasoning has no application to civil matters, non-indictable offences, inquests and a range of other non-jury matters. It also confuses access with wider publication, which will always be subject to the common law of contempt. It also overlooks the court's power to issue suppression, non-access or non-publication orders concerning specific exhibits – a decision which the trial judge is in the best position to make.

The Review deals with allowing access to dangerous or prohibited forensic material. The trial judge is in the best position to control such access, and exhibits can and are admitted into evidence, subject to appropriate orders as to access. There is no suggestion in the review that the current system in this area is failing.

This proposal is wrong in principle and Fairfax opposes it.

### **Proposal 16 – Statutory non-publication orders**

Fairfax supports this proposal, provided it is stated that all it does is to confirm the existing power, which remains to be exercised according to existing common law principles.

### **Proposal 17 – Statutory non-identification orders**

Fairfax supports this proposal, provided it is stated that all it does is to confirm the existing power, which remains to be exercised according to existing common law principles.

### **Proposal 18 – Web based non-publication orders**

This proposal represents a shift away from well established authority. It applies a different test to precisely the same information, depending on the form in which it is held or communicated, as opposed to its content.

Fairfax opposes this proposal, which amounts to the introduction of a statutory power to injunct an apprehended contempt, on grounds far narrower than would be sufficient to make out a sub-judice contempt at common aw.

The test at common law is whether there is a real chance, as opposed to a remote possibility, that as a matter of practical reality there will be serious risk of prejudice. That principles is also qualified by the maxim that ongoing discussion of matters of public controversy will not constitute a contempt where the prejudice occasioned is an incidental and unintended by-product of such discussion.

The courts have other mechanisms at their disposal in the form of directions, orders for split trial and the like. There is no demonstrated need for the new power proposal..

Exercise of such power is likely to prove ineffective, as usually articles will already have been caught and cached by automated web crawlers, and thus will be accessible via search engines, such as Google, on web-sites located out of the jurisdiction, over which the publisher has no control.

To assume the need for such a power is to assume that jurors do not take their oaths seriously. It ignores the approach to juries articulated by Spigelman CJ in *John Fairfax Publications Pty Ltd & Anor v District Court of NSW & Ors* referred to under proposal 4 above. The appropriate remedy for the kind of vice towards which this provision is directed is an appropriate direction from the trial judge.

**Proposal 19 – Take down notices to online law publishers**

Fairfax opposes this proposal, for the reasons outlined above in proposal 18.

**Proposal 20**

This should be considered by the Family Law and Criminal Law Committees.

**Proposal 21 – State Archives**

Fairfax supports this proposal, although recommends that the 75 years ought to be reduced to 25 years.

**Proposal 22 - Fees**

Fairfax believes that given the benefits that flow from the reporting of court proceedings, the media should be exempt from fees imposed on access to court information.