



IMF (Australia) Ltd

**SUBMISSION TO THE NEW SOUTH WALES ATTORNEY
GENERAL IN RELATION TO THE REVIEW OF THE POLICY ON
ACCESS TO COURT INFORMATION**

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REVIEW OF THE POLICY ON ACCESS TO COURT INFORMATION

“The principle that justice must be seen to be done – to which I will refer as the principle of open justice – is one of the most pervasive axioms of the administration of justice in our legal system....The principle of open justice should be understood as so fundamental an axiom of Australian law, as to be of constitutional significance.”

Chief Justice Spigelman¹

1. IMF (Australia) Ltd (‘IMF’) supports removing unnecessary discretion and artificial barriers to access of information and documents to create greater certainty in relation to non-parties’ rights of access.
2. IMF has some concerns, however, about two of the Proposals in the NSW Attorney General’s April 2006 Draft Review (‘**the Review**’).
3. It would be anathema for a piece of new legislation to conflict with one of the most fundamental principles in the legal system – that of open justice.
4. That principle is best embodied in the aphorism that “justice should not only be done but should manifestly and undoubtedly be seen to be done”².
5. IMF submits that restricting access to the originating process and pleadings until the conclusion of the case, and restricting access to documentary exhibits tendered to the Court during the trial, conflicts with the principle of open justice. Accordingly, Proposals 5 and 15 in the Review must be reconsidered:
 - (a) Proposal 5 seeks to restrict access to the originating process and pleadings *until a case has concluded*;

Proposal 5:

Unless the Court orders otherwise, the following documents & information in the civil jurisdiction of the Court shall be classified as open access:

- 1. Judgments and Orders**
- 2. Originating Process and pleadings on concluded cases**
- 3. Transcript of evidence of open court proceedings**

¹ “Seen to be done: The Principle of Open Justice – Part I” (2000) 74 *Australian Law Journal* 290 at 292-3.

² See *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259. The aphorism has been expressly adopted by the High Court of Australia on several occasions: see *Stollery v Greyhound Racing Control Board* (1973) 128 CLR 509 at 518-519 and *Webb & Hay v The Queen* (1994) 181 CLR 41 at 47.

4. Statements and affidavits admitted into evidence
5. Court listing and case history information

and

- (b) Proposal 15 seeks to restrict access to exhibits, including documentary exhibits, even after proceedings have concluded.

Proposal 15:

The protocols relating to access to court information and documents should not extend to exhibits, including documentary exhibits, other than witnesses' statements tendered as evidence. The Court should retain the discretion to allow access to exhibits. The guidelines creating a presumption in favour of release of exhibits should be removed.

Recognising the Principle of Open Justice

6. The common law of England first recognised the right to inspect and copy judicial records as early as the fourteenth century.³
7. The fundamental application of the principle of open justice is that judicial proceedings be conducted in an open court, to which the public has access.
8. As early as 1913, the High Court of Australia held that sections 15 and 16 of the *Judiciary Act* showed an intention on the part of the legislature that the jurisdiction of the Court be publicly exercised.⁴

Concerns about restricting access to the originating process and pleadings to concluded cases

9. Integral to the conduct of cases in public is an access regime that allows members of the public not only to review and understand the *outcome* of cases, but also a capacity to review and understand the *process* by which the Court arrives at those outcomes. Restricting the public's access to the originating process and pleadings to *concluded cases* conflicts with the fundamental principles of open justice, and will hamper the public's ability to understand the decision making process of the Court.

³ In 1372, an ordinance of the English Parliament broadened a common law right to allow access to court records and evidence, whether or not the material was used against the King: see Note "The Common Law right to Inspect and Copy Judicial Records: In Camera or On Camera" (1982) 16 Georgia L Rev 659 at 661.

⁴ *Dickason v Dickason* (1913) 17 CLR 50, cited in Nettheim G, "The principle of open justice" (1986) 8 U Tas LR 28 at 37.

10. IMF submits that an open justice system allows members of the public to understand the nature of the controversy that has been brought before the Court and the justification for invoking the Court's jurisdiction in a particular case.
11. Public oversight of the Court's process operates as a safeguard to ensure judges act impartially. Again, to highlight the words of Chief Justice Spigelman, "impartiality must not only exist, it must be palpable"⁵.
12. Most members of the public are sufficiently sophisticated to discern between allegations made in an originating process and the decision of a Court relating to those allegations. In *Mirror Newspapers v Harrison* (1982) 149 CLR 293, Mason J said (at 300-301) that a reader of the press was able to distinguish between charges laid against a person and their guilt or innocence, which is determined by a Court.
13. In a recent decision in the Federal Court of Australia⁶, Rares J applied the views of Mason J to civil litigation, when he said:

"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."

14. Applying the Rules of the Federal Court, Rares J said⁷:

"The originating process and pleadings in proceedings initiated in a court of justice such as this court with rules such as O 46 r 6, are intended by the rules of the court to be available to the public. That is so that they may see what is the controversy brought to the court for resolution by it in its ordinary function as a court constituted under Chapter III of the Constitution."

15. Any legislation adopted to govern access to documents in the NSW Supreme Court should grant access to the originating process and pleadings *prior to trial*, unless the Court determines there is a particular reason for access not being granted.
16. Given the length of time between the filing of a civil case, and its resolution (especially in commercial matters), an entitlement to early access to the

⁵ "Seen to be done: The Principle of Open Justice – Part II" (2000) 74 *Australian Law Journal* 378 at 379.

⁶ *Llewellyn v Nine Network Australia Pty Limited* [2006] FCA 836 at [27].

⁷ *Ibid* at [28].

originating process and pleadings is critical if the public's confidence in the administration of justice is to be maintained.⁸

17. It also seems nonsensical to allow access to statements and affidavits, which contain evidence, at the time they are admitted into evidence, but not to allow public access to pleadings, which contain only a summary of that evidence, until the conclusion of the case.

Concerns about restricting access to exhibits

18. IMF submits that the same principles of open justice outlined above should be applied when considering access to exhibits.
19. IMF acknowledges that certain exhibits may contain confidential information and it would therefore be appropriate to classify some exhibits as restricted documents, as applies in the status quo.
20. However, in order for members of the public to be able to determine the process by which the Court arrives at a decision, and the basis for a particular decision, the public must be entitled to see the same evidence as seen by the judge (subject to the removal of information which is truly of a confidential nature).
21. Exhibits to statements and affidavits often contain evidence which is critical to the Court's decision-making process. A statement or affidavit will often not make sense without the exhibits. The removal of the presumption in favour of the release of exhibits amounts to an illegitimate restriction on public access to information before the Court.
22. IMF submits that:
 - (a) the NSW Supreme Court should allow non-parties to access exhibits admitted into evidence, except where the Court, or a Judge, has ordered that the exhibit is confidential; and
 - (b) a ruling of confidentiality should be the exception rather than the rule.⁹

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⁸ Maintaining public confidence in the administration of justice was recognised by the High Court as having the same meaning as the "majesty of the law": see Gummow J in *Mann v O'Neill* (1996-97) 191 CLR 204 at 245.

⁹ Rares J acknowledged in *Llewellyn v Nine Network Australia Pty Limited*, *Ibid* n 6, that the Federal Court Rules enabled a judge to decide material was truly confidential and on that basis should not be made available. However, His Honour said that such an order would be "an exceptional course" and that the parties invoking O46 R6(1) needed to do so at the time the documents were filed: see paragraph [22].