

THE PRINCIPLE OF OPEN JUSTICE AND THE JUDICIAL DUTY TO GIVE PUBLIC REASONS

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This article explores the common law duty of courts to provide publicly available reasons for their decisions. The pre-modern position was that a failure to provide reasons did not constitute an error of law. However, the position in Australia has evolved such that the duty to provide reasons is now considered an ‘incident of the judicial process’ and has been recognised more recently as flowing from the principle of open justice. Against the backdrop of the emerging case law in Australia linking the duty to provide reasons with the open justice principle, this article considers when and how such a duty is to be exercised, what it might require in terms of public access to, and publication of, reasons, and the circumstances in which the publication of reasons can be withheld or subject to suppression by the courts.

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I INTRODUCTION

The principle of open justice — ‘that justice should not only be done, but should manifestly and undoubtedly be seen to be done’¹ — is a central feature of the administration of justice under the common law.² The open justice principle operates not only as an overarching principle guiding judicial decision-making and various aspects of procedure,³ it also gives rise to a number of substantive open justice *rules* that, in the usual course of events, a court must follow.⁴ Such rules include: first, that judicial proceedings are conducted,⁵ and decisions pronounced,⁶ in ‘open court’; second, that evidence is communicated publicly to those present in the court;⁷ and, third, that

¹ *R v Sussex Justices; Ex parte McCarthy* [1924] KB 256, 259 (Lord Hewart CJ).

² Chief Justice J J Spigelman, ‘Seen to Be Done: The Principle of Open Justice’ (Pt I) (2000) 74 *Australian Law Journal* 290, 292. Indeed, it is of such importance that it is given constitutional status in Australia as the ‘authentic hall-mark’ that distinguishes the exercise of judicial power from that of executive or administrative power: *McPherson v McPherson* [1936] AC 177, 200 (Lord Blanesburgh for Lords Blanesburgh, Macmillan and Wright); *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J). The constitutional significance of the principle was first recognised by Lord Shaw in *Scott v Scott* [1913] AC 417, 473–5. See also more recent Australian constitutional cases, where adherence to the open justice principle has been described as a ‘defining’ or ‘essential’ characteristic of courts for the purposes of ch III of the *Constitution*: *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638, 659 [67] (French CJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J) (‘*Wainohu*’); *Hogan v Hinch* (2011) 243 CLR 506, 530 [20] (French CJ). It is also seen as a defining feature of the right to a fair trial: see, eg, *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 6, as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) (‘*European Convention on Human Rights*’).

³ Chief Justice Spigelman, ‘Seen to Be Done’ (Pt I), above n 2, 292; Chief Justice J J Spigelman, ‘The Principle of Open Justice: A Comparative Perspective’ (2006) 29(2) *University of New South Wales Law Journal* 147, 153.

⁴ Chief Justice Spigelman, ‘Seen to Be Done’ (Pt I), above n 2; Chief Justice Spigelman, ‘The Principle of Open Justice: A Comparative Perspective’, above n 3.

⁵ *Scott v Scott* [1913] AC 417, 434–5 (Viscount Haldane LC); *Dickason v Dickason* (1913) 17 CLR 50, 51 (Barton AC); *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 476–7 (McHugh JA).

⁶ See, eg, *Wandin Springs v Wagner* [1991] 2 VR 496; *Carra v Hamilton* (2001) 3 VR 114, 122 (Balmford J); *Ho v Lonergan* [2013] WASCA 20 (5 February 2013).

⁷ *A-G (UK) v Levens Magazine Ltd* [1979] AC 440, 450 (Lord Diplock).

nothing should be done to discourage the making of fair and accurate reports of judicial proceedings, including by the media.⁸ However, the rules to which the open justice principle gives rise are not absolute.⁹ In circumstances where it is necessary to avoid prejudice to the administration of justice in particular proceedings¹⁰ or to avoid some other relevant harm — such as, for example, undue distress or embarrassment to a victim of a sexual offence¹¹ — courts can derogate from the open justice rules by ordering that proceedings be heard in closed court (‘in camera’ orders), that certain evidence be concealed from the public (‘concealment’ orders), or that the publicity given to particular proceedings be restricted (‘suppression’ or ‘non-publication’ orders). Despite the exceptional nature of any such measure,¹² substantial criticism in recent years has focused on the frequency with which some Australian courts make suppression orders — especially in Victoria, South Australia and, more recently, in New South Wales.¹³ Indeed, in Victoria, problems identified with the number, breadth and clarity of orders has led to the recent introduction of the *Open Courts Act 2013* (Vic) to tighten up the circumstances in which suppression orders can be made. Similar legislation has also been passed in New South Wales¹⁴ and at the federal level.¹⁵ However, what has been largely overlooked in these discussions and law reform efforts is that some Australian courts frequently engage in a particularly extreme, and, in some instances, far more hidden method of derogating from the open justice principle by suppressing or withholding the publication of the reasons for their decisions.¹⁶

⁸ Ibid; *Hogan v Hinch* (2011) 243 CLR 506, 532 [22] (French CJ); *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, 335 [15] (Gleeson CJ and Gummow J); *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 476–9 (McHugh JA).

⁹ *Hogan v Hinch* (2011) 243 CLR 506, 530 [20] (French CJ).

¹⁰ *Scott v Scott* [1913] AC 417, 436–7 (Viscount Haldane LC).

¹¹ See, eg, *Open Courts Act 2013* (Vic) s 18(1)(d).

¹² Courts have described the making of a suppression order as ‘wholly exceptional’: see, eg, *Herald & Weekly Times Pty Ltd v Magistrates Court of Victoria* (2004) 21 VAR 117, 120 [15] (Whelan J), quoting *R v Pomeroy* [2002] VSC 178 (20 May 2002) [11] (Teague J).

¹³ See, eg, Jason Bosland and Ashleigh Bagnall, ‘An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12’ (2013) 35 *Sydney Law Review* 671.

¹⁴ *Court Suppression and Non-Publication Orders Act 2010* (NSW).

¹⁵ *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth).

¹⁶ Courts do not always make orders directed specifically at the suppression of reasons themselves. Instead, courts will often refrain from publishing reasons in order to comply with other suppression orders that are on foot — for example, where there are orders restraining the publication of a defendant’s name: see, eg, *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, discussed in Part IV below. Furthermore, in some instances courts will withhold the publication of reasons in the absence of any order at all: see, eg, *Matthews v The Queen*

Such is the current practice adopted by superior courts in Victoria, New South Wales and Western Australia.¹⁷

At the time of writing, a search of the Australasian Legal Information Institute database ('AustLII') (a free online legal database of Australian judgments)¹⁸ revealed that in Western Australia, 47 judgments of the Supreme Court and 17 of the Court of Appeal were suppressed, with one such decision going back as far as 1999.¹⁹ Alarming, 24 of the suppressed judgments were handed down in 2013 alone. The AustLII entry for each suppressed judgment contains only the standard case name 'Judgment Suppressed', the court's medium neutral citation and the date of the decision. There is no indication as to the nature of the proceeding, the reasons for suppression, or the identity of the presiding judge. Likewise, judicial reasons are often subject to suppression in New South Wales. At the time of writing, a search of AustLII revealed that nine judgments were suppressed in New South Wales: five Supreme Court judgments, two Court of Criminal Appeal judgments and two District Court judgments. One such judgment from the Court of Criminal Appeal was originally handed down in 1999.²⁰ Again, consistent with the practice in Western Australia, each suppressed decision contains only the case name 'Decision Restricted', the court's medium neutral citation and the decision date, and there is no indication as to the subject matter of the cases. However, unlike in Western Australia, it appears that the name of the presiding judge is always disclosed.

In Victoria, the suppression of judgments is much more secretive. This is because no record enters the public domain (for example, on AustLII) to indicate that a decision has been suppressed or withheld. The usual practice is that all judgments of the Supreme Court of Victoria and the Court of Appeal are sent to the Supreme Court Library, with the Library then forwarding them to AustLII. But a judgment will not be forwarded to AustLII if, consistently with guidelines published by the Supreme Court, the medium neutral citation number is followed by one of the following letters: 'R' (where access to the

[No 2] [2013] NSWCCA 194 (23 August 2013). The reasons in *Judgment Suppressed* [1999] WASCA 29 (24 May 1999) have also been withheld from publication, not because there is a suppression order in place, but because publication of unredacted reasons would potentially breach or result in the breach of other laws.

¹⁷ The authors were unable to obtain any evidence of judgments being suppressed or withheld from publication in other Australian jurisdictions.

¹⁸ Australasian Legal Information Institute, *Australasian Legal Information Institute* <<http://www.austlii.edu.au/>>.

¹⁹ *Judgment Suppressed* [1999] WASCA 29 (24 May 1999).

²⁰ *Decision Restricted* [1999] NSWCCA 306 (17 September 1999).

judgment is restricted); ‘W’ (where a judgment is withheld); ‘P’ (where a judgment is permanently restricted); or ‘T’ (where a judgment is temporarily restricted).²¹ The Library simply holds onto the judgment until the Court lifts the embargo on publication. There is no public information as to the number of judgments currently designated as ‘restricted access’, nor is there any information as to the nature of the cases where publication of reasons is currently restricted.

Against the backdrop of the practice just described, this article considers the duty of courts to provide public statements of reasons for their decisions as a requirement of the principle of open justice. It does this by examining the open justice principle as it relates to three issues: the duty to give reasons; the duty to give *public* reasons; and the circumstances in which a court can suppress or withhold the publication of its reasons. Part II considers the duty of courts to give reasons. In pre-modern times, the failure to pronounce reasons, even to the parties themselves, did not constitute an error of law.²² Nor was the giving of, or failure to give, reasons seen as engaging the open justice principle. However, the position in Australia, as in most other common law countries, has evolved. As outlined in Part II, the development of the duty to provide reasons is such that it is now seen not only as an ‘incident of the judicial process’²³ but also by some courts as an *expression* of the open justice principle.²⁴ Consequently, it is argued that an additional rule based on the open justice principle — the ‘public reasons rule’, as we have called it — appears to have emerged in the case law, which imposes an obligation on courts to give public reasons for all but minor interlocutory decisions.²⁵ The rule, however, is in nascent form and is far from universally accepted.

A number of uncertain consequences flow from this important but largely unacknowledged development. As explored in Part III, the recognition that the open justice principle imposes an obligation on courts to provide reasons suggests that such reasons must be *public*. But what is required in terms of publicity of reasons under the public reasons rule remains unclear and has not

²¹ Supreme Court of Victoria, *Media Policies and Practices* (2010) 13 (on file with authors). The Court has subsequently released Supreme Court of Victoria, *Media Policies and Practices* (2014).

²² See, eg, Justice Michael Kirby, ‘Reasons for Judgment: “Always Permissible, Usually Desirable and Often Obligatory”’ (1994) 12 *Australian Bar Review* 121, 123; *Coleman v Dunlop Ltd* [1998] PIQR 398, 403 (Henry LJ).

²³ *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 667 (Gibbs CJ), quoting *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 386 (Mahoney JA).

²⁴ See, eg, *Wainohu* (2011) 243 CLR 181, 215 [58] (French CJ and Kiefel J).

²⁵ See Part II(A)(3) below.

yet been the subject of determination by the courts. Part III considers whether the publicity requirement of the rule should go further than simply requiring courts to pronounce reasons in open court. First, it considers whether it should also be seen as establishing a non-party right of access to reasons upon request and, second, whether it should be understood to impose further positive obligations on courts in relation to the broader *publication* of their reasons to the public. Part IV explores when and how courts can depart from the public reasons rule by suppressing or withholding the publication of their reasons. It is argued that any decision to derogate from the publicity requirement imposed by the rule — like derogations from the other open justice rules discussed above — should be subject to the strict test of necessity. Furthermore, it is argued that the application of the necessity test will rarely justify the suppression or withholding of reasons in their entirety. Nevertheless, on the basis of the limited information that is available, it appears that the approach of the courts to the suppression or withholding of entire reasons has been inconsistent and there is evidence that it has been undertaken in circumstances where it does not meet the requirements of the necessity test. Part V provides some concluding comments regarding s 16 of the *Open Courts Act 2013* (Vic), which purports to reinforce the existing common law duty of courts in Victoria to provide public reasons, and suggests, albeit briefly and in very general terms, what matters would need to be addressed if the duty to give public reasons were to be put on a more robust statutory footing.

II THE EVOLUTION OF THE LEGAL DUTY TO GIVE REASONS

It is entrenched as ‘both the norm and the ideal’²⁶ of the common law tradition that judges give reasons for their decisions. Judges and legal academics frequently offer a range of convincing justifications for requiring reasons. They are only briefly rehearsed here. For one, it is said that reason is the very essence of judicial decision-making, as compared to arbitrary forms of state-sanctioned decisions.²⁷ Thus, a statement of reasons helps ensure — for the

²⁶ Frederick Schauer, ‘Giving Reasons’ (1995) 47 *Stanford Law Review* 633, 633.

²⁷ *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 278–9 (McHugh JA) (‘*Soulemezis*’). Sir Alfred Denning said that a reasoned decision is ‘the whole difference between a judicial decision and an arbitrary one’: Sir Alfred Denning, *Freedom under the Law* (Stevens & Sons, 1949) 91, quoted in Michael Taggart, ‘Should Canadian Judges Be Legally Required to Give Reasoned Decisions in Civil Cases?’ (1983) 33 *University of Toronto Law Journal* 1, 6. Reasons have been described as essential to ‘turning unruly areas of unfettered discretion into orderly systems guided by rules’: Kenneth Culp Davis, ‘Open Findings, Open

judge, the parties and the public alike — that the decision is, in fact, one arrived at by reason and that all of the relevant submissions, arguments and evidence in that reasoning process have been fairly considered.²⁸ In this way, the giving of reasons is said to promote ‘good decision making’,²⁹ demonstrates ‘an absence of arbitrariness’,³⁰ and acts as an important check on the exercise of judicial power.³¹ In turn, reasons work to encourage the acceptance of decisions³² and to reinforce confidence in the administration of justice.³³ Reasons have also been described as, both philosophically and practically, essential to the very operation of the common law,³⁴ including the principle of *stare decisis*³⁵ and, perhaps even more fundamentally, the rule of law.³⁶ Thus, it is only through the provision of reasons that the common law as developed by the courts is made accessible to ‘all persons and authorities within the state’³⁷

Reasons, and Open Precedents in American Administrative Decisions’ in John N Hazard and Wenceslas J Wagner (eds), *Legal Thought in the United States of America under Contemporary Pressures: Reports from the United States of America on Topics of Major Concern as Established for the VIII Congress of the International Academy of Comparative Law* (Etablissements Emile Bruylant, 1970) 603, 603. See also John Dewey, ‘Logical Method and Law’ (1924) 10 *Cornell Law Quarterly* 17, 24.

²⁸ Taggart, above n 27, 5; *Coleman v Dunlop* [1998] PIQR 398, 403 (Henry LJ).

²⁹ Chief Justice Murray Gleeson, ‘Judicial Accountability’ (1995) 2 *Judicial Review* 117, 122. See also *AK v Western Australia* (2008) 232 CLR 438, 481 [108] (Heydon J); *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430, 442 (Meagher JA) (*‘Beale v GIO (NSW)’*): ‘The requirement to provide reasons can operate prophylactically on the judicial mind, guarding against the birth of an unconsidered or impulsive decision’.

³⁰ J W Bridge, ‘The Duty to Give Reasons for Decisions as an Aspect of Natural Justice’ in D Lasok et al (eds), *Fundamental Duties* (Pergamon Press, 1980) 81, 82.

³¹ Taggart, above n 27, 6; Chief Justice Gleeson, above n 29, 122; *Beale v GIO (NSW)* (1997) 48 NSWLR 430, 442 (Meagher JA).

³² Taggart, above n 27, 5; Bridge, above n 30, 82; Chief Justice Gleeson, above n 29, 122; Justice Susan Kiefel, ‘Reasons for Judgment: Objects and Observations’ (Speech delivered at the Sir Harry Gibbs Law Dinner, Emmanuel College, The University of Queensland, 18 May 2012).

³³ Bridge, above n 30, 83; Taggart, above n 27, 6.

³⁴ See, eg, David Dyzenhaus and Michael Taggart, ‘Reasoned Decisions and Legal Theory’ in Douglas E Edlin (ed), *Common Law Theory* (Cambridge University Press, 2007) 134, 135.

³⁵ Taggart, above n 27, 8; Bridge, above n 30, 83.

³⁶ Justice G T Pagone, ‘Centipedes, Liars and Unconscious Bias’ (2009) 83 *Australian Law Journal* 255, 260–1. See also Jeremy Waldron, ‘The Concept and the Rule of Law’ (2008) 43 *Georgia Law Review* 1, 22; Joseph Raz, ‘The Rule of Law and Its Virtue’ in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2nd ed, 2009) 210, 214 (emphasis in original): ‘if the law is to be obeyed it must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it. This is the basic intuition from which the doctrine of the rule of law derives’.

³⁷ Lord Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 37.

and judges, in applying that law, can follow (or reject or distinguish, as the case may be) what was decided before.³⁸ Reasons are also said to perform an educative function, including for those operating outside the legal system. As stated by Meagher JA in *Beale v Government Insurance Office (NSW)*:

The educative effect does not stop with judges but extends to other lawyers, to government and to the public. Decisions of courts usually influence the way in which society acts and it is trite to point out that it is better to understand why one should act in a particular way.³⁹

Lastly, reasons indicate to the parties why they have won or lost and, in particular, enable a losing party to determine whether or not to pursue an appeal.⁴⁰ Where such an avenue is chosen, adequate reasons are vital to appellate review. Indeed, the absence of reasons for a decision will make it almost impossible for an appellate court to determine whether and, if so, how, a lower court has erred.⁴¹

These justifications — apart from that of enabling an appeal — clearly contemplate that reasons be given not only to the parties but also to the public. It is perhaps not surprising, therefore, that many of the justifications for requiring reasons tend to echo some of the justifications regularly invoked in support of the open justice principle. For example, the common law requirement that proceedings be conducted in full view of the public is said, like the giving of reasons, to guard against the exercise of arbitrary and partial decision-making⁴² and provides ‘an impetus for high judicial performance’.⁴³ As a result, open justice engenders confidence in the administration of justice

³⁸ Taggart, above n 27, 8; *Soulemezis* (1987) 10 NSWLR 247, 279 (McHugh JA).

³⁹ (1997) 48 NSWLR 430, 442.

⁴⁰ See, eg, *Pettitt v Dunkley* [1971] 1 NSWLR 376, 382 (Asprey JA); *Soulemezis* (1987) 10 NSWLR 247, 257 (Kirby P); Sir Frank Kitto, ‘Why Write Judgments?’ (1992) 66 *Australian Law Journal* 787, 788; Taggart, above n 27, 7; Bridge, above n 30, 83; Justice Kiefel, above n 32.

⁴¹ Taggart, above n 27, 7; Bridge, above n 30, 83.

⁴² *A-G (UK) v Levenson Magazine Ltd* [1979] AC 440, 450 (Lord Diplock).

⁴³ Des Butler and Sharon Rodrick, *Australian Media Law* (Lawbook, 4th ed, 2012) 206. See also *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J); Chief Justice Spigelman, ‘Seen to Be Done’ (Pt I), above n 2, 294. For a useful summary of all of the justifications for open justice, see Sharon Rodrick, ‘Open Justice, the Media and Avenues of Access to Documents on the Court Record’ (2006) 29(3) *University of New South Wales Law Journal* 90, 93–6. For an analysis of the history of the open justice principle, see, eg, Garth Nettheim, ‘The Principle of Open Justice’ (1984) 8 *University of Tasmania Law Review* 25; Peter Wright, ‘The Open Court: The Hallmark of Judicial Proceedings’ (1947) 25 *Canadian Bar Review* 721.

and contributes to the acceptance and authority of the court's decisions,⁴⁴ and, accordingly, has been recognised as central to fostering and maintaining the rule of law.⁴⁵ Openness of proceedings also serves, as do reasons, an educative function by allowing the public to learn not only about the court's processes but also how the law is interpreted and applied.⁴⁶

Some commentators, however, have gone further than merely recognising the congruency of these justifications by expressly acknowledging the important role that reasons play in *facilitating* open justice. In a 1973 speech given by Sir Frank Kitto, for example, the delivery of reasons was explained to be 'part and parcel of the open administration of justice' and that the judge 'is never so much on trial as when he [or she] is delivering judgment'.⁴⁷ In similar words, scholar John William Bridge has described reasons as 'part and parcel of seeing that justice is being done'.⁴⁸ But, despite the clear — some might say obvious — relationship between the giving of reasons and the principle of open justice, the courts have not traditionally seen open justice as having any bearing on the recognition of a legal duty of judges to give reasons for their decisions. Rather, it seems that until the latter part of the 20th century, as explored in the remainder of this section, there was no 'cross-fertilisation' between the vigorous jurisprudence surrounding the open justice principle and the 'cautious' and 'uncertain' approach of the courts to the development of a general duty to provide reasons.⁴⁹

A Legal Duty to Give Reasons

The traditional position under the common law was that judicial decision-making, whether of fact or of law, did not require the provision of reasons⁵⁰ —

⁴⁴ *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J); *R v Legal Aid Board; Ex parte Kaim Todner (a firm)* [1999] QB 966, 977 (Lord Woolf MR for Lord Woolf MR, Auld and Buxton LJ); Chief Justice Spigelman, 'Seen to Be Done' (Pt I), above n 2, 294–5.

⁴⁵ On the relationship between open justice, public confidence in the judiciary and the rule of law, see Chief Justice Beverley McLachlin, 'The Relationship between the Courts and the News Media' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media: Challenges in the Era of Digital and Social Media* (Halstead Press, 2012) 24.

⁴⁶ Butler and Rodrick, above n 43, 207; Rodrick, above n 43, 94.

⁴⁷ Kitto, above n 40, 790. See also Chief Justice Gleeson, above n 29, 122–4.

⁴⁸ Bridge, above n 30, 82.

⁴⁹ *Soulemezis* (1987) 10 NSWLR 247, 278 (McHugh JA).

⁵⁰ Some ancient authorities suggest that reasons were not required: see *R v Inhabitants of Audly* (1700) 2 Salk 526; 91 ER 448; *Inhabitants of South Cadbury v Inhabitants of Braddon* (1710) 2 Salk 607; 91 ER 515; *R v Inhabitants of Ripon* (1733) Kel W 295; 25 ER 623.

although some judges in appellate courts have provided reasons by convention for almost 800 years.⁵¹ There are a number of possible explanations for the reluctance of the courts during this time to recognise a general duty to give reasons. For one, reasons, when they were given, did not form part of the official ‘record’:⁵² the primary function of the record, known as the ‘Plea Rolls’, was to record the decision so that it would be final (now known as *res judicata*).⁵³ It was, in other words, ‘to show what was officially done, and nothing else’.⁵⁴ Nor was there a formal doctrine of precedent that could be said to underpin a requirement for reasons.⁵⁵ The reality is, of course, that the common law would not have developed as it did without judges explaining the reasons for their decisions.⁵⁶ For the purpose of deciding cases *similibus ad similia* (like cases in a like manner), the judges relied upon unofficial reports, making it, as one commentator has put it, ‘one of the most extraordinary features of English law that those indispensable reports were left to chance and to private enterprise’.⁵⁷ A further reason why there was no recognised general duty to give reasons, as pointed out by McHugh JA in *Soulezis v Dudley (Holdings) Pty Ltd* (‘*Soulezis*’), was that up until the late 19th century courts had very little cause to properly consider the matter.⁵⁸ Common law procedure saw juries (who, as the case remains, were not required to give reasons)⁵⁹ as the final arbiters on all questions of fact and

⁵¹ Dyzenhaus and Taggart, above n 34, 137. See also J L Montrose, ‘The Language of, and a Notation for, the Doctrine of Precedent’ (Pt I) (1952) 2 *University of Western Australia Annual Law Review* 301, 306.

⁵² Dyzenhaus and Taggart, above n 34, 138. See also Montrose, ‘The Language of, and a Notation for, the Doctrine of Precedent’ (Pt I) above n 51, 306; Sir Frederick Pollock, ‘Judicial Records’ (1913) 29 *Law Quarterly Review* 206, 212; Bridge, above n 30, 85.

⁵³ Pollock, ‘Judicial Records’, above n 52, 212; Bridge, above n 30, 85. See also John H Baker, ‘Records, Reports and the Origins of Case-Law in England’ in John H Baker (ed), *Judicial Records, Law Reports, and the Growth of Case Law* (Duncker & Humblot, 1989) 15. In *Craig v South Australia* (1995) 184 CLR 163, the High Court of Australia held that the reasons of an inferior court did not form part of the ‘court record’ for the purposes of certiorari, unless incorporated by reference.

⁵⁴ Pollock, ‘Judicial Records’, above n 52, 212.

⁵⁵ See generally Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008).

⁵⁶ Bridge, above n 30, 85.

⁵⁷ *Ibid.*

⁵⁸ (1987) 10 NSWLR 247, 277. See also Justice Michael Kirby, ‘Ex Tempore Judgments — Reasons on the Run’ (1995) 25 *University of Western Australia Law Review* 213, 218.

⁵⁹ See *Otis Elevators Pty Ltd v Zitis* (1986) 5 NSWLR 171, 199 (McHugh JA); *Casey City Council v Kohn* [2006] VSCA 82 (19 April 2006) [46] (Habersberger AJA).

there were few avenues of appeal or judicial review that provided the opportunity to raise the question.⁶⁰ It was not until judges became increasingly charged with the responsibility of determining factual issues, along with the significant broadening of statutory rights of appeal, that there was a 'fertile jurisdictional basis for the question to be raised'.⁶¹ But, once raised, opinions on the duty to give reasons varied widely.

Although it has long been acknowledged by courts of the highest authority that reasons are desirable and are given as a matter of practice,⁶² a small number of modern common law courts have maintained the historically accepted view that the common law does not require that judges provide reasons for their decisions.⁶³ In those cases, a failure to provide reasons was not, in and of itself, an error of law.⁶⁴ The Judicial Committee of the Privy Council appeared to adopt this approach as recently as 1952⁶⁵ and, until even

⁶⁰ *Soulemezis* (1987) 10 NSWLR 247, 277 (McHugh JA).

⁶¹ *Ibid* 277–8.

⁶² See, eg, *Deakin v Webb* (1904) 1 CLR 585, 604–5 (Griffith CJ).

⁶³ See, eg, *Nana Osei Assibey III, Kokofuhene v Nana Kwasi Agyeman, Boagyaahene* [1952] 2 All ER 1084; *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338, 352 (Denning LJ); *R v Southend Stipendiary Magistrate; Ex parte Rochford District Council* [1995] Env LR 1, 6 (Judge J); *Lawson v Lee* (1978) 19 SASR 442. See also *Swinburne v David Syme & Co* [1909] VLR 550, 566, where Madden CJ noted that although the provision of reasons is desirable, a judge 'is not bound to do so'. The view that there was no common law duty to provide reasons perhaps received greater support in the commentary: see, eg, H W R Wade, 'Statutory Tribunal's Duty to Give Reasons' (1963) 79 *Law Quarterly Review* 344, 346; J L Montrose, 'Reasoned Judgments' (1958) 21 *Modern Law Review* 80, 80; Montrose, 'The Language of, and a Notation for, the Doctrine of Precedent' (Pt I), above n 51, 306; Michael Akehurst, 'Statements of Reasons for Judicial and Administrative Decisions' (1970) 33 *Modern Law Review* 154, 154; S A de Smith, *Judicial Review of Administrative Action* (Stevens & Sons, 3rd ed, 1973) 128; S A de Smith, *de Smith's Judicial Review of Administrative Action* (Stevens & Sons, 4th ed, 1980) 195: 'Courts are not obliged at common law to give reasons'. Cf Lord Harry Woolf et al, *De Smith's Judicial Review* (Sweet & Maxwell, 7th ed, 2013) 442 [7-087]: 'Today not only the higher courts, but all courts, at least in relation to some decisions, are under such an obligation'.

⁶⁴ *Swinburne v David Syme & Co* [1909] VLR 550, 566 (Madden CJ).

⁶⁵ *Nana Osei Assibey III, Kokofuhene v Nana Kwasi Agyeman, Boagyaahene* [1952] 2 All ER 1084. See also *Selvanayagam v University of West Indies* [1983] 1 WLR 585, 588, where Lord Scarman, delivering the advice of the Privy Council, suggested that a trial judge did not need to make explicit findings in relation to each disputed piece of evidence. Rather, it was sufficient to state the final decision. Ho suggests that this latter case represents an outright rejection of the obligation to provide reasons: H L Ho, 'The Judicial Duty to Give Reasons' (2000) 20 *Legal Studies* 42, 43–4. See also *Stefan v General Medical Council* [1999] 1 WLR 1293, where the Privy Council recognised that there is sometimes a statutory duty to state reasons, but not a general duty. Cf *Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1984] 1 AC 729, where unequivocal support was given to a general duty to provide reasons.

more recently, it remained the position in New Zealand⁶⁶ and Canada.⁶⁷ The authorities, however, have overwhelmingly rejected this view and, as outlined in this section, it has been increasingly accepted in England and Australia (as well as in other common law jurisdictions) that judges are required, as a general rule, to provide reasons for their decisions. But even then, throughout the 20th century the justifications for, and content of, the obligation have given rise to differing interpretations. Some courts have limited the duty to decisions that attract a right of appeal; other courts have treated the duty much more broadly, relying on the notion that reasons are, to a greater or lesser extent, inherent to the exercise of judicial power; others still have appeared to vacillate between these different approaches. What is fair to say is that the duty has been in a process of evolution under the common law and, in many respects, remains in a state of uncertainty even today.

1 *Duty as an Incident of the Right to Appeal*

In 1891, in the House of Lords case of *Allcroft v Lord Bishop of London*, Lord Bramwell clearly adopted a broad understanding of when reasons should be given in the following obiter dictum:

Then it is said why if his decisions cannot be reviewed is he to state his reasons? Lindley LJ has given an excellent answer to this. It is that he may be under the necessity of forming a careful opinion, and one that will bear public examination. It is like *the constitutional duty of judges who give their reasons for their judgment though there is no appeal ...*⁶⁸

⁶⁶ See, eg, *R v Awatere* [1982] 1 NZLR 644; *R v MacPherson* [1982] 1 NZLR 650; *R v Jefferies* [1999] 3 NZLR 211, 215–16 [14]–[16] (Richardson P for Richardson P, Doogue and Goddard JJ).

⁶⁷ See, eg, *MacDonald v The Queen* [1977] 2 SCR 665, 672 (Laskin CJ for Laskin CJ, Martland, Judson, Ritchie, Pigeon, Dickson, Beetz and de Grandpré JJ):

Mere failure of a trial judge to give reasons, in the absence of any statutory or common law obligation to give them, does not raise a question of law. There is no such statutory obligation ... nor can I find, or be justified in fashioning, a common law rule applicable to all criminal trials. The desirability of giving reasons is unquestionable.

See also Taggart, above n 27, 1–13. The position in Canada has since ‘evolved’, at least in relation to criminal trials ‘where the accused’s innocence is at stake’: *R v REM* [2008] 3 SCR 3, 10 (McLachlin CJ for McLachlin CJ, Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ).

⁶⁸ [1891] AC 666, 678 (emphasis added). See also *Re Mercer* (1877) 7 Ch D 184, 187, where Jessel MR said:

The first observation I will make upon that case is that there are no reasons given for the decision. As a rule, Judges give reasons, though in many of the old cases the Judges gave

By 1898, however, it appeared that the English courts had rejected such an approach. In a series of matrimonial cases, beginning with the case of *Robinson v Robinson*,⁶⁹ it was held that reasons were necessary to enable effective statutory rights of appeal. Following these cases, it became generally accepted in England that a judge was obliged by law to state reasons for a decision where a right of appeal existed in relation to determinations of fact or law, or both.⁷⁰

The view that reasons are required primarily for the benefit of a court of appeal also received support in a long line of cases in Australia.⁷¹ Thus, in *Carlson v King*, in delivering the judgment of the Court, Jordan CJ said:

It has long been established that it is the duty of a Court of first instance, *from which an appeal lies to a higher Court*, to make, or cause to be made, a note of everything necessary to enable the case to be laid properly and sufficiently before the appellate Court if there should be an appeal. This includes not only the evidence, and the decision arrived at, but also the reasons for arriving at the decision. The duty is incumbent, not only upon magistrates ... and District Courts, but also upon this Court, from which an appeal lies to the High Court and the Privy Council ...⁷²

It was later confirmed in 1971 by the New South Wales Court of Appeal in *Pettitt v Dunkley* that 'there is as much a duty ... or an obligation imposed by law to give reasons in an appropriate case as there is otherwise a duty to act judicially' but that such reasons were *only* required for the benefit of enabling an appeal.⁷³ Thus, in dismissing the earlier suggestion of Cussen ACJ in the

no reasons; but where no reasons are given for a particular decision, it becomes extremely difficult for a Judge to follow it, because he does not know the principle on which the decision proceeded.

⁶⁹ [1898] P 153. See also *Cobb v Cobb* [1900] P 145; *Barker v Barker* (1905) 21 TLR 253. For later cases, see *Romilly v Romilly* (1934) 50 TLR 386, 387 (Bateson J), 387 (Langton J); *Sullivan v Sullivan* [1947] P 50; *Starkie v Starkie* [1953] 2 All ER 1255.

⁷⁰ Taggart, above n 27, 13.

⁷¹ See *Donovan v Edwards* [1922] VLR 87, 88 (Irvine CJ); *Brittingham v Williams* [1932] VLR 237, 239 (Cussen ACJ); *Ex parte Reid; Re Lynch* (1943) 43 SR (NSW) 207, 211–14 (Jordan CJ); *Ex parte Powter; Re Powter* (1945) 46 SR (NSW) 1, 4–5 (Jordan CJ); *Carlson v King* (1947) 64 WN (NSW) 65; *Lock v Gordon* [1966] VR 185; *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Donges v Ratcliffe* [1975] 1 NSWLR 501; *Watson v Anderson* (1976) 13 SASR 329; *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697, 701–2 (Moffitt P); *Perez v Transfield (Qld) Pty Ltd* [1979] Qd R 444; *Australian Timber Workers' Union v Monaro Sawmills Pty Ltd* (1980) 29 ALR 322.

⁷² (1947) 64 WN (NSW) 65, 66 (emphasis added) (citations omitted).

⁷³ [1971] 1 NSWLR 376, 387–8 (Moffitt JA).

Victorian case of *Brittingham v Williams* that the giving of reasons may also be desirable for the information of the parties,⁷⁴ Moffitt JA (with whom Manning JA agreed) said: 'I do not think there is any judicial duty to give reasons except so far as such duty can be related to a right of appeal'.⁷⁵ This meant that if a right of appeal were available only on a matter of law, no duty burdened a judge to provide reasons in relation to pure determinations of fact⁷⁶ — although determinations of fact may have required explanation where mixed questions of law and fact were involved.⁷⁷

2 Broader Duty to Give Reasons

During the latter part of the 20th century, the English courts⁷⁸ progressively began to accept the broader view that courts have a 'general duty'⁷⁹ to provide reasons as a 'function of due process'.⁸⁰ However, the rationales for doing so largely continued to emphasise the importance of reasons to the appellate process. In *Coleman v Dunlop Ltd*, for example, Henry LJ gave three explanations for requiring reasons.⁸¹ First, the giving of reasons ensures proper decision-making;⁸² second, the parties will be made aware why they have won

⁷⁴ [1932] VLR 237, 239.

⁷⁵ *Pettitt v Dunkley* [1971] 1 NSWLR 376, 388; see also at 387–8 (Manning JA).

⁷⁶ *Ibid* 389.

⁷⁷ *Ibid* 390.

⁷⁸ See *Capital & Suburban Properties Ltd v Swycher* [1976] 1 Ch 319, 325–6 (Buckley LJ); *Norton Tool Co Ltd v Tewson* [1973] 1 WLR 45, 49 (Sir John Donaldson P); *Alexander Machinery (Dudley) Ltd v Crabtree* [1974] ICR 120; *Tramontana Armadora SA v Atlantic Shipping Co SA* [1978] 2 All ER 870, 872 (Donaldson J); *R v Knightsbridge Crown Court; Ex parte International Sporting Club (London) Ltd* [1982] 1 QB 304, 314–15 (Griffiths LJ for Griffiths LJ and May J); *R v Immigration Appeal Tribunal; Ex parte Khan (Mahmud)* [1983] QB 790, 794–5 (Lord Lane CJ); *Hoey v Hoey* [1984] 1 WLR 464; *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119; *R v Harrow Crown Court; Ex parte Dave* [1994] 1 WLR 98, 101–7 (Pill J for Kennedy LJ and Pill J); *Coleman v Dunlop Ltd* [1998] PIQR 398; *Abada v Gray* (1997) 40 BMLR 116; *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, 381–2 (Henry LJ for Henry and Laws LJ and Hidden J).

⁷⁹ *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, 381 (Henry LJ for Henry and Laws LJ and Hidden J). See also *R v Knightsbridge Crown Court; Ex parte International Sporting Club (London) Ltd* [1982] 1 QB 304; *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119, 122 (Griffiths LJ); *R v Harrow Crown Court; Ex parte Dave* [1994] 1 WLR 98.

⁸⁰ *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, 381 (Henry LJ for Henry and Laws LJ and Hidden J).

⁸¹ [1998] PIQR 398, 403.

⁸² *Ibid*.

or lost, and whether the court has misdirected itself;⁸³ and, third, ‘the duty to give reasons ensures that the appellate court has the proper material to understand and do justice to the decisions taken at first instance’.⁸⁴ Certainly, Henry LJ gave no indication of a broader public interest in judicial reasons or that the duty to provide them was underpinned by the principle of open justice.⁸⁵

A broader view of the obligation to give reasons was also recognised in Australia as early as 1957 by Monahan J in the Victorian case of *De Iacovo v Lacanale*.⁸⁶ In considering an appeal against the decision of a magistrate sitting as the Rent Appeal Board for which reasons were not given, Monahan J reviewed earlier authorities and endorsed the following passage from Broom:

A public statement of the reasons for a judgment is due to the suitors and to the community at large — is essential to the establishment of fixed intelligible rules, and for the development of law as a science ... A judgment once delivered becomes the property of the profession and the public; it ought not, therefore, to be subsequently moulded in accordance with the vacillating opinions of the judge who first pronounced it.⁸⁷

This statement, which Monahan J accepted as having ‘general application to all persons exercising judicial functions’,⁸⁸ is significant because it clearly contemplates the public interest in the general availability of reasons. But at least until the 1980s, the seemingly broad approach of Monahan J largely remained an unacknowledged outlier in the Australian jurisprudence.⁸⁹ While each of the main judgments in *Pettitt v Dunkley* cited the case, the support it offered for a broader obligation to provide reasons went completely unnoted.⁹⁰

⁸³ Ibid. Henry LJ elaborated on this point in the later case of *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, 381.

⁸⁴ *Coleman v Dunlop* [1998] PIQR 398, 403.

⁸⁵ Some cases alluded to the broader public interest: see, eg, *Capital and Suburban Properties Ltd v Swycher* [1976] 1 Ch 319, 326, where Buckley LJ pointed out that ‘[i]t is of importance that the legal profession should know on what grounds cases are decided, particularly when questions of law are involved’.

⁸⁶ [1957] VR 553.

⁸⁷ Herbert Broom, *Constitutional Law Viewed in Relation to Common Law, and Exemplified by Cases* (William Maxwell, 1866) 152–3, quoted in *De Iacovo v Lacanale* [1957] VR 553, 558.

⁸⁸ *De Iacovo v Lacanale* [1957] VR 553, 558.

⁸⁹ The High Court has recently recognised that Monahan J endorsed the broad approach of Broom in *Wainohu* (2011) 243 CLR 181, 213 [54] (French CJ and Kiefel J). See also *Donges v Ratcliffe* [1975] 1 NSWLR 501, 505–6 (Rath J).

⁹⁰ [1971] 1 NSWLR 376, 380–1 (Asprey JA).

It was not until Mahoney JA's decision in 1983 in *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* ('*Tatmar*') that the duty to give reasons was again recognised in Australia as a broader 'incident of the judicial process' rather than as simply attendant to a right of appeal to a higher court.⁹¹ Mahoney JA's broader view soon after received the qualified support of Gibbs CJ (with whom Wilson J, Brennan J, Deane J and Dawson J agreed) in 1986 in *Public Service Board (NSW) v Osmond* ('*Osmond*'), a case concerning the duty of a statutory tribunal, rather than a court, to state reasons.⁹² But, despite adopting a broad approach to the provision of reasons, there was no suggestion in either *Tatmar* or *Osmond* that reasons, where required, must be published to the public or that open justice considerations were at all relevant to the duty.⁹³ Rather, this critical step was taken one year after *Osmond* in the 1987 New South Wales Court of Appeal decision of *Soulemezis*, where Kirby P⁹⁴ and McHugh JA,⁹⁵ in separate judgments, acknowledged for the first time in Australia, and possibly the common law world,⁹⁶ that the duty to give reasons is an aspect of the open justice principle.⁹⁷

⁹¹ [1983] 3 NSWLR 378, 386 (Mahoney JA). See also *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8; *Yates Property Corporation Pty Ltd (in liq) v Darling Harbour Authority* (1991) 24 NSWLR 156.

⁹² (1986) 159 CLR 656, 667.

⁹³ This is despite such cases being cited in support of an obligation to publish reasons to the public: see, eg, *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 1024 (14 November 2001) [23] (Einstein J). See also Chief Justice Spigelman, 'Seen to Be Done' (Pt I), above n 2, 294, 296 n 35.

⁹⁴ (1987) 10 NSWLR 247, 257–61.

⁹⁵ *Ibid* 277–81, cited in *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462, 483 (McPherson and Davies JJA) and *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8, 19 (Gray J).

⁹⁶ Note, however, that in *Scott v Scott* [1913] AC 417, 472, Lord Shaw quoted with approval the following passage from Commissioners Appointed to Inquire into the Practice and Jurisdiction of Ecclesiastical Courts in England and Wales, *Report of Commissioners* (1832):

The judgment of the Court is then pronounced upon the law and facts of the case; and in discharging this very responsible duty, the judge publicly, in open Court, assigns the reasons for his decisions, stating the principles and authorities on which he decides the matters of law, and reciting or adverting to the various parts of the evidence from which he deduces his conclusions of fact; and thus the matter in controversy between the parties becomes adjudged.

⁹⁷ It should be noted that recent decisions in England, New Zealand and Canada have also recognised the relationship between the giving of reasons and open justice, although it is unclear from these cases the extent to which the open justice principle is seen as informing any legal obligation to provide reasons: see *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2011] QB 218; *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR

3 *Open Justice and the Duty to Give Reasons*

In *Soulemezis*, the Compensation Court of New South Wales made a determination that the appellant was, as a matter of fact, 'fit for all work' by a particular date but the presiding judge did not explain the reasons for the finding.⁹⁸ While there was no available avenue of appeal on questions of fact, the appellant nevertheless claimed that the failure to provide sufficient reasons for the finding constituted an error of law.⁹⁹ Under the approach in *Pettitt v Dunkley* the appellant's claim would have failed — that is, as there was no avenue of appeal other than on matters of law the judge could not be obliged to state his findings of fact. However, in light of the comments made in both *Tatmar* and *Osmond*, this position could not be maintained. Rather, the New South Wales Court of Appeal in *Soulemezis* was required to examine what was meant in *Tatmar* and *Osmond* by requiring reasons as a broader 'incident of the judicial process'.

Mahoney JA, who gave the most conservative judgment in *Soulemezis*, repeated his reasoning from *Tatmar*¹⁰⁰ and explained: 'I meant by this that, in general terms, the giving of reasons is seen as part of the process of deciding a matter judicially rather than in the course of other and different forms of decision'.¹⁰¹ His Honour said, however, that while a court's *order* is a 'public act', a *statement of reasons* is 'a professional document, directed to the parties and their professional advisers'.¹⁰² Moreover, the fact that such reasons might develop or delineate the law 'is peripheral and not essential to its nature'.¹⁰³ His Honour, therefore, did not consider the duty to give reasons to be underpinned by broader considerations of public interest, public judicial accountability or open justice.

Kirby P and McHugh JA, on the other hand, took much broader views — although it was McHugh JA who provided the most comprehensive discussion

2409; *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546; *Wesselingh v New Zealand Police* [2013] NZHC 1993 (8 August 2013); *R v REM* [2008] 3 SCR 3.

⁹⁸ (1987) 10 NSWLR 247, 249, 257 (Kirby P).

⁹⁹ *Ibid* 252.

¹⁰⁰ [1983] 3 NSWLR 378, 385–6, quoted in *Soulemezis* (1987) 10 NSWLR 247, 269–71.

¹⁰¹ *Soulemezis* (1987) 10 NSWLR 247, 273.

¹⁰² *Ibid*.

¹⁰³ *Ibid*. This reasoning was adopted with apparent approval by the England and Wales Court of Appeal in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, 2417 [15] (Lord Phillips MR for Lord Phillips MR, Latham and Arden LJ), although it was acknowledged that one of the justifications given for the requirement for reasons is that 'justice must not only be done but be seen to be done'.

of the history, rationale and scope of the duty to give reasons. Rather than arising from a litigant's right of appeal, McHugh JA said, in clear reference to the open justice principle, that 'the duty rests on a wider basis: its foundation is the principle that justice must not only be done but it *must be seen to be done*'.¹⁰⁴ His Honour explained that the giving of reasons 'is correctly perceived as "a necessary incident of the judicial process" because it enables the basis of the decision to be seen and understood both for the instant case and for the future direction of the law'.¹⁰⁵ In this regard, McHugh JA saw the provision of reasons as serving at least three purposes. First, reasons are required for the information of the parties — that is, to enable 'the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge's decision'.¹⁰⁶ Second, the duty to provide reasons safeguards judicial accountability and acts as a constraint on the exercise of judicial power.¹⁰⁷ Third, reasons are necessary because courts 'formulate rules for application in future cases'.¹⁰⁸ According to his Honour, the giving of reasons, therefore, 'enables practitioners, legislators and *members of the public* to ascertain the basis upon which like cases will probably be decided in the future'.¹⁰⁹ McHugh JA, earlier in his judgment, also described 'rationality' as 'the hallmark of a judicial decision' and said that 'without the articulation of reasons, a judicial decision cannot be distinguished from an arbitrary decision'.¹¹⁰

In finding that the legal duty to give reasons has its foundations in the open justice principle, and that failure to comply with the duty will amount to an error of law, McHugh JA in *Soulemezis* clearly saw the duty as a *rule* flowing from the principle. His Honour was not, in other words, merely employing the legal concept of open justice as a guiding principle or as one of a number of relevant factors in the exercise of a broader discretion to give

¹⁰⁴ *Soulemezis* (1987) 10 NSWLR 247, 278 (emphasis added); see also at 259, where Kirby P alluded (without elaboration) to the significance of the open justice principle in the giving of reasons: 'Where nothing exists but an assertion of satisfaction on undifferentiated evidence the judicial obligation has not been discharged. Justice has not been done and it has not been seen to be done.'

¹⁰⁵ *Ibid* 279.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*; see also 258 (Kirby P).

¹⁰⁸ *Ibid* 279 (McHugh JA).

¹⁰⁹ *Ibid* (emphasis added).

¹¹⁰ *Ibid*.

reasons.¹¹¹ This is evidenced by the fact that even the *adequacy* of reasons, according to his Honour, is to be judged by reference to the open justice principle. Thus, the failure to adequately state a finding of fact will 'constitute an error of law if the failure can be characterised as a *breach* of the principle that justice must be seen to be done'.¹¹² The distinction between the open justice principle and a rule flowing from the principle is important in this context:¹¹³ it means that, if correctly characterised as an open justice *rule* (like the open court and fair and accurate report rules), courts *must* provide public reasons in all cases where the rule applies and that departure from that rule can only be justified on the grounds of strict necessity (discussed in Part IV).

Although some cases have followed *Soulemezis* by treating the duty, either explicitly or implicitly, as an open justice rule,¹¹⁴ the vast majority of subsequent cases dealing with the duty to give reasons have not acknowledged the important development in *Soulemezis*.¹¹⁵ In those cases, the relevance of the open justice principle to the giving of reasons has gone completely unnoted and the courts have continued to focus exclusively on the role of reasons in appellate review. On the other hand, while the High Court has not authoritatively ruled on the matter, a number of statements have appeared in cases concerning the exercise of the judicial power of the Commonwealth where the duty to give reasons, in addition to being one of the 'defining characteristics'

¹¹¹ *Contra Pasha v Edmonds* (1999) 28 MVR 217, 220 [14], where Smith J held that, rather than giving rise to the duty to give reasons, open justice was 'a very important separate or underlying consideration'.

¹¹² *Soulemezis* (1987) 10 NSWLR 247, 281 (emphasis added). See also *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8, 18 (Gray J); *Mifsud v Campbell* (1991) 21 NSWLR 725, 728 (Samuels JA).

¹¹³ See *Re Hogan; Ex parte West Australian Newspapers Ltd* (2010) 41 WAR 288, 295–7 [29]–[34] (McLure P).

¹¹⁴ See, eg, *Ives v Western Australia [No 2]* [2010] WASC 221 (3 September 2010) [5] (Le Miere J) (where it was held that the open justice principle gives rise to an obligation to publish reasons); *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 1024 (14 November 2001) [23] (Einstein J) (where it was held that the 'obligation of a court is to publish reasons for its decision'); *Mifsud v Campbell* (1991) 21 NSWLR 725, 728 (Samuels JA) (where it was held that failure to explain reasons for a factual finding will involve a 'breach' of the open justice principle); *Sun Alliance Insurance Ltd v Massoud* [1988] VR 8, 18–19 (Gray J) (where it was held that the adequacy of reasons must be such that justice can be seen to be done). See also Chief Justice Spigelman, 'The Principle of Open Justice: A Comparative Approach', above n 3, 154.

¹¹⁵ See, eg, *O'Brien v Noble* (2012) 6 ACTLR 132; *Baini v The Queen* (2011) 33 VR 252; *Crystal Dawn Pty Ltd v Redruth Pty Ltd* [1998] QCA 373 (17 November 1998); *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462; *Kiama Constructions Pty Ltd v Davey* (1996) 40 NSWLR 639; *Yates Property Corporation Pty Ltd (in liq) v Darling Harbour Authority* (1991) 24 NSWLR 156; *Xuereb v Viola* (1989) 18 NSWLR 453.

of a court,¹¹⁶ has been said to flow from the open justice principle. In *Grollo v Palmer*, for example, Gummow J said:

An essential attribute of the judicial power of the Commonwealth is the resolution of such controversies ... so as to provide final results which are delivered in public after a public hearing, and, where a judge is the tribunal of fact as well as law, are preceded by grounds for decision which are animated by reasoning. An objective of the exercise of the judicial power in each particular case is the satisfaction of the parties to the dispute and the general public that, by these procedures, *justice has both been done and been seen to be done*.¹¹⁷

Similarly, in *Wainohu*, after citing with approval authorities that the duty to give reasons is an ‘aspect of the judicial function’,¹¹⁸ French CJ and Kiefel J set out directly the relationship between the duty to give reasons and the principle of open justice:

The provision of reasons for decision is also an expression of the open court principle, which is an essential incident of the judicial function. A court which does not give reasons for a final decision or for important interlocutory decisions withholds from public scrutiny that which is at the heart of the judicial function: the judicial ascertainment of facts, identification of the rules of law, the application of those rules to the facts and the exercise of any relevant judicial discretion.¹¹⁹

Moreover, their Honours expressly confirmed that the duty arises whether or not the decision is subject to appeal.¹²⁰

In 2008, Heydon J in *AK v Western Australia* also appeared to adopt a broad view of the duty when he said ‘[t]he duty of judges to give reasons for their decisions after trials and in important interlocutory proceedings is well-established’.¹²¹ His Honour then continued on to quote the following passage from Chief Justice Murray Gleeson (writing extrajudicially):

¹¹⁶ *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638, 659 [67] (French CJ).

¹¹⁷ (1995) 184 CLR 348, 394 (emphasis added).

¹¹⁸ (2011) 243 CLR 181, 214 [55] (French CJ and Kiefel J).

¹¹⁹ *Ibid* 215 [58]. See also *AA v BB* (2013) 296 ALR 353, 387 [177] (Bell J).

¹²⁰ *Wainohu* (2011) 243 CLR 181, 215 [57]. *Contra* H P Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013) 259, where the authors appear to confine the duty to give reasons to circumstances where a decision is subject to appeal.

¹²¹ (2008) 232 CLR 438, 470 [89].

First, the existence of an obligation to give reasons promotes good decision making. As a general rule, people who know that their decisions are open to scrutiny, and who are obliged to explain them, are more likely to make reasonable decisions. Second, the general acceptability of judicial decisions is promoted by the obligation to explain them. Third, it is consistent with the idea of democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, *in public*, an account of the reasoning by which they came to those decisions.¹²²

However, in an apparent and unexplained retreat from this broad approach, Heydon J in his later decision in *Wainohu* made no mention of the public's interest in reasons and said that even important and highly contested decisions may not require reasons if precluded by considerations of urgency or if 'there is no possibility of an appeal and hence no point in providing reasons so as to enable proper appellate consideration of the order to be given'.¹²³ While this approach appears to be advocating a return to the narrow pre-*Soulemezis* approach of *Pettitt v Dunkley*, it is clearly at odds with the broader direction of the High Court's jurisprudence.

B *Exceptions to the Duty to Give Reasons*

Before turning to consider what the emerging (but far from universally accepted) 'public reasons rule' might require in terms of the publicity of reasons, it is necessary to say something about the categories of cases where the duty to provide reasons has been held *not* to arise. While there has been a gradual expansion of the recognised legal duty of judges to give reasons for their decisions, the courts have consistently held that the duty, whether broadly or narrowly defined, is subject to certain recognised exceptions. Thus, the duty is not, in the words of Gibbs CJ in *Osmond*, an 'inflexible rule of universal application'.¹²⁴ As explained by Cussen ACJ in *Brittingham v Williams*:

We must not be taken as laying down as a universal rule that a Judge is bound upon request to give reasons for his decision. A case may turn entirely upon a finding in relation to a single and simple question of fact, or be so conducted

¹²² Chief Justice Gleeson, 'Judicial Accountability', above n 29, 122 (emphasis added), quoted in *AK v Western Australia* (2008) 232 CLR 438, 470 [89] (Heydon J).

¹²³ (2011) 243 CLR 181, 238 [147].

¹²⁴ (1986) 159 CLR 656, 667, quoting *R v Awatere* [1982] 1 NZLR 644, 649 (Woodhouse P).

that the reason or reasons for the decision is or are obvious to any intelligent person; or a claim or defence may be presented in so muddled a manner that it would be a waste of public time to give reasons; and there may be other cases where reasons are not necessary or even desirable.¹²⁵

Exceptions have also been traditionally acknowledged in relation to both procedural and discretionary decisions,¹²⁶ including: a judge's discretion on costs unless an unusual decision is made;¹²⁷ whether a matter should be expedited or adjourned or an extension of time granted;¹²⁸ decisions on applications for leave to appeal where 'considerations of fact and law are clear';¹²⁹ and, at least in England, interlocutory decisions to grant relief by way of injunction.¹³⁰ However, it should be noted that the range of exceptions in England (and the rest of the United Kingdom) has been 'progressively decreasing'¹³¹ as a result of the introduction of the *Human Rights Act 1998* (UK) c 42.¹³² In recent years, for example, reasons have been required for decisions on costs¹³³ and extensions of time,¹³⁴ as well as for interlocutory injunctions.¹³⁵

¹²⁵ [1932] VLR 237, 239, cited in *Australian Timber Workers' Union v Monaro Sawmills Pty Ltd* (1980) 42 FLR 369, 379 (Keely J), *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8, 19 (Gray J) and *Pettitt v Dunkley* [1971] 1 NSWLR 376, 380 (Asprey JA). See also *Lamb v Toledo-Berkel Pty Ltd* [1969] VR 343, 345 (Starke J): reasons are not necessary in 'some trivial and simple cases'.

¹²⁶ See, eg, *Capital and Suburban Properties Ltd v Swycher* [1976] 1 Ch 319, 325–6 (Buckley LJ); *Director General, Department of Community Services (NSW) v Children's Court of New South Wales*; *Re Peter* (2003) 56 NSWLR 555, 564–5 [45] (O'Keefe J); *Kypreos v Nabalco Pty Ltd* [1999] NTSC 60 (10 June 1999); *Soulezis* (1987) 10 NSWLR 247, 270 (Mahoney JA), 279 (McHugh JA); *Dowling v Fairfax Media Publications Pty Ltd [No 2]* [2010] FCAFC 28 (16 March 2010) [131] (Logan and Flick JJ).

¹²⁷ *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119, 122 (Griffiths LJ); *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, 381 (Henry LJ for Henry and Laws LJ and Hidden J).

¹²⁸ *Capital and Suburban Properties Ltd v Swycher* [1976] 1 Ch 319, 325–6 (Buckley LJ); *Apps v Pilet* (1987) 11 NSWLR 350, 356 (McHugh JA).

¹²⁹ *Soulezis* (1987) 10 NSWLR 247, 270 (Mahoney JA).

¹³⁰ *Capital and Suburban Properties Ltd v Swycher* [1976] 1 Ch 319, 326 (Buckley LJ).

¹³¹ Lord Woolf et al, above n 63, 442 [7-088].

¹³² Under the *Human Rights Act 1998* (UK) c 42, s 6, courts must act compatibly with the *European Convention on Human Rights*, including art 6 (the right to a fair trial), which has been held by the European Court of Human Rights to require public reasons: see, eg, *Ruiz Torija v Spain* (1999) 303-A Eur Court HR (ser A) 12 [29]. See also *Anya v University of Oxford* [2001] EWCA Civ 405 (22 March 2001) [12], where Sedley LJ noted that art 6 requires that 'adequate and intelligible reasons must be given for judicial decisions'.

¹³³ *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, 2419 [27] (Lord Phillips MR for Lord Phillips MR, Latham and Arden LJ). The Court of Appeal in this case described the

Despite adopting the broader view and seeing reasons as an expression of the open justice principle, Kirby P and McHugh JA in *Soulemezis* maintained that reasons are not required for every judicial decision. For example, interlocutory matters and decisions on the admissibility of evidence may not require reasons.¹³⁶ McHugh JA also cited with seeming approval the exceptions set out in *Brittingham v Williams*, quoted above,¹³⁷ and added that, as justice is a ‘multi-faceted concept’, other interests may be relevant in determining the requirement for reasons, including court resources and private and public costs.¹³⁸ However, his Honour said that where a ‘decision constitutes what is in fact or in substance a final order, the case must be exceptional for a judge not to have a duty to state reasons’,¹³⁹ a view subsequently endorsed by French CJ in *Hogan v Hinch*.¹⁴⁰ French CJ and Kiefel J also made similar comments in *Wainohu*: reasons are required for final and important interlocutory decisions but not minor interlocutory decisions.¹⁴¹

Common sense would suggest that for reasons of practicality, justice and cost, it is appropriate that judges should not be required to provide reasons for minor interlocutory decisions. From a strictly open justice perspective, on the other hand, it might be thought that *all* decisions, regardless of their importance, should be accompanied by reasons. But it must be kept in mind that the open justice principle, which is now acknowledged as underpinning the

duty as ‘regrettable’ considering the imposition on judges: at 2420 [29]. However, it was also said that a failure to state reasons on costs will only constitute a ground of appeal ‘where an order for costs is made with neither reasons nor any obvious explanation for the order’: at 2420 [30]. See also *R (Cunningham) v Exeter Crown Court* (2003) 167 JP 93.

¹³⁴ *R (Tofik) v Immigration Appeal Tribunal* [2003] EWCA Civ 1138 (21 July 2003).

¹³⁵ *Douglas v Hello! Ltd* [2001] QB 967, 974 [8]–[9] (Brooke LJ).

¹³⁶ *Soulemezis* (1987) 10 NSWLR 247, 260 (Kirby P), 279 (McHugh JA).

¹³⁷ *Ibid* 279, quoting *Brittingham v Williams* [1932] VLR 237, 239 (Cussen ACJ). For more recent cases, see *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8, 19 (Gray J); *Baini v The Queen* (2011) 33 VR 252, 254 [2]–[5] (Warren CJ); *Opeka Pty Ltd v Mackie Group Pty Ltd* [2003] VSC 183 (23 May 2003) [24] (Nettle J) (finding that a magistrate did not err in failing to provide reasons); *Dura (Aust) Constructions Pty Ltd v Girgin* [2002] VSC 449 (23 October 2002) [11] (Balmford J); *Tural v Potter* [2000] VSC 80 (24 March 2000) [84] (Eames J); *Pasha v Edmonds* (1999) 28 MVR 217, 219 [12]–[13] (Smith J); *Bevis v Alex Gregson Roof Tiles Pty Ltd* (Unreported, Supreme Court of Victoria, Gillard J, 19 June 1997).

¹³⁸ *Soulemezis* (1987) 10 NSWLR 247, 279; see also at 259, where Kirby P said that ‘behind the numerous judicial observations concerning the duty of judicial officers to give reasons lies a legitimate anxiety about the comparative costs and benefits of a more ample entitlement to reasons, particularly in specialist courts with a heavy workload’.

¹³⁹ *Ibid* 279.

¹⁴⁰ (2011) 243 CLR 506, 540 [42].

¹⁴¹ (2011) 243 CLR 181, 214–15 [56].

requirement for reasons, is not an ‘inflexible dictate’,¹⁴² and its influence in guiding the exercise of judicial power will be amplified or diminished depending on the context.¹⁴³ For example, in routine decisions about procedure and admissibility, it is perhaps correct that open justice will have a lesser role to play such that the public reasons rule will not be seen to be engaged. Much, however, might turn on what is considered ‘minor’. Thus, open justice considerations will have greater weight in requiring reasons where a decision on a procedural aspect of an action affects the substantive rights of one or more of the parties,¹⁴⁴ or where the matter is highly contested and detailed argument has been put to the court.¹⁴⁵

Two further points should be made about the open justice principle and possible exceptions to the duty to give reasons under the public reasons rule. First, caution must be urged in relation to the *Brittingham v Williams* exception, quoted above, regarding obvious or simple determinations. For one, what is the context in which the obviousness of the decision is to be judged? That is, is it to be judged from the perspective of an ‘intelligent person’ present in court at the time the order is made, or must the reasons for the decision be capable of being understood solely from the order itself? And, what knowledge of the law should be attributed to such an ‘intelligent person’? A decision on costs provides a useful example. It might be obvious to an observer present in court that the order was made on the basis of the well-established rule in civil cases that costs follow the event. This may not, however, be evident on the basis of the costs order itself — at least not to an intelligent member of the public without a certain level of knowledge of civil litigation. In any event, if a decision is so obvious, simple or trivial, the reason for the decision should be relatively quick and simple to explain.

Second, from an open justice perspective, the mere fact that a decision is discretionary should not, in and of itself, be relevant. In fact, in some ways, it may be the case that reasons for discretionary decisions are especially important from an open justice perspective. A discretionary decision has been described as one ‘where the judge has an area of autonomy, free from strict

¹⁴² *West Australian Newspapers Ltd v Western Australia* [2010] WASCA 10 (22 January 2010) [30] (Owen JA).

¹⁴³ Butler and Rodrick, above n 43, 212.

¹⁴⁴ See, eg, *Apps v Pilet* (1987) 11 NSWLR 350. See also Justice Kirby, ‘Reasons for Judgment’, above n 22, 126–8.

¹⁴⁵ Indeed, there is authority that these types of procedural decisions are, in certain circumstances, significant enough to attract the duty to give reasons: see, eg, *Apps v Pilet* (1987) 11 NSWLR 350.

legal rules, in which the judge can exercise his or her judgment in relation to the particular circumstances of the case'.¹⁴⁶ While the exercise of a judicial discretion will usually be confined within broad guidelines or a limited set of criteria,¹⁴⁷ such decisions are inherently subjective.¹⁴⁸ This means that without reasons, it may be difficult — much more so than for non-discretionary decisions which are dictated by law — to assess, for the parties and the public alike, what factors might have affected a judge's conclusions, whether such factors were relevant to the exercise of the discretion, and whether the decision-making process was arrived at judicially — and therefore by reason — rather than arbitrarily.¹⁴⁹

III OPEN JUSTICE AND THE PUBLICITY OF REASONS

If we accept the existence of the public reasons rule, it follows as a logical consequence that reasons must be *public*. The publicity of reasons was certainly contemplated by Sir Frank Kitto when he said:

It is not enough that the hearing of a case has been in public. The process of reasoning which has decided the case must itself be exposed to the light of day, so that all concerned may understand what principles and practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to judicial high performance.¹⁵⁰

Since *Soulemezis*, a number of courts — including the High Court — have referred to the requirement that reasons be 'public'.¹⁵¹ Other courts have referred to an obligation on courts to 'publish' their reasons as an incident of

¹⁴⁶ Wendy Lacey, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere' (2004) 5 *Melbourne Journal of International Law* 108, 110.

¹⁴⁷ *Ibid.*

¹⁴⁸ This observation was made in a postscript to Justice Kirby, 'Reasons for Judgment', above n 22, 136.

¹⁴⁹ *Ibid.* Cf Justice Kirby, 'Ex Tempore Judgments', above n 58, 222, where the view is expressed that reasons are not required for wholly discretionary decisions.

¹⁵⁰ Kitto, above n 40, 790.

¹⁵¹ See, eg, *Grollo v Palmer* (1995) 184 CLR 348, 394 (Gummow J); *AK v Western Australia* (2008) 232 CLR 438, 470 [89] (Heydon J); *Wainohu* (2011) 243 CLR 181, 215 [58] (French CJ and Kiefel J).

the open justice principle.¹⁵² What has not yet been considered is what the public reasons rule precisely demands in terms of publicity. Where reasons are given orally in open court, members of the public are entitled to attend and report on why the court decided as it did. On a traditional view of the open justice principle, this might be thought to be enough to satisfy any requirement for publicity. But today, reasons are often given in written form and, where so given, they are rarely read out in full in open court.¹⁵³ This is not necessarily a problem. Superior courts routinely make their written reasons available through various public outlets, including on the AustLII website and in official and unofficial reports; inferior courts, however, less so. But, at least from the perspective of the courts, such publication appears to be treated as a matter of convention rather than as an obligation imposed by law. The next section considers, therefore, the rights that non-parties (including members of the public) may now have under the emerging public reasons rule to request access to written reasons and court transcripts of oral reasons where they have not been voluntarily published by the courts.¹⁵⁴ It also considers whether the public reasons rule requires courts to do more than simply state or refer to reasons in open court and accede to requests for access at the court registry. In particular, it questions whether there is a broader legal duty on courts arising from the public reasons rule to publish their reasons to the public in an accessible manner.

A Open Justice and the Public's Right to Access Reasons

It has been consistently held in Australia that there is no general right of public access to judicial records supported by the principle of open justice under the common law.¹⁵⁵ This is because the open justice principle is not

¹⁵² See, eg, *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 1024 (14 November 2001) [23] (Einstein J); *Ives v Western Australia [No 2]* [2010] WASC 221 (3 September 2010) [5] (Le Miere J); *McJannett v Daley [No 2]* [2012] WASC 386 (S) (25 October 2012) [4] (Le Miere J); *X v Y* [2013] WASC 339 (S) (12 September 2013) [12] (Pritchard J). See also Chief Justice J J Spigelman, 'Seen to Be Done: The Principle of Open Justice' (Pt II) (2000) 74 *Australian Law Journal* 378, 378.

¹⁵³ Justice Kirby, 'Ex Tempore Judgments', above n 58, 214.

¹⁵⁴ In addition to the common law, the right to access court judgments may be granted under statute: see, eg, *Supreme Court Act 1935* (SA) ss 131(1)(e)–(f). Court rules and practice notes also regularly deal with access to judgments: see, eg, *Federal Court Rules 2011* (Cth) r 2.32(2)(f).

¹⁵⁵ See, eg, Rodrick, above n 43, 100; *The Herald & Weekly Times Ltd v Magistrates' Court of Victoria* (2000) 2 VR 346; *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512; *Van Stokkum v Finance Brokers Supervisory Board* [2002] WASC 192

considered a freestanding right but a principle guiding the decisions of the courts on a range of matters, including in the exercise of a court's discretion to grant access to documents on the court file.¹⁵⁶ Moreover, the court file itself is not considered a 'publicly available register'¹⁵⁷ and the open justice principle is not thought to be engaged until a document or other relevant material contained on the court file is actually used in court.¹⁵⁸ But even where documents are deployed in open court, opinions have differed as to the extent to which the open justice principle is relevant to the exercise of the discretion to grant access.¹⁵⁹ Whatever view is taken, it remains the case that there is no access *as of right* to material admitted into evidence arising from the open justice principle.

However, if by virtue of the public reasons rule there is a duty on courts to provide *public* reasons, it seems logical that a concomitant public right of access to such reasons should also be recognised as arising from the rule. The extent to which the public reasons rule might support such a right, however, will logically depend on when reasons are deemed to be 'public' under the rule. If a narrow view is taken that the duty to provide public reasons is satisfied merely by stating reasons in open court, then it might be concluded that there is no ongoing public right of access to the written version of such reasons. On this analysis, rather, such a right could only arise in relation to written reasons *not* read out in court — that is, where reasons have not been disclosed to the public at all. But accepting such a narrow approach would lead to the perverse result that unread written reasons would be subject to an ongoing right of public access, while verbal reasons or written reasons

(9 August 2002); *Australian Securities and Investments Commission v Rich* (2001) 51 NSWLR 643.

¹⁵⁶ *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 521 [29] (Spigelman CJ).

¹⁵⁷ *Dobson v Hastings* [1992] Ch 394, 401–2 (Sir Donald Nicholls V-C), quoted in *Titelius v Public Service Appeal Board* (1999) 21 WAR 201, 221 [80] (Malcolm CJ).

¹⁵⁸ *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 521 [32] (Spigelman CJ).

¹⁵⁹ It has been said that 'use in court will often be determinative': *ibid.* Other courts have indicated, however, that the relevance of the open justice principle will depend on the extent to which a document is required 'to enable or facilitate the public scrutiny essential to the maintenance of confidence in the integrity and independence of the courts': *Re Hogan; Ex parte West Australian Newspapers Ltd* [2009] WASCA 221 (8 December 2009) [34] (McLure P). See also *Smith v Harris* [1996] 2 VR 335, 350 (Byrne J). Others still have rejected applications on the grounds that the release of exhibits would be prejudicial to the administration of justice: see, eg, *DPP (Vic) v Bracken [Ruling No 16]* [2014] VSC 96 (28 February 2014) (Maxwell P).

previously read out in open court would be made available to the public only on a once and for all basis. This is neither logical nor consistent with the rationales that underpin the open justice principle or, indeed, the public reasons rule. As a matter of policy and principle, it seems that a better approach would be to treat the public reasons rule as giving rise to a ‘blanket’ right of access to all judicial reasons, irrespective of whether such reasons have been read out in open court and whether or not they have been committed to writing.

Recognising such a right of access draws support, by way of analogy, from the similar right that has already been recognised in relation to court orders. It has been held that court orders — unlike pleadings, evidence and other documents held on the court file — are public documents that any member of the public has a common law right to inspect (but not copy).¹⁶⁰ This rule, first recognised in *Titelius v Public Service Appeal Board*, is based, at least in part, on the principle of open justice¹⁶¹ and is consistent with the open justice rule that court orders must be pronounced in open court.¹⁶² It is submitted that, given the public reasons rule, judicial reasons should be afforded the same status that court orders receive as public documents under the common law and, hence, should be subject to the same public rights of access. While this is contrary to Mahoney JA’s view that judicial reasons (as opposed to court orders) are not public documents,¹⁶³ it is an argument that has nevertheless already received some academic¹⁶⁴ and judicial support.¹⁶⁵

It should be noted that access to written reasons referred to but not read out in open court might be pursued under an alternative argument based on the open court rule (rather than the public reasons rule). Given that the fundamental rationale of the open justice principle is to expose courts to public scrutiny and thereby maintain public confidence in the administration of justice, it has been held that the principle demands that any material that ‘is necessary for the public to scrutinise the process’ of justice should be made

¹⁶⁰ *Titelius v Public Service Appeal Board* (1999) 21 WAR 201, 220–1 [80]–[82] (Malcolm CJ).

¹⁶¹ *Ibid* 223–4 [100] (Ipp J).

¹⁶² See above n 6 and accompanying text.

¹⁶³ See above nn 102–3 and accompanying text.

¹⁶⁴ Paul Seaman, LexisNexis, *Civil Procedure in Western Australia*, vol 1 (at Service 137) 12 838 [67.11.1], cited in *Re Smith; Ex parte DPP (WA) [No 1]* (2004) A Crim R 40, 55 [109] (Roberts-Smith J). Note, also, Broom’s view that judgments are the ‘property of the profession and the public’: Broom, above n 87, 153.

¹⁶⁵ *Re Smith; Ex parte DPP (WA) [No 1]* (2004) A Crim R 40, 55 [109] (Roberts-Smith J).

available to the public.¹⁶⁶ Moreover, it has been held that the failure to grant public access to material that has been taken as read rather than actually disclosed to the public in open court is akin to hearing proceedings in camera.¹⁶⁷ In other words, the open court rule is seen as directly infringed by such a practice. Thus, as explained by Lord Clyde in *Cunningham v The Scotsman Publications Ltd*:

If the hearing is a public hearing then it does not seem to me that that characteristic is destroyed simply because for perfectly proper reasons of convenience a document is referred to and not read out in full. Where a document had been incorporated into what counsel has said, *the proceedings cannot be said to be open to the public unless the terms of the document can be seen by the public*.¹⁶⁸

If accepted, this analysis must also apply to written reasons not read out in court, where there will be no opportunity, unless access is granted, to scrutinise the court's process of reasoning. Some courts, on the other hand, have taken the contrary view that a court is not effectively closed just because a document (for example, an affidavit or a hand-up brief) is relied upon but not read out in open court.¹⁶⁹ In such cases, a limited view has been taken that the open court rule is satisfied simply if the public has a 'reasonably and conveniently exercisable' right of admission¹⁷⁰ and that the rule, furthermore, 'is

¹⁶⁶ *Smith v Harris* [1996] 2 VR 335, 350 (Byrne J) (emphasis added). See also *R v Clerk of Petty Sessions; Ex parte Davies Brothers Ltd* (1998) 8 Tas R 283, 295–6 (Slicer J); *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 526–7 [69] (Spigelman CJ); *Rich v Harrington* (2007) 99 ALD 297, 301 (Branson J); *New South Wales v Reed* [2011] NSWSC 981 (26 August 2011) [6] (McCallum J). On the increasing use of documentary evidence in court proceedings and the open justice principle, see Ernst Willheim, 'Are Our Courts Truly Open?' (2002) 13 *Public Law Review* 191.

¹⁶⁷ *Cunningham v The Scotsman Publications Ltd* 1987 SC 107, 118–21 (Lord Clyde); *R v Clerk of Petty Sessions, Court of Petty Sessions Hobart; Ex parte Davies Brothers Ltd* (1998) 8 Tas R 283, 296–7 (Slicer J). See also *R v Grace* (2012) 13 DCLR (NSW) 350, 356 [42], where Colefax DCJ noted that 'administrative convenience should not be used to keep withheld from the public ... material which otherwise would or could have been publicly given in full'.

¹⁶⁸ 1987 SC 107, 120 (emphasis added), cited in *R v Clerk of Petty Sessions, Court of Petty Sessions Hobart; Ex parte Davies Brothers Ltd* (1998) 8 Tas R 283, 296 (Slicer J); *Homestead Award Winning Homes Pty Ltd v South Australia* (1997) 72 SASR 299, 308 (Prior J); *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 526 [68] (Spigelman CJ).

¹⁶⁹ *The Herald & Weekly Times Ltd v Magistrates' Court of Victoria* [1999] 3 VR 231, 247 [43] (Mandie J); *The Herald & Weekly Times Ltd v Magistrates' Court of Victoria* (2000) 2 VR 346, 361 [40] (Charles JA).

¹⁷⁰ *The Herald & Weekly Times Ltd v Magistrates' Court of Victoria* [1999] 3 VR 231, 247 [43] (Mandie J).

silent on the issue of the provision of court documents and exhibits to [non-parties]'.¹⁷¹ But, whatever the ambit of the open court rule in such contexts, an argument may be made that in the context of access to *reasons* the open justice principle applies with greater force than access to other aspects of, or documents relevant to, the judicial process, such that the open court rule should be seen as being directly affected in circumstances where written reasons are not disclosed to the public in open court. Indeed, as explained by Hutley AP in *David Syme & Co Ltd v General Motors-Holden's Ltd* ('*General Motors-Holden's*'), 'the interest which the public has in knowing the result of a court's work is even greater than the interest it has in observing the actual operation of courts'.¹⁷² This was said by his Honour to apply with equal force to court judgments and court orders.

B *Extent of the Duty to 'Publish' Reasons*

As already noted, apart from the duty to make reasons 'public', some courts have identified what is ostensibly a more onerous obligation to 'publish' their reasons.¹⁷³ This raises a number of questions. What does publication in this context mean? Will it be sufficient — as a traditional understanding of open justice would suggest — for a court to orally pronounce its reasons in open court or, as discussed above, to provide access to reasons upon request? Or, is it being used to indicate a broader obligation to disseminate reasons to the public in accessible form — for example, via a dedicated website such as AustLII or in official law reports? And, if the latter, what might such an obligation to publish require?

In the recent case of *Matthews v The Queen [No 2]* ('*Matthews*'), the New South Wales Court of Criminal Appeal indirectly rejected the broader understanding of the obligation to publish reasons.¹⁷⁴ In that case, the Court's sentencing decision had been handed down in open court and the defendant applied for an order to restrain the Court from publishing the reasons on the

¹⁷¹ *Re Hogan; Ex parte West Australian Newspapers Ltd* (2010) 41 WAR 288, 296 [31] (McLure P).

¹⁷² [1984] 2 NSWLR 294, 307. See also *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 1024 (14 November 2001) [23] (Einstein J).

¹⁷³ *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 1024 (14 November 2001) [23] (Einstein J). See also *Ives v Western Australia [No 2]* [2010] WASC 221 (3 September 2010) [5] (Le Miere J).

¹⁷⁴ [2013] NSWCCA 194 (23 August 2013) [3] (Hoeben CJ at CL, Leeming JA and Beech-Jones J).

internet via the Caselaw website.¹⁷⁵ The Court drew a distinction between reasons being ‘published’ in the sense of simply being handed down by a court and ‘published’ more broadly by the court on the internet.¹⁷⁶ The latter was seen as an administrative action rather than a judicial one, meaning that the Court’s decision to withhold the publication of written reasons on the internet — and presumably via any other publicly accessible outlet, including in official reports — did not require the making of an order. Moreover, by failing to make any reference to the open justice principle, the Court did not appear to treat such a decision as raising open justice issues or as constituting any derogation from the public reasons rule.

Convincing arguments, however, can be made to support the view that the duty to publish reasons under the public reasons rule must be understood in the broader sense. For one, there appears to be a fundamental inconsistency between the reasoning in *Matthews* in relation to the Court’s decision to *withhold* the publication of reasons to the public and the approach that has been adopted by courts where suppression orders are sought to *restrain* others from publicly disseminating reasons (discussed in detail in Part IV). That is, while the Court’s own withholding of reasons handed down in open court is not, according to *Matthews*, seen as derogating from open justice, an order restraining the public from disseminating reasons *is* seen as constituting such derogation and can only be made on the grounds of strict necessity.¹⁷⁷ This distinction, however, is difficult to justify. The public dissemination of reasons, whether by the court itself or by others, must be seen as either falling within the scope of the open justice principle or not. If it does fall within the principle, as the case law on the suppression of reasons suggests it does, a court’s decision to restrain or withhold the public dissemination of reasons should be subject to the same considerations regardless of the context in which the decision is made. This means that when deciding whether or not to withhold its reasons from publication to the public once a decision has been handed down, a court must be satisfied that the necessity test is met and, if it is not so met, the reasons for the decision *must* be published. More to the point, it follows that the failure to effect such publication in the absence of necessity must be understood as constituting an error of law.

¹⁷⁵ Caselaw is the online repository of judicial reasons in New South Wales: Caselaw, *New South Wales Caselaw* (23 October 2014) <<http://www.caselaw.nsw.gov.au/>>.

¹⁷⁶ *Matthews* [2013] NSWCCA 194 (23 August 2013) [3] (Hoeben CJ at CL, Leeming JA and Beech-Jones J).

¹⁷⁷ See below nn 179–80 and accompanying text for authorities that the suppression of reasons engages the open justice principle.

However, apart from this apparent inconsistency, recognising a duty to publish reasons in the broader sense is also essential to achieving many of the functions said to be performed by the provision of public reasons outlined in Part II above. This is because publication in the narrow sense — merely pronouncing reasons in open court and providing access to reasons upon request — will not always be sufficient in facilitating public access. For example, a member of the legal profession or the public interested in obtaining access to reasons on a particular topic or area of law will need to be aware that the reasons exist and what they are about before an application for access can be made; otherwise, how will he or she know what reasons to apply for? Thus, genuine public access can only be achieved through the broader publication of the reasons themselves. And, while pronouncing reasons in open court and the provision of fair and accurate reports of cases, particularly by the media, might assist in some instances in the identification of reasons of interest, very few members of the public attend legal proceedings and only a small proportion of all legal proceedings receive coverage in the media.

If we are correct in suggesting that the legal duty to publish should be understood in the broader sense, this then raises the question as to what will be required to fulfill the duty. The precise means of publication is probably a matter best determined by the courts themselves. However, we suggest that the central criterion to fulfilling the duty should be that written reasons and transcribed *ex tempore* reasons¹⁷⁸ be published to the public in an accessible manner and form, and in a location known to members of the legal profession within the jurisdiction as the repository for judicial reasons. We suggest that best practice in this regard is for all reasons to be published in searchable form on the internet — for example, on the court's own website or some other publicly accessible online database.

IV DEROGATING FROM THE DUTY TO PUBLISH REASONS

Parts II and III of this article have identified the open justice public reasons rule as imposing a duty on courts to provide reasons for the making of final and important interlocutory decisions and have argued that such a rule should be understood as requiring the publication of reasons in the broad sense. This Part examines the principles that govern a court's decision to derogate from the duty to publish reasons.

¹⁷⁸ Due to the costs of transcription, untranscribed *ex tempore* reasons may only require that access be provided upon demand.

As an open justice rule, it follows that any derogation from the duty to publish reasons by the making of a suppression order must be subject to the same principles that apply to derogations from the conventional open justice rules. This was the approach explicitly adopted by the New South Wales Court of Appeal in *General Motors-Holden's*,¹⁷⁹ discussed in further detail below in this Part. Other courts have implicitly adopted this approach by treating the open justice principle as being engaged by the suppression of reasons.¹⁸⁰ However, none of the cases to date on the suppression of judicial reasons — unlike the cases on the duty to *give* reasons — has explicitly recognised the emerging public reasons rule or that the suppression of reasons is a departure from that specific rule. Moreover, as noted above in Part III, the courts have evinced a degree of inconsistency by treating the withholding of the publication of reasons (as opposed to the suppression of reasons) as a non-judicial decision not subject to the principle of open justice. If, however, it is accepted that the public reasons rule requires the publication of reasons, this distinction cannot be maintained. As argued above, both the suppression *and* withholding of reasons should be treated as derogating from the public reasons rule. Furthermore, both should be characterised as an exercise of judicial power and, as such, both (contrary to current practice) should require the making of a court order.

The overarching principle under the common law is that the open justice rules can only be departed from in circumstances where it is necessary to secure the proper administration of justice,¹⁸¹ either in the proceedings before

¹⁷⁹ [1984] 2 NSWLR 294, 299–300 (Street CJ), 307 (Hutley AP). Samuels JA agreed with Hutley AP.

¹⁸⁰ Courts have held that the open justice principle is engaged when applications are made to suppress reasons: see, eg, *X v Y* [2013] WASC 339 (S) (12 September 2013) [12], where Pritchard J recently stated that '[t]he power to suppress or to restrict the publication of part of a judgment is to be exercised with great caution, because it involves a departure from the principle of open justice'. See also *Sims v Mackowiak* [2011] NSWSC 1496 (29 November 2011); *Re Bartlett; Ex parte The Queen* [2012] WASC 34 (6 February 2012); *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd [No 2]* [2011] WASC 276 (23 August 2011); *McJannett v Daley [No 2]* [2012] WASC 386 (S) (25 October 2012); *Perpetual Trustee Co Ltd v Burniston [No 2]* [2012] WASC 383 (S) ('*Perpetual Trustee [No 2]*') (previously *A v B [No 2]* [2012] WASC 383 (S) (15 October 2012)); *Ives v Western Australia [No 2]* [2010] WASC 221 (3 September 2010) [5] (Le Miere J); *AA v BB* (2013) 296 ALR 353, 391 [193] (Bell J); *Legal Practitioners Conduct Board v Viscariello [No 2]* [2013] SASFC 47 (31 May 2013).

¹⁸¹ *Scott v Scott* [1913] AC 417; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 54 (Kirby P), 61 (Samuels JA). See also *General Motors-Holden's* [1984] 2 NSWLR 294, 299 (Street CJ); *O'Shane v Burwood Local Court (NSW)* (2007) 178 A Crim R 392, 401 [34] (McClellan CJ at CL); *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344, 358 (Spigelman CJ), with whom Handley JA and Campbell AJA

the court¹⁸² or as an ongoing process.¹⁸³ The test is a demanding one and will not be satisfied on the basis of mere convenience¹⁸⁴ or at the consent of the parties.¹⁸⁵ Nor will derogations be permitted under the common law due to potential embarrassment to parties or witnesses,¹⁸⁶ damage to reputation¹⁸⁷ or the disclosure of private facts.¹⁸⁸ Rather, there are ‘few and strictly defined’ categories of cases where derogations are accepted as ‘necessary’ under the common law.¹⁸⁹ These include: cases involving confidential information (that is, trade secrets) where public disclosure would destroy the subject matter of the litigation;¹⁹⁰ blackmail;¹⁹¹ police informers;¹⁹² national security;¹⁹³ and wards of the state and the mentally ill.¹⁹⁴ Orders can also be made to prevent the publication of certain other types of prejudicial information, such as prior convictions, past criminal behaviour, the pleas of co-defendants or the results

agreed; *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 522–3 [39]–[47] (Spigelman CJ), with whom Mason P and Beazley JA agreed; *John Fairfax & Sons Pty Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 477 (McHugh JA). The concept of defeating the ends of justice has also been described in terms of ‘frustrat[ing] the purpose of a court proceeding by preventing the effective enforcement of some substantive law and depriving the court’s decision of practical utility’: *J v L & A Services Pty Ltd [No 2]* [1995] 2 Qd R 10, 44 (Fitzgerald P and Lee J).

¹⁸² *Scott v Scott* [1913] AC 417, 436–7 (Viscount Haldane LC).

¹⁸³ *John Fairfax Group Pty Ltd (rec and mgr apptd) v Local Court of New South Wales* (1991) 26 NSWLR 131, 141 (Kirby P), 161 (Mahoney JA).

¹⁸⁴ *John Fairfax & Sons Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 523 (Spigelman CJ).

¹⁸⁵ *Scott v Scott* [1913] AC 417, 436 (Viscount Haldane LC).

¹⁸⁶ *John Fairfax Group Pty Ltd (rec and mgr apptd) v Local Court of New South Wales* (1991) 26 NSWLR 131, 142 (Kirby P).

¹⁸⁷ *The Herald & Weekly Times Ltd v Medical Practitioners Board (Vic)* [1999] 1 VR 267, 294–5 (Hedigan J).

¹⁸⁸ *John Fairfax Group Pty Ltd (rec and mgr apptd) v Local Court of New South Wales* (1991) 26 NSWLR 131, 142–3 (Kirby P).

¹⁸⁹ *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344, 353 (Spigelman CJ); *A-G (NSW) v Nationwide News Pty Ltd* (2007) 73 NSWLR 635, 640 [29] (Hodgson JA).

¹⁹⁰ *Australian Broadcasting Commission v Parish* (1980) 43 FLR 129, 132 (Bowen CJ).

¹⁹¹ *R v Socialist Worker Printers and Publishers Ltd; Ex parte A-G (UK)* [1975] 1 QB 637, 649–51 (Lord Widgery CJ); *John Fairfax Group Pty Ltd (rec and mgr apptd) v Local Court of New South Wales* (1991) 26 NSWLR 131, 141 (Kirby P).

¹⁹² See, eg, *Cain v Glass [No 2]* (1985) 3 NSWLR 230.

¹⁹³ See, eg, *A v Hayden* (1984) 156 CLR 532, 599 (Deane J); *John Fairfax Group Pty Ltd (rec and mgr apptd) v Local Court of New South Wales* (1991) 26 NSWLR 131, 141 (Kirby P).

¹⁹⁴ *Scott v Scott* [1913] AC 417, 437 (Viscount Haldane LC).

of concurrent trials.¹⁹⁵ Although the courts have been reluctant to expand upon these common law categories, it is accepted that they are not closed and may be added to in circumstances of close analogy.¹⁹⁶ Moreover, statutory powers exist in all states and territories that greatly expand the range of circumstances in which an order to derogate from open justice can be made,¹⁹⁷ although the common law understanding of the necessity test is usually relevant to the exercise of such powers.¹⁹⁸ Statutes regularly provide, for example, that orders can be made to protect the safety of a person or to avoid embarrassment to a party or witness in proceedings involving sexual offences.¹⁹⁹ Where circumstances of necessity arise, whether under the common law or statute, a court can only depart from the open justice rules ‘*to the extent that it is necessary to do so*’.²⁰⁰ In other words, the measure adopted must be the minimum intrusion necessary to protect the administration of justice or to avoid the relevant harm.

Applying these principles to derogations from the open reasons rule, courts will only have the power to order the suppression of reasons in circumstances falling within one of the recognised categories of exceptions (either under the common law or statute) and, importantly, the court must not withhold from the public aspects of judicial reasons beyond what is necessary in the circumstances. Rather, it is incumbent upon a court, if possible, to draft reasons in such a manner as to provide an account of the reasoning without incorporating the confidential, sensitive or prejudicial

¹⁹⁵ See, eg, *DPP (Vic) v Williams* [2004] VSC 360 (9 September 2004); *Nationwide News Pty Ltd v Farquharson* (2010) 28 VR 473.

¹⁹⁶ *R v Kwok* (2005) 64 NSWLR 335, 341 (Hodgson JA).

¹⁹⁷ See, eg, *Open Courts Act 2013* (Vic); *Court Suppression and Non-Publication Orders Act 2010* (NSW); *Evidence Act 1929* (SA) s 69A. Such statutory powers to derogate from open justice operate in addition to automatic publication bans limiting reports of aspects of proceedings, such as the identity of sexual assault victims (see, eg, *Crimes Act 1900* (NSW) s 578A; *Judicial Proceedings Reports Act 1958* (Vic) s 4), identity of children involved in proceedings (see, eg, *Adoption Act 2000* (NSW) ss 119, 143, 176, 178–180A, 186, 194, 205; *Children, Youth and Families Act 2005* (Vic) s 534), adoption (see, eg, *Adoption Act 1984* (Vic) s 121) and family law matters (*Family Law Act 1975* (Cth) ss 97, 121).

¹⁹⁸ See, eg, *Lew v Priester [No 2]* (2012) 35 VR 216, 220 [12] (Davies J); Andrew T Kenyon, ‘Not Seeing Justice Done: Suppression Orders in Australian Law and Practice’ (2006) 27 *Adelaide Law Review* 279, 287.

¹⁹⁹ See, eg, *Court Suppression and Non-Publication Orders Act 2010* (NSW) s 8(1); *Open Courts Act 2013* (Vic) s 18(1).

²⁰⁰ Paul Mallam, Sophie Dawson and Jaelyn Moriarty, Thomson Lawbook, *Media and Internet Law and Practice*, vol 1 (at Update 38) [15.60] (emphasis added). See also *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 477 (McHugh JA).

information.²⁰¹ If, however, such drafting of reasons is not possible — because, for example, the inclusion of the information is essential to the reasoning — there are alternative measures that a court might be required to adopt. One option, as advocated by Street CJ in the *General Motors-Holden's* case, is to incorporate the information by a neutral reference and to set it out in full in a sealed document placed with the court papers.²⁰² Another is for the court to provide a public version of the reasons that differs from the version provided to the parties where certain information is anonymised or redacted.²⁰³ For example, depending on what is required in the circumstances, this may occur by using a letter pseudonym to refer to one or more of the parties or witnesses,²⁰⁴ or by the redaction of particulars as to the confidential,²⁰⁵ prejudicial²⁰⁶ or sensitive information.²⁰⁷ Of course, when such an avenue is chosen, the necessity test requires that the complete version of the reasons be made publicly available as soon as the circumstances justifying the derogation are no longer applicable. For example, where aspects of a decision are redacted to ensure the fair trial of an accused, the original version should be published upon the completion of the accused's trial.²⁰⁸ The same approach should be adopted in confidential information cases: once the confidential information enters the public domain, any suppression orders should be lifted and the complete version of the reasons for judgment should be published.

The strict application of the necessity test means that only rarely will a court be justified in ordering the complete suppression of its reasons and can only do so as a last resort. This is consistent with the approach adopted by Street CJ in *General Motors-Holden's*. In that case, the respondent plaintiff, a car manufacturer, sought an interlocutory injunction to restrain the appellant defendant from publishing confidential information relating to a new motor vehicle. The trial judge, after agreeing to hear the application in camera,

²⁰¹ See, eg, *General Motors-Holden's* [1984] 2 NSWLR 294, 300 (Street CJ), 308 (Hutley AP), 311 (Samuels JA).

²⁰² *Ibid* 301.

²⁰³ See, eg, *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 (29 August 2012) [4] (Heenan J).

²⁰⁴ See, eg, *Application concerning Section 80 of the Supreme Court Act and Sections 119 and 128 of the Evidence Act* [2004] NSWSC 614 (1 July 2004) [13] (Brownie AJ); *X v Y* [2013] WASC 339 (S) (12 September 2013).

²⁰⁵ See, eg, *General Motors-Holden's* [1984] 2 NSWLR 294.

²⁰⁶ See, eg, *Quaid v Western Australia* [2013] WASC 228 (S) (10 June 2013).

²⁰⁷ See, eg, *X v Y* [2013] WASC 339 (S) (12 September 2013).

²⁰⁸ See *ibid* [19] (Pritchard J).

granted the interlocutory injunction and made an order that the judgment of the court, which referred to the confidential information, 'be placed in a sealed envelope, which said envelope shall not be opened except by the order or direction of a judge'.²⁰⁹ In quashing the order on appeal, the New South Wales Court of Appeal held that the fact that a case is heard in camera does not justify the court's judgment being suppressed and that, in line with the requirements of the necessity test,²¹⁰ a court must not withhold from publication aspects of judicial reasons beyond what is necessary in the circumstances to protect the confidential information in question.²¹¹ In this case, the Court held that parts of the trial judge's reasons could have been published, even if what remained was 'untidy and unfair to the judge, whose deeper analysis is concealed from the public gaze'.²¹² Moreover, in relation to the *complete* non-publication of reasons, Street CJ was of the view that this will 'almost invariably, if not invariably' amount to an error of law.²¹³ This is because, as his Honour said, it is 'difficult to conceive any case in which it is impossible to provide some statement by way of a public account of the proceedings and the reasons' by adopting one or more of the strategies set out in the preceding paragraph.²¹⁴

Other Australian courts have also applied the necessity test in a similar manner to the *General Motors-Holden's* case when applications have been made for the complete suppression of reasons. In *AA v BB*, for example, Bell J of the Victorian Supreme Court recently rejected an application for the suppression of reasons on the basis that it went 'beyond what is necessary for the avoidance of prejudice to the administration of justice'.²¹⁵ His Honour said:

Complete suppression would involve a high degree of departure from the open court principle in circumstances where this was not necessary to avoid prejudicing the administration of justice. An order for complete suppression would

²⁰⁹ *General Motors-Holden's* [1984] 2 NSWLR 294, 296 (Street CJ), in which the trial judge's order is reproduced.

²¹⁰ *General Motors-Holden's* [1984] 2 NSWLR 294, 307 (Hutley AP).

²¹¹ *Ibid* 308.

²¹² *Ibid*.

²¹³ *Ibid* 301. Such an approach is implicit in the comments of Hutley AP: at 307–8; see also at 308, 310–11, where Samuels JA agrees with Hutley AP on this point.

²¹⁴ *Ibid* 301.

²¹⁵ (2013) 296 ALR 353, 391 [193].

not be the most compatible, and would not involve the least interference, with the principle of open justice.²¹⁶

Such an approach was similarly adopted by the Supreme Court of Western Australia in *X v Y*, where Pritchard J agreed to anonymise the parties in the reasons as well as to redact certain information that was said to be prejudicial to the accused's right to a fair trial.²¹⁷

However, as evidenced by the data presented in the introduction, courts in Victoria, Western Australia and New South Wales have taken the view that it is, at least at times, necessary to withhold publication or to order the suppression of entire reasons.²¹⁸ There are two possible explanations for this. A court may consider that it is impossible to draft reasons without including the confidential or sensitive information, yet the redaction of the information results in reasons that are unintelligible.²¹⁹ The Full Court of the Federal Court in *Arnotts Ltd v Trade Practices Commission* described the difficulties that can arise in such circumstances:

In deference to the claims for confidentiality, the trial judge felt constrained to issue an expurgated version of his reasons, for a general audience, from which all citations from the 'confidential' documents were omitted. That version lacked both basic information and intelligibility ... It is not until one reads the unexpurgated version that one can gain any real understanding of his Honour's findings of fact or processes of reasoning.²²⁰

²¹⁶ Ibid.

²¹⁷ [2013] WASC 339 (S) (12 September 2013). Such an approach was also adopted by Brownie AJ in *Application concerning Section 80 of the Supreme Court Act and Sections 119 and 128 of the Evidence Act* [2004] NSWSC 614 (1 July 2004); see especially at [1], [4], [11], [13]. See also *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd [No 2]* [2011] WASC 276 (23 August 2011); *Ives v Western Australia [No 2]* [2010] WASC 221 (3 September 2010); *Legal Profession Complaints Committee v A Practitioner* [2010] WASC 13 (21 December 2009); *D1 v P1* [2012] NSWCA 314 (28 September 2012); *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 (29 August 2012); *Commissioner, Australian Federal Police v Dickson* [2013] NSWSC 560 (13 May 2013).

²¹⁸ See, eg, *Western Australia v Langford [No 2]* [2011] WASC 203 (6 July 2011) [2] (Simmonds J); *Application of Bodiotis, Taleb and Amoun* [2013] NSWCCA 40 (8 February 2013); *Perpetual Trustee [No 2]* [2012] WASC 383 (S) (15 October 2012); *R v Lovett [No 3]* [2013] WASC 102 (S) (27 March 2013); *Western Australia v Simion* [2012] WASC 330 (14 September 2012); *Rizhao Steel Holdings Group Co Ltd v Koolan Iron Ore Pty Ltd [No 2]* [2011] WASC 276 (23 August 2011).

²¹⁹ See, eg, *Perpetual Trustee [No 2]* [2012] WASC 383 (S) (15 October 2012); *R v Lovett [No 3]* [2013] WASC 102 (S) (27 March 2013).

²²⁰ (1990) 24 FCR 313, 317 (Lockhart, Wilcox and Gummow JJ).

Such a problem with redacted reasons, however, is only likely to arise in relation to judgments that have been written or published and only later require redaction. Otherwise, as emphasised by Street CJ in *General Motors-Holden's*, it would usually be possible to draft reasons in such a way as to provide an account of what has transpired without having to suppress them in their entirety.

Alternatively, it may be that courts are in the practice of suppressing or withholding from publication entire reasons in circumstances that cannot be justified. An example of this can be found in the decision of the Victorian Court of Appeal to withhold the publication of its reasons in *News Digital Media Pty Ltd v Mokbel* (*'News Digital Media'*).²²¹ In that case, Antonios ('Tony') Mokbel, the notorious Melbourne gangland figure, was facing multiple trials — one for murder and the remainder for drug importation offences. During the course of pre-trial hearings, extensive orders ('the suppression orders') were made prohibiting the publication of any material containing reference to any proceedings concerning Mokbel, in addition to certain other information, including Mokbel's prior convictions and criminal offences, and information relating to his gangland associations. Just prior to the empanelment of the jury in the murder trial, a further order was made directing specified online news organisations to remove all historical internet news articles containing any reference to Mokbel. The news organisations appealed that order. In upholding the appeal, the Court of Appeal decided (for reasons that do not require elaboration in the present article) for the first time in Australia the point in time that historical internet articles are deemed to be 'published' as a matter of law for the purpose of sub judice contempt. However, due to the suppression orders prohibiting the disclosure of Mokbel's identity in relation to the proceedings, the Court of Appeal directed that its reasons could not be published because they referred to Mokbel in the case name and in the body of the judgment and contained other potentially identifying information. It was not until Mokbel pleaded guilty 15 months later that all suppression orders were revoked and the Court of Appeal's reasons were immediately published on the AustLII website. During the intervening period, however, the public and, perhaps more importantly, lawyers were deprived of knowledge of the important legal development recognised in the case. In our opinion, the reasons in *News Digital Media* could easily have been published. By anonymising Mokbel's identity and

²²¹ (2010) 30 VR 248 (previously *News Digital Media Pty Ltd v Mokbel* [2010] VSCA 51R (18 March 2010)).

generalising the information relating to the background facts, it would have been possible for the Victorian Court of Appeal to have published an intelligible version of the reasons for its decision without disclosing any information which fell within the scope of the relevant suppression orders. The majority of the reasons focused on legal principle rather than the particular facts at hand, and the facts which were relevant could have been described in terms that did not disclose Mokbel's identity.²²² Even the suppression order under dispute could have been referred to in general terms.²²³ It should be noted that a similar approach was taken in one of the suppressed decisions of the Western Australian Court of Appeal²²⁴ — the only other instance where the authors were able to obtain a copy of suppressed reasons. The case involved an appeal by the defendant for her conviction on a series of sex offences. The reasons were removed from AustLII on the basis that identifying the defendant would enable the identification of the victim. However, rather than removing the reasons in their entirety, we contend that it would have been entirely possible for the Court to amend the reasons by substituting the defendant's name with an appropriate pseudonym.

It is impossible to know whether the approach in *News Digital Media* was the result of the Court of Appeal exercising an overabundance of caution or whether the Court had considered anonymisation and redaction and, if so, whether there was a genuine belief that redacted reasons could not be produced. Similarly, of the suppressed reasons referred to in the introduction of this article, it is impossible to ascertain the courts' reasons for complete suppression, let alone evaluate whether such suppression in these cases can be justified. This is not only because the reasons themselves are unavailable, but

²²² See *News Digital Media* (2010) 30 VR 248, 251–5 [1]–[16] (Warren CJ and Byrne AJA), 273–5 [99]–[105] (Buchanan JA).

²²³ See *ibid* 252 [5], 253 [7], 254 [10] (Warren CJ and Byrne AJA). For example, the order mainly at issue — the 'internet order' — could have been reproduced in the reasons in the following terms: 'Until further order News Digital Media Pty Ltd and Fairfax Digital Ltd remove from their Website and not publish any Articles containing reference to [A] by 4pm on [date]'.

²²⁴ Unfortunately, it is not possible to provide a citation to this case. To do so may constitute a breach of s 36C of the *Evidence Act 1906* (WA) (which makes it an offence to publish any matter likely to lead to the identification of a sexual offence complainant), despite the fact that the case has been widely cited by courts around Australia. The full reasons in the case were included by accident in the Western Australian Reports. The hardcopy version was identified by the current authors by inputting the neutral citation listed on AustLII into the AustLII LawCite database, where the Western Australian Reports citation was also provided. The Western Australian Supreme Court media liaison officer confirmed that the reasons were removed from the internet despite the full version being available in hardcopy and that this was done to protect the identity of the victim.

also due to the general lack of public explanation by the courts. While courts will often (but not always) give reasons for making suppression orders prohibiting the publication of, for example, the identity of one or more of the parties or certain aspects of proceedings, especially where such orders are made following a contested hearing, the same cannot be said of suppression orders to restrict the publication of reasons. However, even in the few instances where courts *have* provided such reasons,²²⁵ they are not always made public until after all suppression orders in a case have been lifted.²²⁶ This, however, constitutes a clear breach of the public reasons rule. As this article has outlined, courts are required to provide public reasons for their decisions and, as explained by French CJ in *Hogan v Hinch*, this extends to reasons for the making of suppression orders.²²⁷ As far as we can see, there is no reason why decisions on suppression orders that restrict the publication of reasons should be treated any differently.

V CONCLUDING COMMENTS

In tracing the development of the legal duty to give reasons, this article has suggested the emergence in Australia of a new open justice rule: the rule that judges must give public reasons for final and important interlocutory decisions. While the High Court has explicitly recognised the relationship between the duty to give reasons and the open justice principle, the existence of the public reasons rule — which has only been explicitly acknowledged by a handful of courts (and, even then, not by that precise name) — has not received widespread acknowledgement. Moreover, the consequences of its recognition under the common law are both complex and uncertain. As explored in Parts II and III, there are unresolved questions about the extent of the duty and the exceptions to it, whether the public has a right of access to reasons as a corollary of the duty, and what degree of publicity might be required. The discussion in Part IV also suggests a level of inconsistent treatment regarding the suppression of reasons. Given the central importance of both reasons and the open justice principle to the exercise of judicial power

²²⁵ See, eg, *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* [No 2] [2011] WASC 276 (23 August 2011) [2] (Edelman J); *R v Lovett* [No 3] [2013] WASC 102 (S) (27 March 2013).

²²⁶ See, eg, *R v Lovett* [No 3] [2013] WASC 102 (S) (27 March 2013). Cf *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* [2011] WASC 276 (23 August 2011) [2] (Edelman J); *Perpetual Trustee* [No 2] [2012] WASC 383 (S) (15 October 2012).

²²⁷ (2011) 243 CLR 506, 540 [42].

according to the rule of law, it seems unsatisfactory that such fundamental aspects of the judicial process have been left to prolonged and tentative gestation under the common law. Indeed, it is perhaps even more unsatisfactory that many uncertainties continue regarding the scope and content of the duty. The obvious solution, of course, is statutory intervention.

Section 16 of the *Open Courts Act 2013* (Vic), referred to in the introduction, touches on the duty to give reasons. It provides:

Nothing in this Act limits or otherwise affects any duty of a court or tribunal to publish reasons for judgment or decisions, subject to the court or tribunal editing those reasons to the extent necessary to comply with any order of a court or tribunal or statutory provision restricting the publication of information.

The Explanatory Memorandum states that the aim of the provision is to reinforce the existing common law duty, as recognised by the High Court in *Wainohu*, to provide public reasons for final and important interlocutory decisions.²²⁸ Given that the overall objective of the *Open Courts Act 2013* (Vic), as described by the Victorian Attorney-General Robert Clark, is to promote and reinforce ‘the law in relation to open courts and open justice in Victoria’,²²⁹ it can be assumed that the object of the provision was to emphasise the importance of reasons to an open and transparent system of justice. The problem with s 16, however, is that it relies on the common law duty but does not attempt to define the duty itself; nor does it expressly set out the relationship between reasons and the open justice principle. This is unfortunate in light of the uncertainties of the developing jurisprudence set out in the present article. It is, nevertheless, understandable given that the section is clearly intended as a ‘limiting’ provision rather than one purporting to impose a statutory duty per se.

In order to achieve greater certainty and clarity regarding the duty to give public reasons, any attempt to put the duty on a statutory basis must go beyond simply referencing the common law. Rather, it must address the uncertainties of the common law. Moreover, those uncertainties should be resolved in the manner argued for in the present article. Thus, such a statutory obligation should acknowledge that the duty to give public reasons is an aspect of the open justice principle and comes into play whenever judicial power is being exercised. The duty should require that all decisions (other than minor interlocutory decisions) be accompanied by reasons and that

²²⁸ Explanatory Memorandum, *Open Courts Bill 2013* (Vic) 5. See also Victoria, *Parliamentary Debates*, Legislative Assembly, 27 June 2013, 2419 (Robert Clark).

²²⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2013, 2297.

failure to provide such reasons will constitute an error of law. Importantly, any statutory obligation should also stipulate that reasons will only be 'public' when published in the broader sense and that such publication must be in a manner and form accessible to the public and in a location acknowledged by the legal profession as the jurisdiction's repository of judicial reasons. It should also be made clear that the power to derogate from the duty to provide public reasons is subject to the same principles that govern the open court rule. As such, the suppression of reasons (including their withholding) will only be permitted in very limited circumstances of necessity and, even then, only to the extent that it is necessary to avoid the relevant harm. Under the strict application of this test, reasons will only be suppressed in their entirety in very rare circumstances. In addition, the statutory obligation should also require that any decision to withhold or suppress judicial reasons (whether in whole or in part) be made only pursuant to court order,²³⁰ and make it clear that such a decision is an exercise of judicial power rather than a matter of internal judicial administration.²³¹

²³⁰ If this were to occur any decision to suppress reasons (whether in whole or in part) should be subject to considerations similar to those set out in pt 2 of the *Open Courts Act 2013* (Vic). Part 2 includes the following requirements: that notice be given of any application to suppress reasons, which as a general rule requires three business days' notice be given prior to the making of an application to suppress reasons: at s 10; that any court or tribunal which receives notification of an application to suppress reasons (pursuant to s 10) takes reasonable steps to notify relevant media organisations that the application has been made: at s 11; that limits are imposed on the duration of any order suppressing reasons: at s 12; that orders are clear and appropriate in scope, including that any order suppressing reasons is specified in such terms that the order is limited to achieving the purpose for which the order has been granted: at s 13; and that an order suppressing reasons may only be made on the basis of evidence of sufficiently credible information: at s 14. Part 2 also includes requirements in relation to the process of review of any order to suppress reasons, including that the Attorney-General, news media organisations and any person who has a sufficient interest may make an application to review an order to suppress reasons and that all such persons are entitled to attend and be heard at the hearing to review the order: at s 15.

²³¹ As the court making the order to suppress reasons may be seen to have an interest in suppressing its reasons for judgment, there is some merit in imposing an additional requirement that any application made to review an order to suppress reasons should be heard and determined by a court other than the court whose decision to suppress reasons is being reviewed. Further, consideration could also be given to whether any hearing to review an application suppressing reasons should be heard by the Court of Appeal to ensure consistency and, hopefully, to limit the occasions on which such orders will be granted.