R v Hoser and Kotabi Pty Ltd [2001] VSC 443 (29 November 2001) Supreme Court of Victoria

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IN THE SUPREME COURT OF VICTORIA Not Restricted
AT MELBOURNE
COMMON LAW DIVISION
No. 5928 of 2001

THE QUEEN
(Ex parte the Attorney-General for the STATE OF VICTORIA) Plaintiff
v
RAYMOND TERRENCE HOSER
And
KOTABI PTY LTD
(ACN 007 394 048) First Respondent
Second Respondent

JUDGE: Eames J
WHERE HELD: Melbourne
DATES OF HEARING: 23 - 25, 30, 31 October
DATE OF JUDGMENT:29 November 2001
CASE MAY BE CITED AS: R v Hoser and Kotabi Pty Ltd
MEDIUM NEUTRAL CITATION: [2001] VSC 443

Contempt of Court - summary procedure - scandalising the court - statements contained in books published by second defendant and written by first defendant - thousands of copies sold - whether tendency to interfere with administration of justice - allegations of bias and corruption against judges and magistrates - defence of truth - defence of fair comment - "good faith" - onus of proof as to truth - whether "real risk" and/or "practical reality" of statements undermining authority of courts.

APPEARANCES: Counsel Solicitors
For the Applicant Mr D.G. Graham QC (Solicitor-General)
with Mr H.J. Langmead James Syme
Victorian Government Solicitor
For the Respondents Mr C.M. Maxwell QC
with Mr P.D. Nicholas
and Mr D. Perkins Access Law

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HIS HONOUR:

In this case the summary procedure for prosecuting contempt of court has been invoked by originating summons pursuant to Order 75 of the Rules of the Supreme Court. The originating motion alleges that the respondents are guilty on two counts of contempt of court by scandalising the court. The allegations relate to the publication of statements in two books written by the first defendant, Raymond Terrence Hoser (hereafter referred to as "Hoser"), and published by the second defendant, Kotabi Pty Ltd ("Kotabi"). Hoser is the sole director of Kotabi and the sole shareholder. The company was first registered in 1990 and has total paid up shares of $2.

Both books which are the subject of the charges were published in 1999. The first book was titled "Victoria Police Corruption" (hereafter called "Book One"). One passage from that book is the subject of the second count of contempt. That passage refers to then Magistrate Mr H.F Adams. Count 1 relates

to the second book, titled "Victoria Police Corruption 2" (hereafter called "Book Two") and there were numerous passages identified by the Crown in the particulars of contempt on the first count of contempt. Apart from these books Hoser is the author of numerous other books and has published many papers, on topics concerning alleged corruption and in the field of zoology. One book, "The Hoser Files - The Fight Against Entrenched Official Corruption", published in 1995 by Kotabi, was referred to by Hoser in the course of his defence to the present charges. That book gives an account of court appearances by Hoser arising during his time as a taxi driver. One such appearance has direct relevance to matters discussed in Book Two.

On the first count of contempt, which relates to Book Two, 23 separate particulars were set out in the originating motion, each particular being an extract from the book. Eleven particulars related to his Honour Judge Neesham, three to his Honour Chief Judge Waldron, and three to her Honour Judge Balmford (as she then was). All of those judges were sitting in the County Court at the time of these events. Four particulars relate to passages referring to Magistrate Ms J. Heffey and one to Magistrate Mr H.F. Adams.

At the close of the case for the applicant, counsel for the respondents submitted that there was no case to answer on either count, both generally and with respect to each particular on those counts. On 30 October 2001 I ruled that a number of the particulars were incapable of constituting contempt by scandalising the court, but I held that there was a case to answer on the first count (relating to Book Two) with respect to three particulars referring to his Honour Judge Neesham, with respect to two particulars concerning comments about her Honour Judge Balmford, two particulars concerning Magistrate Heffey and one particular concerning Magistrate Adams. On the second count I held that with respect to the one particular which was alleged, there was a case to answer. Upon so ruling the case proceeded, with Hoser giving evidence as the sole witness called by the respondents.

It is now my task to rule whether I am satisfied beyond reasonable doubt that either or both counts of contempt have been proved.

"VICTORIA POLICE CORRUPTION" (BOOK ONE)

Book One, "Victoria Police Corruption", has more than 720 pages of closely typed text but also includes a number of photographs. In common with the second book, it appears to be a highly professional publication. Both books have a colour cover and Book One has a banner headline on the cover announcing it to have been "Previously Censored" and "The Book that the Victoria Police don't want you to read". The cover describes it as a book which deals with "Drug trafficking, murders, rapes, assaults, thefts, court fixing, corrupt judges and magistrates, money scams, car crash rackets, rapes, frauds, political corruption, OPP/police criminal activity, media manipulation and propaganda, cover ups at the highest levels, etc". On the title page, under the author's name, he is described as "Author of the controversial best sellers, "Smuggled: the Underground Trade in Australia's Wildlife" and "Smuggled 2 - Wildlife Trafficking, Crime and Corruption in Australia". Author's notes opposite the Contents page claim copyright in Mr Hoser and provide ISBN numbers. The Author's Notes announce, inter alia, that "Most or all manuscript from this book has been tabled in various Australian Parliaments. Some are now the subject of official enquiries and investigations", and asserts that "All reasonable steps have been taken to ensure accuracy of material in this book. Furthermore, all reasonable steps have been taken to elicit and publish appropriate responses from all adversely named persons". There then follows the following passages:

> "In November and December 1996 material published by Raymond Hoser in previous books was subject to a series of three defamation claims against Raymond Hoser and Kotabi Publishing in the Sydney Supreme Court. The cases centred on attempts to ban Smuggled 2: Wild Life Trafficking, Crime and

> Corruption in Australia. All three cases came down in favour of author Raymond Hoser and neither that book or Smuggled was banned (temporary bans were lifted). Furthermore, in no case did any judge find a single statement in either book that was in any way false or defamatory. Two attempted defamation actions against Raymond Hoser in relation to "The Hoser files - The Fight Against Entrenched Official Corruption" failed. Both were dropped before they made it to court. Likewise for a pair of unsuccessful attempts to sue Raymond Hoser over information placed on the Internet web site. To order other corruption books by Raymond Hoser please contact the publisher at the above address."

The Author's Notes (in Book 2) opposite the Content's page identify Mr Hoser as "Australia's most frequently banned author" and specify a web site at which contact may be made and relevant links be accessed. The note asserts that all information sources used in the compilation of the books can be found at another web site, which is also given.

Book One has 40 chapters, covering a wide range of reported and/or alleged instances of police impropriety, and appear to have been taken from media reports, court records and the accounts of person claiming to have been wrongly accused by police and/or wrongly convicted of offences.

The single item which comprises the particular of contempt alleged on this count appears at page 57 of Chapter 4 of Book One, which carries the title "Sex, Graft and Sabotaged Prosecutions".

"VICTORIA POLICE CORRUPTION 2" (BOOK TWO)

Book Two, "Victoria Police Corruption 2", runs in excess of 765 pages. The format and professional appearance is identical to the first book and the Author's Notes opposite the Content's page are identical. An Author's Note (which appears in both books) states: "Except by way of citation or peripheral reference, material/content from the books `The Hoser Files - The Fight Against Entrenched Official Corruption' or `Victoria Police Corruption' (or `Victoria Police Corruption 2') is NOT repeated here'. Reading of both books is highly recommended".

Book Two has 45 chapters. On the front cover (which is multi-coloured, as is the case in the first book) the author is again described as Australia's most frequently banned author and a sub-heading states, "Including what the media didn't tell you!" and also on the cover the following insight to the contents is given:

> "Bashings, Thefts, Cover Ups, Police Use And Protection Of Criminals Including Child Molesters, Systematic Illegal Strip Searches, Set Ups, Fabricated Charges, Disruption of Evidence, Crooked Judges and Magistrates, Rent a Witness Scams, Jury Knobbling, Perjury, Taxi Directorate Frauds, Schemes Against Corruption, Whistle Blowers, Dishonest Politicians, Prisons, Media Censorship, etc."

There is a distinct change in emphasis in Book Two compared with Book One. Of the 45 chapters the great majority concern court cases in which Hoser was himself a party and represents his account of what occurred during those hearings, both in Magistrates' Courts and in the County Court, and provides his explanation as to the, mostly, adverse outcomes which he experienced.

Hoser provides a detailed chronology in Book Two which records his arguments with government officials, including the New South Wales Wildlife Authority and police, commencing in New South Wales in 1976, and his prosecution by police - in New South Wales from 1981 and subsequently by Victorian police. He also details disputes, allegations of corruption and charges involving officials of the Road Traffic Authority, dating from about 1985, when he was driving taxis. The chronology indicates that he brought charges, himself, against Road Traffic officers and police on some occasions. The majority of the book is concerned with an exhaustive discussion, with some references to transcript, of, first, the hearing in the Magistrates Court of the traffic

offence, then, secondly, his appeal against his conviction on that count, which appeal was heard by Judge Balmford. The appeal before Judge Balmford is discussed in detail as is his being subsequently charged with perjury. He next details the committal proceeding before Magistrate Heffey, and then, in considerable detail, he discusses the trial on the perjury count before a jury, presided over by Judge Neesham.

In Book Two, under a heading, "About the Author", Mr Hoser is described as a person who is "Internationally regarded as an authority on Australian reptiles having published over 140 papers" and two of his books on frogs and endangered animals are said to be "regarded as definitive works in their fields". It is noted that:

> "Most of the author's claims regarding corruption have since been vindicated by other independent sources. Officials named by him as being corrupt, have since been removed from their positions. Smuggled was Raymond's first corruption book. Following its release in 1993, it soon became widely accepted as the new benchmark in terms of investigative books about corruption within Australia. It was an instant best seller."

The Author's Note asserts that the book "The Hoser Files", which was first published in 1995, "is widely regarded as the precursor of a notably increased media attention to the problem of police corruption in Victoria". The book contains a foreword written by Mr Graeme Campbell, who is described as former MHR for Kalgoorlie WA.

I turn to the particulars on the first count (all of which relate to Book Two, "Victoria Police Corruption 2").

COUNT ONE: (RE: `VICTORIA POLICE CORRUPTION 2'; BOOK TWO)

(A) PARTICULARS OF CONTEMPT REFERRING TO JUDGE NEESHAM

All of the particulars relating to Judge Neesham concerned the trial for perjury in 1995. The first particular on which I found that there was a case to answer was Particular (iii), a passage at page 260, of Book Two, in a chapter titled, "A Hot Bed of Corruption". The following passage appears:

> "Perhaps most tellingly, he was one of those judges who had refused to allow me to have the case tape recorded, thereby effectively stamping him as a crook judge who wanted his activities never to be opened up to scrutiny. My initial judgements of Neesham as corrupt and dishonest were further proven during the course of the trial and its aftermath, much of which will be explained in the material which follows."

In Book Two, Hoser[1] defines the term "corrupt" as including an illegal, immoral, inconsistent, unethical or dishonest action.

Particular (iv), which I also held to constitute a case to answer, appears at page 274, in a chapter titled, "Another Can of Worms". The particular is as follows:

> "As soon as the trial proper commenced, Neesham's bias against me commenced in earnest and his desired result was clearly known. His whole modus operandi was to guide the jury towards a guilty verdict. Furthermore these actions were separate to others which also appeared to have been taken to ensure the jury's verdict was pre-determined."

I pass over two particulars which I held did not constitute a case to answer, and the next particular on which I held there was a case to answer appears at page 329, in a chapter titled, "The Twenty Counts of Perjury". The particular reads as follows:

> "Of course Connell had been doing effectively what Neesham had told him. It was a classic case of bent judge improperly helping a prosecution witness."

Hoser's trial for perjury commenced in September 1995 and continued for approximately a month. Prior to the trial he had applied to the Chief Judge of the County Court under s.360A of the Crimes Act 1958 for an order that the Legal Aid Commission grant him funding for legal representation, and complains that his application was rejected on a basis which was subsequently to be

ruled erroneous[2]. It seems that he was offered a grant of legal aid for the trial, at some stage, but refused to accept a condition which the legal aid body imposed, namely, that a charge be placed over his property. Hoser, therefore, was unrepresented in the trial.

The trial judge, Judge Neesham, had previously sat on an appeal arising from a conviction and fine for a parking infringement at St Kilda, which occurred in July 1992 and on which Hoser was convicted by a magistrate in July 1993. On that occasion Judge Neesham refused to permit the proceedings to be taped and, after hearing the case, confirmed the conviction. It does not appear that at the outset of the perjury trial Hoser objected to Judge Neesham presiding in the case, but very late in the trial, during final addresses, such a complaint was made.

In common with Magistrates' Court proceedings, it was not the practice for County Court appeals (which were in the nature of re-hearings) to be tape recorded, or for transcripts to be produced. A recurring theme in Hoser's books is his complaint about proceedings in the Magistrates' Court, and County Court Appeals, not being transcribed or taped. It is by no means an unreasonable complaint, but Hoser contends that the decision not to tape proceedings is due not to (unacceptable) financial constraints or for any valid or lawful reason, but to a desire on the part of the judges or magistrates to hide the truth, and reflects a disregard for the fact, as he sees it, that the absence of a record allows prosecution witnesses to commit perjury.

(B) PARTICULARS OF CONTEMPT CONCERNING JUDGE BALMFORD

The first of the two particulars on which I found a case to answer appears at page 142, in a chapter titled, "Forgeries, Forgeries, Forgeries". The passage reads, as particularised:

> "Like I've noted, Balmford wanted to convict me and get the whole thing over with as soon as possible. After all she'd obviously made up her mind before the case even started. Recall, she'd refused to allow the matter to be tape recorded."

The second passage appears at page 144 in the same chapter and reads as follows:

> "Balmford's bias in favour of police and the DPP isn't just something I've noted. In fact three Supreme Court judges have noted it as well."

(C) PARTICULARS OF CONTEMPT CONCERNING MAGISTRATE HEFFEY

At page 208, in a chapter titled, "A Policeman's Magistrate" the following passage appears:

> "In siding with the police, Heffey made her `ruling' where she goes through the motions of stating the alleged `facts' and `reasons' for her decision. She said she was going ahead because I had failed to notify the other side of my intention to seek an adjournment pending legal aid. That her statement was an obvious lie was demonstrated by the multiple letters in Hampel's files and Heffey's own court records. Then again, I suppose it was a case of not letting the truth get in the way of a pre-determined outcome."

The second passage with respect to Magistrate Heffey appears at page 212, as follows:

> "Oh, and, just in case you haven't yet worked it out, my committal to stand trial had clearly been well determined before a word of evidence was given."

(D) PARTICULARS OF CONTEMPT CONCERNING MAGISTRATE ADAMS

On the inside back cover of Book Two appears a full page photograph of Magistrate Adams, with eyes cast down and with a serious expression, under a bold title, "The Magistrate". A sidebar attribution for the photograph notes that it is "Courtesy of `The Age'". Under the photograph appears the following heading: "The Magistrate that the cop said he paid off", which is then followed by the following text (which constitutes the particular of contempt):

> "Following the 1995 publication of Policeman Ross Bingley's confession that

> he had paid off Hugh Francis Patrick Adams to fix a case, some of his other rulings that seemingly flew in the face of the truth or logic have come under renewed scrutiny. This includes the bungled inquest into the murder of Jennifer Tanner, which police falsely alleged was suicide."

On the inside front cover of the book, under a bold title, "The Policeman", appears a full page photograph of a person in a suit, again with head down, standing by a motor vehicle. Under the photograph is the caption, "Crooked Cop" and under that the following text appears:

> "Ross Allen Bingley gained notoriety for several actions including falsifying charges, perjury and using police protected criminals as witnesses. After one case he confessed to fixing the result by paying off Magistrate Hugh Francis Patrick Adams (see inside back cover). Several recently retired Victorian police officers have said that `fixing' court cases by paying off judges and magistrates, knobbling juries, harassing witnesses and other unlawful means is so common as to be effectively routine. Meanwhile the government maintains that charade, that this sort of thing never happens."

There is no particular of contempt relating to the words or photograph appearing on the inside front cover but it was submitted on behalf of the respondents that it was relevant to the defence to refer to that, so as to give context to the statements which appeared on the inside back cover.

COUNT TWO: RE: `VICTORIA POLICE CORRUPTION'; BOOK ONE

PARTICULARS OF CONTEMPT CONCERNING MAGISTRATE ADAMS

In Book One, as I have said, only one passage is the subject of a particular with respect to the second count of contempt. At page 57 the same photograph of Magistrate Adams appears as was used in the second book. Once again, attribution is given to `The Age' and the caption is, "Magistrate Hugh Francis Adams". Of the words which then appear not all have been included in the particular of the offence. The words in italics are those which are not part of the particulars of contempt:

> "In a controversial decision he let corrupt policeman Paul John Strang walk free from court after he pled guilty to a charge related to planting explosives on an innocent man. He then put a suppression order on the penalty. In a separate matter, a Policeman admitted to paying a bribe to Adams to have an innocent man sentenced to jail. Adams was also the magistrate who preceded over the first bungled Jennifer Tanner inquest. His finding in that matter was qashed (sic) and overturned. Adams has also come under criticism for his handling of other cases including the Wagnegg and Walsh Street matters."

Before dealing with the matters of fact and law which the plaintiff contended constituted these statements to be contempt, and the defences which were raised by the respondents, it is first necessary to provide some background to the perjury charge which was determined by the jury in the trial presided over by Judge Neesham.

THE BACKGROUND TO THE PERJURY CHARGE

A very large proportion of the chapters in the second book deal with Hoser's conviction by verdict of a jury on a count of perjury. Hoser was presented at the County Court at Melbourne on 4 September 1995 and after being convicted of perjury was sentenced by Judge Neesham to six months' imprisonment with two months of that sentence suspended for two years. The circumstances which gave rise to his prosecution for perjury commenced on 8 March 1992, when two police officers observed Hoser driving a taxi in the early hours of that day at the intersection of Sydney Road and Harding Street, Coburg. The police officers observed Hoser drive into the intersection against a red traffic light. They stopped him and issued an On the Spot Penalty Notice.

Hoser contested the charge, but in proceedings in the Magistrates' Court in November 1993 was convicted, fined and had his licence cancelled. He appealed

from that conviction to the County Court and on 17 and 18 February 1994 the appeal was heard by her Honour Judge Balmford (at that time a judge of the County Court, but her Honour was later elevated to the Supreme Court). Once again, no transcript was taken of the proceedings. Hoser objected to the fact that the proceedings were not being tape recorded and upon her Honour's rejection of his contention that they should be, Hoser thereafter covertly tape recorded part of the proceedings, being the 28 minutes of his own evidence.

At the conclusion of the evidence for the prosecution on the appeal before Judge Balmford, Hoser produced a document and then gave evidence on oath and tendered the document, which he said was advice which he had received in writing from VicRoads that the traffic lights at that intersection were malfunctioning at the time of his offence, and were showing red in all directions at that time. The letter purported to be written in reply to a telephone enquiry made by Hoser on 24 January 1994 about that intersection. Hoser said he had received this response by fax, on his home fax machine which, he said, did not print out the time of receipt of the document.

The prosecution sought an adjournment to make further enquiries, and upon the matter resuming evidence was led that the document which had been produced by Hoser, and which had the VicRoads' letterhead, also bore a reference number which was an internal reference number used by VicRoads to identify the intersection about which an enquiry had been made by a member of the public and to which the response related. The reference number in the document tendered by Hoser was not to the intersection at which he had been charged but to the intersection at King Street and Flinders Lane, Melbourne.

The prosecution tendered a letter from VicRoads which bore the same date as the letter tendered by Hoser and which was in identical form, save for the fact that it was referring to a different intersection and a different time and date, and which letter had been produced in response to a request for information made by Hoser on the same date on which he said he had made the enquiry about the intersection of Sydney Road and Harding Street, Coburg. In response to this material Hoser claimed that he had in fact made enquiries on the same date, that is, 24 January 1994, about malfunctions at two separate intersections.

Hoser was charged with perjury for this evidence and was committed for trial by Magistrate Heffey. According to Hoser, in committing him for trial Her Worship did not hear his tape recording of his evidence before Judge Balmford, having been told that the tape (which had been seized and copied by police) had not been brought to court, and having ruled that it was not necessary to hear it to be satisfied that there was a case to answer at trial. An attempt by Hoser to tender and play a copy of the tape was successfully objected to by counsel for the DPP.

On his trial for perjury in the County Court the count was amended so as to allege that he had falsely sworn on oath that the letter which he tendered had been sent to him, by fax, from VicRoads. At the trial in the County Court the Crown led evidence from witnesses from Roads Corporation and from an expert from the State Forensic Science Laboratory to the effect that the document tendered by Hoser had been a forgery and constituted a doctored version of the document which had been sent to him by VicRoads concerning the intersection at King Street and Flinders Lane. In other words, it was the Crown case that to bolster his case Hoser had produced a manufactured forgery, and had been caught out. The records of Roads Corporation disclosed no enquiry having been made by Hoser concerning lights at the intersection of Harding Street and Sydney Road.

In his defence to the charge of perjury Hoser claimed that he had been "set up" by police officers and officers of Roads Corporation, whom he claimed had been victimising him over a long period of time. He called another taxi

driver, one Burke, who gave evidence that he had travelled through the intersection on the same evening for which Hoser had been charged and that the traffic lights were then stuck on red. The witness, Burke, appears to be the same person who gave evidence for Hoser in his earlier Magistrate's Court prosecution for assault which was heard by Magistrate Adams, out of which the "confession" was made by Bingley concerning the alleged corruption of the magistrate. As Hoser acknowledges in his book, Burke's credibility was the subject of sustained attack by the prosecutor in the perjury trial.

Unlike his previous encounters in the law courts, the decision in the perjury trial was not made by a magistrate or a judge, but by a jury of 12 citizens who had the opportunity to observe Hoser and his witness, and also the prosecution witnesses. They disbelieved Hoser and his witness. A conviction for perjury was plainly a very serious setback for a person who proclaimed himself to be an authority about corruption and a person whose word should be accepted as truth.

Hoser appealed to the Court of Appeal, and was represented by Queen's Counsel, but his appeal failed. Hoser attended the hearing, and was present when, at the outset of the hearing, counsel announced that he proposed to argue only three grounds, those being three new grounds of appeal drafted by Hoser's lawyers, and that he would not argue the 26 grounds which had been drafted and lodged by Hoser. As appears in the report of the decision of the Court of Appeal (R v Hoser[3]), counsel advised the court that his instructions would not permit him to abandon those grounds, although he did not propose to argue them. Hoser complains that the abandonment of the 26 grounds of appeal was contrary to his express instructions. Although the original 26 grounds were not filed in the proceedings before me it is apparent from the terms of the report to the Court of Appeal by Judge Neesham what some of those grounds were, and the grounds are re-produced in Book Two[4].

Before examining the circumstances and context of the events referred to in each of the particulars of alleged contempt, it is convenient to discuss the relevant law applicable to a charge of contempt by scandalising the court.

WHAT CONSTITUTES CONDUCT WHICH SCANDALISES THE COURT?

The summary procedure of prosecuting instances of contempt by scandalising the court should be regarded as invoking criminal jurisdiction and, accordingly, requires that the charge be proved beyond reasonable doubt[5]. The Supreme Court has jurisdiction to deal with contempts of inferior courts[6]. The offence of scandalising the court is a well recognised form of criminal contempt and is not obsolete[7]. The offence of contempt by scandalising the court was described in the following terms by Rich J. in R v Dunbabin; ex parte Williams[8] when speaking of interferences with the course of justice:

> "...But such interferences may also arise from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to influence the confidence of the people in the court's judgments because the matter published aims at lowering the authority of the court as a whole or that of its judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office. The jurisdiction is not given for the purpose of protecting judges personally from imputations to which they may be exposed as individuals. It is not given for the purpose of restricting honest criticism based on rational grounds of the manner in which the court performs its functions. The law permits in respect of courts, as of other institutions, the fullest discussion of their doings so long as that discussion is fairly conducted and is honestly directed to some definite public purpose. The jurisdiction exists in order that the authority of the law as administered in the courts may be established and maintained."

There are generally recognised to be two categories of publications which scandalise the court, although they tend to overlap[9]. In the first place,

there are those which impugn the impartiality or integrity of the court. The second category relates to scurrilous abuse. In this case the particulars on which I held there was a case to answer fell into the former category, although in some instances language was employed which was capable of constituting scurrilous abuse, also. Abuse or attacks on the personal character of a judge or magistrate which reflect upon the capacity of the person to act as a judge or magistrate - for example, by calling the judge or magistrate a liar[10] - would be capable of constituting scurrilous abuse[11]. In the leading case concerning scurrilous abuse, R v Gray[12], Lord Russell of Killowen CJ drew a distinction between criticism, on the one hand, and personal, scurrilous, abuse of a judge, as a judge. Lord Russell characterised contempt by scandalising a court or judge as being conduct where an act done or a writing published was calculated to bring a court or judge of the court into contempt, or to lower his authority. His Lordship qualified that statement by holding:

> "Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of court."

In The King v Nicholls[13] Griffiths CJ observed:

> "In one sense, no doubt, every defamatory publication concerning a judge may be said to bring him into contempt as that term was used in the law of libel, but it does not follow that everything said of a judge calculated to bring him into contempt in that sense amounts to contempt of court."

In Attorney-General (NSW) v Mundey[14] Hope JA held that it may, and generally will, constitute contempt to make unjustified allegations that a judge has been affected by some personal bias against a party, or has acted mala fide, or has failed to act with the impartiality required of the judicial office, but in Ahnee & Ors v Director of Public Prosecutions[15] Lord Steyne, delivering the judgment of the Judicial Committee of the Privy Council, held that the imputation of improper motives to a judge could not be regarded as always, and absolutely, constituting contempt, and gave as an example of a possible exception an instance where a judge engaged in patently biased conduct in a criminal trial.[16] As I will later discuss, it is my view that none of the particulars with which I am concerned would constitute such an exception, i.e., by virtue of being criticism of what was patently biased conduct.

In stressing the importance of freedom of speech and the right of members of the public to criticise decisions of the courts, Lord Denning M.R. in R v Metropolitan Police Commissioner; Ex parte Blackburn (No 2)[17] said that every person had the right:

> "to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not."

Lord Denning then followed that statement with this important qualification:

> "All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication."

In citing the judgment of Lord Denning, with approval, Hope JA in Attorney-General (NSW) v Mundey[18], observed:

> "But criticism does not become contempt because it is `wrong headed, or based on the mistaken view of the facts or of the law. Nor, in my opinion, need it be respectfully courteous or coolly unemotional. There is no more reason why the acts of courts should not be trenchantly criticised than the acts of other public institutions, including parliament. The truth is of course that public institutions in a free society must stand upon their own

> merit; they cannot be propped up if their conduct does not command respect and confidence; if their conduct justifies the respect and confidence of the community, they do not need the protection of special rules to shield them from criticism. Indeed informed criticism, whether from a legal or social or any other relevant point of view, would be of the greatest assistance to them in the performance of their function. However, the law has undoubtedly imposed qualifications on the right of criticism, and they are qualifications that relate to the effective performance by courts and judges of their role in the administration of justice. Unfortunately these qualifications are ones the boundaries of which are difficult to define with precision, and indeed in respect of which courts have from time to time had different attitudes."

The prosecutor is not obliged to prove that the comments actually did undermine the standing of the court or its officers. It is sufficient if the court is satisfied, objectively, that they had the tendency to do so[19]. In determining whether the material has that tendency, it is to be judged by reference to its impact upon the ordinary reader[20], or a reasonable person[21].

The first defendant denied that he had made the statements with any intention of interfering with the administration of justice or the standing of the judges. Indeed, he claimed that his intention was to enhance the reputation of the judicial system by exposing those instances where judges or magistrates had behaved improperly. His intention, assuming I accepted his assertion in that respect, can not be decisive on the question whether he has committed contempt.

Hope JA in Mundey held that in the circumstances of that case the issue whether the respondents statements constituted contempt had to be determined by reference to their inherent tendency to interfere with the administration of justice and that:

> "The defendant's intention, while of some relevance in this regard, is of importance mainly in relation to whether the matter should be dealt with summarily, if any of the statements did constitute contempt, and in relation to the question as to what penalty, if any, should be imposed"[22].

In John Fairfax & Sons Pty Ltd v McRae the High Court held that "the actual intention or purpose lying behind a publication in cases of this kind is never a decisive consideration. The ultimate question is as to the inherent tendency of the matter published. But intention is always regarded by the court as a relevant consideration, its importance varying according to the circumstances"[23].

The courts have long stressed that the jurisdiction to punish in a summary way for contempt by scandalising the court should be exercised "sparingly"[24] and "with great caution"[25]. There must be a real risk of the administration of justice being undermined[26].

The need to exercise caution is starkly demonstrated by the leading authority on scurrilous abuse, itself. In R v Gray[27] the judge who was the subject of the abuse was Mr Justice Darling, a judge who has been the subject of much criticism by writers since his retirement in 1923. The author, David Pannick, in his book "Judges"[28] said of the published criticism of Mr Justice Darling, which earned the journalist concerned a substantial fine (imprisonment only being avoided by virtue of a grovelling apology):

> "This splendid piece of invective effectively punctured the vain pretensions of Mr Justice Darling whose injudicious behaviour on the bench was frequently a disgrace."

Similar criticisms have been made elsewhere[29].

DEFENCES OF TRUTH AND FAIR COMMENT

The learned authors Borrie and Lowe[30] suggest that a defence of fair comment is available in Australia, but are more doubtful that a defence of

justification (I shall employ the term "truth" to identify this defence) is available in cases of contempt. In his book, "Contempt of Court" Professor C.J. Miller[31] came to similar conclusions. Although the law can not be taken to be settled, it does now seem that both defences are available in Australia. In this case the respondents' defence to all charges was that the comments constituted fair comment, but, as I shall discuss, the defence of truth nonetheless arises.

In his affidavit Hoser made the following assertions:

> "7. When undertaking research for my books I take all reasonable steps to ensure the accuracy and truth of the statements made in the books and of any material relied on. I adopted that approach in writing the relevant books. 8. I set out in the relevant books the facts and matters upon which my comments, criticisms and opinions - as expressed in the books - were based. All transcript extracts relating to the passages complained of were taken from the official court transcripts and, to the best of my knowledge at the time of publication, were accurately reproduced. 9. To the best of my knowledge at the time of publication, the statements of fact contained in the relevant books were true. Wherever in the relevant books I expressed views, opinions or beliefs, I was expressing views, opinions and beliefs which I held at the time of publication. 10. It was no part of my purpose in writing the relevant books to harm the administration of justice. As stated at p. 18 of book 2 (and elsewhere), my purpose in writing both books was to highlight what I perceived to be corruption (as defined in the books) and wrongs in the justice system and in the conduct of police. I sought to do so as the first step towards rectifying those deficiencies and ultimately strengthening public faith and trust in the criminal justice system."

In the course of his evidence to me, Hoser said: "The point is made early in both books that the vast majority of judges and magistrates and police and so forth, are doing a very difficult job very well, and I think in the context of the books, what I am worried about Your Honour is that a perception is being put across that I have some sort of bent or vendetta against all judges and magistrates which is very far from the case".

Mr Maxwell QC submitted that because, in his brief cross-examination, counsel for the Attorney-General did not challenge directly the assertions made in the above paragraphs of Hoser's affidavit, it must follow that the plaintiff was obliged to accept the truth of what was there asserted. However, whilst it is true that (somewhat surprisingly) Hoser was not cross-examined directly on those matters, there could be no doubt that the Crown was challenging every one of Hoser's assertions as to his integrity and good faith, and the contention that the offending passages from his books constituted fair comment.

In his evidence Hoser emphasised the care he took to check the facts in his books. He said that invariably publication of his books was delayed for a substantial period "so that the facts can be checked and double checked and persons adversely named can be sent relevant manuscripts so that if they believe I have got something wrong, they have the opportunity to correct the whole thing". He did not suggest, however, that any of the persons named in the particulars for the two counts of contempt were accorded that opportunity.

No defence of truth was argued. Instead, what was argued was that if it was accepted that Hoser had written in good faith what he believed to be true, and had based his statements on facts which he believed supported the statements, then the Crown carried an onus of proving that what was asserted was not true. In the written reply counsel for the respondents put the matter this way:

> "The submissions for the respondents do not assert that the books themselves are evidence of the truth of the matters stated in them. Rather, it is the submission of the respondents that the books are to be taken at face value,

> in the absence of any basis for a suggestion that they should not be so treated"

To emphasise the point, counsel noted that Hoser had sent to the Attorney-General the transcript and tape of the "confession" which he said Bingley had made concerning the alleged corruption of magistrate Adams. Since the Crown had not taken steps to investigate whether there was truth in the allegation, then, so it was submitted, it should be presumed that it was true, unless the Crown disproved the allegation. I will later deal with that contention, in some detail. Insofar as the particulars other than those concerning Magistrate Adams allege bias, rather than corruption, then the case is put not that there was actual bias but that Hoser believed that he had been the victim of bias and that his statements constitute fair comment made in good faith and based on the facts concerning what transpired in his hearings before the magistrates and judges concerned.

I turn then to consider what are the features of the defence of fair comment. As emerges from the decided cases, for a statement to constitute fair comment it must be honest criticism based on rational grounds, and be discussion which is fairly conducted. It must not be motivated by malice or by an intention to undermine the standing of the courts within the community. Lord Russell CJ in R v Gray saw no difficulty with criticism which constituted "reasonable argument or expostulation".

A further prerequisite for fair comment, namely, that the comment not impute improper motives, at all, to the magistrate or judge, was stated in the early decision of Ambard v Attorney-General for Trinidad and Tobago[32] where Lord Aitkin, delivering the judgment of the Judicial Committee, held:

> "But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

The apparent prohibition on any assertion of impropriety and the relevance of a claim of good faith were considered in Ahnee v Director of Public Prosecutions[33]. The Judicial Committee of the Privy Council was there concerned with a published allegation that the Chief Justice of Mauritius had improperly fixed the date and chosen judges to hear a case in which he had a personal interest. Their Lordships held that the offence of contempt by scandalising the court was not obsolete, but was an offence which was to be narrowly defined. Their Lordships added, at 306:

> "It does not extend to comment on the conduct of a judge unrelated to his performance on the bench. It exists solely to protect the administration of justice rather than the feelings of judges. There must be a real risk of undermining public confidence in the administration of justice. The field of application of the offence is also narrowed by the need in a democratic society for public scrutiny of the conduct of judges, and for the right of citizens to comment on matters of public concern. There is available to a defendant a defence based on the `right of criticising, in good faith, in private or public, a public act done in the seat of justice': see Reg v Gray[34]; Ambard v Attorney-General for Trinidad and Tobago[35] and Badry v Director of Public Prosecutions[36]. The classic illustration of such an offence is the imputation of improper motives to a judge. But so far as Ambard's case may suggest that such conduct must invariably be an offence

> their Lordships consider that such an absolute statement is not nowadays acceptable."

Their Lordships said that they preferred the view of the Australian courts, that exposure and criticism of judicial misconduct would be in the public interest (citing R v Nicholls[37]). The approach of the Australian courts, as adopted in R v Nicholls and R v Fletcher; Ex parte Kisch[38], also gained support from the Court of Appeal in New Zealand in Solicitor General v Radio Avon Ltd and Anor[39]. In that case the Court discussed the notion of "fair comment" and held that the mere fact that a criticism involved the imputation of improper motives to a judge or magistrate did not, in itself, determine that contempt had been committed. Their Honours continued:

> "If this were the law then nobody could publish a true account of the conduct of a judge if the matter published disclosed that the judge had in fact acted from some improper motive. Nor would it be possible, on the basis of facts truly stated, to make an honest and fair comment suggesting some improper motive, such as partiality or bias, without running the risk of being held in contempt."

The New Zealand Court of Appeal held in Solicitor General v Radio Avon that a defence based on fair comment was accepted to be available in R v Nicholls and R v Fletcher; Ex parte Kisch and was consistent with the view of the learned authors Borrie and Lowe, in The Law of Contempt, but their Honours held that comments would only avoid a finding of contempt "provided the allegation of partiality is free from the taint of scurrilous abuse and can be either justified or be properly considered as fair comment[40]".

The balancing approach which the court must undertake when considering a charge of contempt is discussed in Gallagher v Durack[41]. In that case the appellant, having successfully appealed against a sentence for contempt, imposed by a judge of the Federal Court, reacted to the decision of the Full Court in allowing his appeal by suggesting that it had been motivated by demonstrations staged by his union members. In the joint judgment, the High Court held;

> "The law endeavours to reconcile two principles, each of which is of cardinal importance, but which, in some circumstances, appear to come in conflict. One principle is that speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong headed. The other principle is that `it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon Courts of Justice which, if continued, are likely to impair their authority': per Dixon J in R v Dunbabin; Ex parte Williams[42]. The authority of the law rests on public confidence and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges. However, in many cases the good sense of the community will be a sufficient safeguard against the scandalous disparagement of a court or a judge and the summary remedy of fine or imprisonment `is applied only where the court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable': R v Fletcher; Ex parte Kisch, per Evatt J."

As may be seen, that statement, by its reference to "baseless" and "unwarrantable" criticism was consistent with the view that a defence of truth was open.

The High Court has more recently discussed the ambit of the contempt power, and the defences of fair comment and truth/justification, in the decision of Nationwide News Pty Ltd v Wills[43]. In that case the High Court was not called on to resolve the question of the range of defences which might be

available on a charge of contempt, and the statements of the judges on these issues, therefore, are obiter. Nonetheless, the Court considered the issues in some detail, and the judgments suggest that defences of truth and fair comment are available to defeat the charge of contempt by scandalising the court. The judgments also discuss the relevance of a claim of good faith and the limits which might be imposed on criticism.

In Nationwide News v Wills the Court was interpreting a statutory provision which purported to prohibit all criticism of the Industrial Relations Commission, even criticism which was "justifiable, fair and reasonable"[44], thus purporting to create a protection from criticism which was much wider than that provided to any court, at common law. In considering the words employed in the section ("calculated to bring a member of the Commission or the Commission into disrepute") Mason CJ, at 24, gave the word "calculated" its common law meaning in the law of contempt, namely, that it should be construed to mean "likely", rather than "intended".

In considering whether defences of justification and fair comment should apply, it was contended in argument that such defences were available at common law with respect to contempt. Mason CJ held, at 31-32, that at common law there would be no contempt if criticism was made in good faith by a person "genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice".

Brennan J held, at 38-39, that it would not be contempt to criticise court decisions "when the criticism is fair and not distorted by malice, and the basis of the criticism is accurately stated". His Honour held that it would be for the public benefit if comment was "fairly made" concerning conduct "that is truly disreputable (in the sense that it would impair the confidence of the public in the competence or integrity of the court)". Brennan J held that revelation of "truth" would be for the public benefit if it constituted "fair criticism based on fact", and that would be so even if the end result was that there would be less public confidence in a court or a judge. His Honour held that the laws of contempt do not suppress "justifiable or fair and reasonable criticism which exposes grounds for loss of official repute".

In their joint judgment, Deane and Toohey JJ, at 67, rejected the contention that the statute, in that case, imported defences which would be available at common law to a person charged with contempt, but in rejecting that contention their Honours accepted that, at common law, for a critical statement to constitute contempt it must have been "unwarranted"[45] or "unwarrantable"[46].

Deane and Toohey JJ, held, at 78, that, as with a court, it was important that members of the Industrial Relations Commission have the appearance as well as the substance of being fit and qualified and of acting fairly and impartially, and that the national system of conciliation and arbitration would be undermined were the public perception to be that the Commission's members were biased, unqualified, unfit, corrupt or customarily acted unfairly or improperly. Their Honours held that some control over "unfounded and illegitimate" attacks on the Commission could "in accordance with the traditional standards of our society, be justified as being in the public interest for the reason that it is necessary to enable the effective discharge of the important functions of conciliation and arbitration for the prevention and settlement of interstate industrial disputes". Their Honours held, at 79, that the protection of the Commission from unfounded attacks:

> ". . . does not mean that it is in the public interest that the substance of impropriety, bias or incompetence should be concealed under a false veneer of good repute. Indeed, the traditions and standards of our society dictate a conclusion that, putting to one side times of war and civil unrest, the public interest is never, on balance, served by the suppression of well-founded and relevant criticism of the legislative, executive or

> judicial organs of government or of the official conduct or fitness for office of those who constitute or staff them. Suppression of such criticism of government and government officials removes an important safeguard of the legitimate claims of individuals to live peacefully and with dignity in an ordered and democratic society. Indeed, if that suppression be institutionalised, it constitutes a threat to the very existence of such a society in that it reduces the possibility of peaceful change and removes an essential restraint upon excess or misuse of governmental power."

In his judgment in Nationwide News v Wills Dawson J, at 90-91, noted that the common law of contempt provided a very restricted basis on which criticism could be held to constitute contempt and cited the following passage in the judgment of Griffith CJ in R v Nicholls[47]:

> "On the contrary, I think that if any judge of this court or of any other court were to make a public utterance of such character as to be likely to impair the confidence of the public, or of suitors or any class of suitors in the impartiality of the court in any matter likely to be brought before it, any public comment on such an utterance, if it were a fair comment, would so far from being a contempt of court, be for the public benefit, and would be entitled to similar protection to that which comment upon matters of public interest is entitled under the law of libel".

McHugh J, at 98, noted that many statements made about the Commission or its members might not constitute contempt of the Commission although they would constitute contempt if made about a court or a judge. His Honour held that the words of the section which the court was concerned to interpret could not be read down by reference to common law concepts relating to contempt by scandalising a court. McHugh J held, at 102, however, that a protection against justifiable as well as unjustifiable criticism went beyond the protection afforded any court of law. His Honour adopted the statement of the Privy Council in Ambard v Attorney-General of Trinidad and Tobago, that at common law no wrong is committed by persons who, in good faith, criticise courts or judges or the administration of justice, provided that they abstain from imputing improper motives and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice. His Honour noted, too, that R v Nicholls went further than that statement of the law, in stating that it was not in all cases of an imputation of want of impartiality that there would be a contempt of court (but noted that the instance which would provide the exception - i.e. which would not constitute contempt - would be where the conduct of the judge exposed himself or herself to such a charge, fairly made). Furthermore, at 102-103, his Honour held that while there were decisions of courts in other jurisdictions suggesting that truth or falsity were irrelevant to a charge of scandalising the court "this Court has said that the summary remedy of fine or imprisonment is applied only `where the attacks are unwarrantable' (referring to a passage in Gallagher v Durack, at 243, in turn citing Evatt J in R v Fletcher; Ex parte Kisch, at 257)."[48]

McHugh J held, at 104, that the common law principles relating to scandalising the court were not applicable to the Industrial Relations Commission, but that, in any event, the legislation went well beyond the protection which the law of contempt gave to courts. His Honour was not required to determine whether defences of fair comment and justification were available at common law in proceedings for contempt.

Whilst the statements in Nationwide News v Wills strongly suggest that defences of truth and fair comment now apply, the question can not be taken to be concluded. In Re Colina, Ex parte Torney[49], Gleeson CJ and Gummow J left open the question of the defences which might be available, but noted that the policy of the common law as to the ambit of contempt remained a matter of controversy, and their Honours cited Regina v Kopyto, as one of the cases

which reflected the controversy.

83 Regina v Kopyto, was a decision of the Ontario Court of Appeal[50]. Cory JA, referring to the guarantee of freedom of expression to be found in s. 2(b) of the Canadian Charter of Rights and Freedoms, held:

> "A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. Because of their very importance in a democratic society the courts are bound to be the subject of comment and criticism, not all of which will be sweetly reasoned."

In that case the court held that the offence of scandalising the court conflicted with the entitlement of freedom of expression guaranteed by the Charter of Rights and Freedoms. The comments made by Cory J.A[51], notwithstanding the significant difference between that case and the present, are nonetheless of relevance:

> "However, change for the better is dependent upon constructive criticisms. Nor can it be expected that criticism will always be muted by restraint. Frustration with outmoded practices will often lead to vigorous and unpropitious complaints. Hyperbole and colourful, perhaps even disrespectful language, may be the necessary touchstone to fire the interest and imagination of the public to the need for reform, and to suggest the manner in which that reform may be achieved. The concept of free and uninhibited speech permeates all truly democratic societies. Caustic and biting debate is, for example, often the hallmark of election campaigns, parliamentary debates and campaigns for the establishment of new public institutions or the reform of existing practices and institutions. The exchange of ideas on important issues is often framed in colourful and vitriolic language. So long as comments made on matters of public interest are neither obscene nor contrary to the laws of criminal libel, citizens of a democratic state should not have to worry unduly about the framing of their expression of ideas."

In the case before me it was submitted that the right to free speech, which had always been acknowledged to be a relevant consideration when determining whether statements amounted to contempt, must now be regarded as being paramount, by virtue of the decision of the High Court in Lange v Australian Broadcasting Commission[52], which, so it was submitted, gave free speech the status of a constitutional right.

In Lange the High Court held that the Commonwealth Constitution, by reference to several sections, gave an implied right of freedom of communication, but the court identified it as a "freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors[53]". The Court added that the relevant sections of the Constitution "do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power"[54]. It is, thus, doubtful that the freedom which the Court identified would bear upon the application of contempt of court principles. In any event, the Court stated[55] that the freedom was not absolute but was limited to what is necessary for the effective operation of the system of representative and responsible government.

The High Court held that even if there was an interference with the freedom of communication "about government and political matters" a law would not be invalid if it was "reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government . . .[56]".

The Solicitor-General contended that the application of contempt laws would be an instance of an acceptable limitation of the freedom of communication which

was discussed in Lange, but that, in any event, it should not be considered that the principles in Lange were intended to interfere with the common law powers of courts to deal with contempt of court, a view taken by the New South Wales Court of Appeal in John Fairfax Pty Ltd v Attorney-General (New South Wales[57]). That view had also been expressed by Deane J in an earlier decision on the question of the implied freedom (Theophanous v Herald & Weekly Times Ltd[58]) and was suggested to be so, too, by Kirby P in John Fairfax Publications Pty Ltd v Doe[59], and by the Full Court in Western Australia in Hamersley Iron Pty Ltd v Lovell[60], which also held that the contempt laws were compatible with the freedom of communication discussed in Lange.

Mr Graham also contended that the State Constitution may not give rise to the same implied freedom as was found to exist under the Commonwealth Constitution. He referred to the discussion by Kirby J in Yougarla v Western Australia[61].

I conclude that the principles in Lange do not detract from or alter any of the common law principles which I have held to apply with respect to contempt by scandalising the court, nor does the principle impose any additional restriction on the circumstances in which the court might conclude that it was appropriate to exercise the jurisdiction to punish contempt. It is my view that the constitutional freedom of communication, even if it was applied in full measure - to the extent and subject to the limitations that the High Court discussed in Lange - would add no greater emphasis to the statement of the importance of recognition of the right to free speech than had already been firmly embedded by the courts at common law[62].

As may be seen, for comment to be regarded as fair criticism it must be shown to have been made in good faith. I turn then to consider Hoser's assertion that each of his statements met that criteria.

GOOD FAITH? - TAKING THE BOOKS AT "FACE VALUE"

As noted above, Hoser's claim to have acted in good faith is not merely the assertion in his evidence, but he contends that a reading of his books demonstrates that when taken at face value they are the product of good faith of the author.

Counsel on both sides accepted that the passages identified in the particulars on which there is a case to answer needed to be read in the context of the books as a whole. On behalf of the respondents it was contended that various passages in both books, and also in the earlier book, "The Hoser Files", ameliorated any impression that the selected extracts constituted contempt. I was referred to numerous passages, in many instances self-serving statements, published by Hoser, and to detailed factual arguments set out in his books, not only in support of the conclusions which are to be found in the selected extracts, but also to support his contention that he was acting in good faith. The Crown, on the other hand, referred to passages throughout the book in order to discredit Hoser's claim that he acted in good faith, and his further claim that the opinions and statements made in the book were made only after careful examination of evidence and checking of sources. It was appropriate, in my view, that the books be used for the purpose of context in this way (see The Herald and Weekly Times Ltd v Attorney-General for the State of Victoria[63]; and Re Perkins[64]).

No defence of fair comment could apply to comments made in bad faith: see Solicitor-General v Radio Avon[65]. The learned authors Borrie and Lowe[66] observe that it is clear that comments made mala fide fall outside the protective umbrella of the right to criticise. The authors comment:

> "How can mala fides be proved? One way is to look at the language in the publication. It is easy, for example, to infer an intention to vilify the courts where outrageous and abusive language is used, especially where the article is one sided, containing little or no reasoning. In R v White[67] an early English decision of 1808, Grosse J decided that a censure of judge and

> jury in abusive terms constituted a contempt because the article: `Contained no reasoning or discussion but only declamation and invective... written not with a view to elucidate the truth but to injure the character of individuals, and to bring into hatred and contempt the administration of justice in this country.'

The authors then continue:

> "Cases of `scurrilous abuse' of a judge, particularly in R v Gray, where Lord Russell CJ said that the comment went beyond criticism, clearly by their language show an intention to vilify rather than to correct; if an article is written in abusive language, the bona fides of the writer will immediately be brought into question. The actual language used in an article is not, of course, conclusive proof of intention. Such factors as the party's attitude in court can also be important."

If one is to take the books at face value, especially Book Two, then it is difficult to accept that the author is motivated by good faith, or by a desire to correct rather than to vilify. The language used throughout is often both extreme and offensive; his comments about magistrates and judges almost universally contemptuous and sarcastic. His books, themselves, demonstrate how selective he is in his use of relevant material, and how prone he is to inflate a reasonable point by inflammatory language, or by making exaggerated claims as to what the fact demonstrates. At the same time I must make allowance of the fact that in Book Two, in particular, he is largely writing as one seeking vindication, claiming to be a person who has been wrongly convicted of a serious offence. In evaluating Hoser's claim to good faith, and the extravagance of his language, I have to also make allowance for what seems to be his highly developed belief that he is the victim of multiple conspiracies.

At page 142 of Book Two he states, "It has always amazed me how an innocuous activity by myself is always deliberately misinterpreted by the prosecution as part of some major criminal plot". I asked him whether that sense of conspiracy was one which rather more applied to himself. He said he had asked himself that question many times over the years, but said that that was not a possibility, having regard to the number of cases that he had won and the reasons why he had lost those cases on which he had been unsuccessful. He said in many cases it was not a conspiracy, just the magistrates choosing to accept other peoples' word rather than his own. He attributed that to perjury by the other witnesses rather than necessarily to corruption by the magistrates.

I give just one example of an exaggerated claim based on flimsy evidence in order to illustrate the difficulty I have with Hoser's contention that his books should be taken on face value, and that they demonstrate a person acting in good faith.

In a passage in Book Two in a chapter titled "Crime - Who you are determines the penalty", and under a sub-heading "Looking After the Criminals", the following passage appears:

> "Then there's (sic) the judges and magistrates who look after hardened criminals with lenient or non-existent sentences. These occur in various circumstances including when the criminal has mates in the system, but weren't able to actually prevent the charges being laid. A common scenario is when a straight cop busts a protected drug trafficker and refused to `pull' the charge. The criminal is then forced to front court, but a deal is done with one or more of the clerk, the prosecution and the person hearing the matter (judge or magistrate) to give the person an easy ride through the system. Instead of a penalty such as jail, the offender may get a suspended sentence, bond or whatever. The double standards show up when the penalty is compared to that of a non protected criminal."

Hoser then cites as examples two instances of sentencing of offenders, - the first being a person who he describes as "treasurer of a major heroin

syndicate" who pleaded guilty and was given a suspended sentence, as to which he says "she walked free without any tangible penalty. The police side had not opposed the application". He contrasted that case with the case of two heroin traffickers "without the same level of protection" who, before another judge (for an entirely different incident), were sentenced to six years' imprisonment for drug trafficking of $60,000 worth of heroin. He offers not a word of evidence to support his assertion of corrupt deals being done to secure the more lenient result.

Various other cases are thereafter mentioned, apparently for the purpose of demonstrating that those who received what Hoser regarded as a lenient sentence might have their result explained by virtue of corruption, but, none of the cases mentioned provides any support for the contention of "deals" being done with magistrates and judges to give the offender an easy passage through the courts, nor could he offer any better support for the allegation when he gave evidence before me.

Although his list of earlier publications, and two earlier books, were tendered, those books were not directly relevant before me, and I have not read them. I can make no judgment on those books but I am prepared to accept that Hoser does see himself as a crusader, and that his earlier books may well have been motivated by a genuine belief that he was exposing corruption. It is, however, difficult to accept his self-serving assertion that it was no part of his purpose in Book One and, especially, Book Two, to harm the administration of justice. In my view, he had a powerful motive in Book Two to seek to discredit the judicial system, in order to overcome the embarrassing facts that a jury had deemed him to be a perjurer and that his conviction for perjury had been upheld on appeal.

IS THERE A BASIS FOR GRIEVANCE?

In defending his client against the allegations of contempt, Hoser's counsel, Mr Maxwell QC, placed emphasis on the fact that most of the passages which are alleged to constitute contempt are the writings of a disappointed defendant, whose perceptions were coloured by that experience, and by a sense of injustice, which is aggravated by the fact that he was imprisoned for perjury. The fact that he had been unrepresented in his trial, compounded by his lack of legal training, meant that his perception of the events of his trial is a blinkered one, so it was submitted, but represents opinions honestly held. Furthermore, so it was submitted, his complaints are in many instances justifiable, or at the very least, understandable, as they are often based on fact, and the complaints contained in his original grounds of appeal to the Court of Appeal were never aired. The Crown, it was submitted, has not proved that his criticisms or allegations made against magistrates or judges were baseless or did not constitute fair comment made in good faith.

The defence of a charge of contempt for comments arising from court proceedings is not the opportunity for an accused person to make a collateral attack on the original proceedings, but I will address aspects of his perjury trial which he identifies as demonstrating that he had a basis in fact for his belief that the judge had been biased in his conduct of the trial. Those contentions are relevant to evaluating his claim of good faith and fair comment, and in evaluating those allegations it becomes clear that, whatever Hoser's own perceptions, the allegation of bias against the judge for the conduct of the trial is without substance.

Among the many factors which Hoser identifies as justification for his perception of the unfairness of his trial, the following are some of the most important:

* The fact that he was unrepresented;
* The fact that Judge Neesham had heard and rejected an appeal brought by Hoser almost two years earlier;
* The fact that the prosecutor made inappropriate attempts to ingratiate

himself with the jury, giving rise to the belief held by Hoser, and some others who attended court to watch his trial, that he was communicating with the jury in the courtroom, during the trial;
* The belief that the judge and the prosecutor were meeting together outside court hours to discuss the case and to plot means to secure Hoser's conviction;
* The fact that Hoser was not permitted by Judge Neesham to tender in his trial a tape recording, which, in defiance of an express order of Judge Balmford, he had secretly made of his evidence during the appeal before Judge Balmford;
* The fact that Judge Neesham ordered the jury out of court on occasions when Hoser was seeking to cross examine a witness, but permitted the witness to remain in court when asking Hoser what the scope and relevance was of the questions which he wanted to ask;
* Rulings and directions to the jury which Hoser said favoured the prosecution and did not assist him.

Analysis of these complaints (and I stress that they are only some of the matters which Hoser discussed in his books and in his evidence) discloses that even where in some instances there is a basis of fact to justify his complaint, Hoser has often, whether deliberately or unconsciously, so inflated the circumstances as to make his reporting of events quite unreliable and to raise doubts about his claim of good faith. In no instance is an allegation of bias capable of being sustained.

Hoser is an intelligent man and there are many indications throughout his books that he is an opportunist in seizing on events, and reporting them to his readers, in a way which attributes bias and unfairness in circumstances where, even as a non-lawyer, he must have known that innocent explanations were open. His posture of crusader against corruption does not prevent him being quite manipulative in seeking the sympathy of his audience. It is, however, important to try to ascertain those events which might understandably, even if wrongly, have caused him to feel badly done by in his court proceedings.

(A) THE ROLE OF THE PROSECUTOR

There seems to be little doubt that the prosecutor in the perjury trial acted quite inappropriately, at times, during the trial, and attempted to ingratiate himself with the jury. Hoser's claims, however, exaggerate the situation, and, in particular, unfairly attribute improper conduct or motives to the judge. Thus, in one of the passages which I ruled did not constitute a case to answer (but which I mention simply to demonstrate the capacity for leaps from fact to fantasy in which Hoser is prone to indulge) Hoser complained that, although he had not been aware of it himself, to any extent - until a spectator told him of it - the prosecutor "had spent most of the day apparently chatting to jurors", while Hoser was cross-examining. Hoser wrote in Book Two that Judge Neesham had been "green-lighting" the conduct of the prosecutor in that respect.

As is the practice for criminal appeals, Judge Neesham filed a report concerning what were then the 26 grounds of appeal lodged by Hoser. That report was tendered before me by counsel for Hoser, as support (from the judge himself) for the allegation that the prosecutor had behaved inappropriately. What the trial judge had to say, however, also demonstrates the hollowness of the complaint that the judge "greenlighted" such conduct. His Honour reported that he was not aware of there having been any "contact or dialogue" between the prosecution and the jury, but as to the suggestion that the prosecutor in the trial communicated with the jury, Judge Neesham reported:

> "Counsel for the prosecution did, at an early stage of the trial, behave in an inappropriate matter (sic) in the presence of the jury. That his behaviour was inappropriate was brought to his attention at p. 50 of the

transcript, lines 4 and 9. Reference to that episode was made in the course of my charge at p. 1602. As a result of it I kept watch upon counsel for the prosecution. He did frequently look at the jury and from time to time smile at it. I did not think that further intervention by me was called for until I had occasion again to rebuke him for his facial expression at p. 808 of the transcript. He had, in the meantime, been rebuked for other inappropriate behaviour at pp. 462 and 464. I saw no winking at the jury nor facial gesture other than what I have described. I saw no attempt to distract the jury from its task. Had I done so I would have intervened immediately."

As counsel for the Attorney-General contended, far from it being the case that Judge Neesham "greenlighted" the conduct of the prosecutor, he "redlighted" that conduct.

It is apparent, however, that the prosecutor had been acting in a quite inappropriate manner which merited censure, and received censure, from the trial judge. Such conduct would at any time be inappropriate, and arguably improper, but for it to be conduct indulged in by a senior crown prosecutor in a trial when a person is unrepresented reflects appalling judgement on the part of the prosecutor and a total disregard for the importance of maintaining both the reality and the appearance of fairness in such circumstances. Such conduct can itself undermine the administration of justice. The fact that any such conduct occurred would be likely to create a sense of anxiety and unfairness in an unrepresented person in Hoser's position, and I will have regard to that fact when assessing these charges.

(B) DENIAL OF TENDERING OF THE COVERT TAPE OF EVIDENCE

Much was made on behalf of Hoser in the proceedings before me of his suggestion that he had been denied the opportunity to present his defence to the perjury charge, because Judge Neesham had refused to allow him to make use of the tape recording of the proceedings before Judge Balmford which he had covertly made (in defiance of the order of Judge Balmford) during the hearing of his appeal before her Honour. In his book Hoser constructs an elaborate defence to the perjury charge whereby the tape recording would constituted definitive disproof of the allegation of perjury. The actual basis of the perjury allegation, as is discussed in the judgment of the Court of Appeal, was such that it seems to me highly unlikely that the playing of the tape recording could have made the slightest difference to his prospects of defence to the charge. None of his 26 grounds of appeal expressly complained about denial of use of the tape, and Hoser in his lengthy discussion of the trial does not set out the transcript of his application for tendering the tape and the reasons for refusal by the trial judge. I expressly asked to be directed to any such passage in the book and the passages to which I was directed do not overcome that deficiency.

Hoser's defence was in part, that in order for him to be guilty the Crown had to prove that he swore that it was VicRoads, which sent him the fax. He contended that he had never actually said that it was sent by VicRoads, because he claimed that he was not home when the fax arrived, and, thus, he could not see who had sent it. It was plain, however, that the thrust of the charge of perjury was that he had sworn that the document was a genuine one sent to him by VicRoads, by fax, in response to his query about the intersection. It was the Crown case that it was a forgery and had never been received by Hoser in the form in which it was produced by him to the court. Thus, Hoser's contention that he had not sworn that he was actually at home when the fax arrived was beside the point. At his perjury trial Hoser seems to have accepted that it was a forgery, but suggested to police witnesses that it may have been a forgery created by his enemies at VicRoads who had sent it to him in order to trap him into relying on it for his defence.

If the jury had a reasonable doubt as to who forged the fax then it would have

had a reasonable doubt on the perjury charge. It is plain that his conviction was very much the product of the jury's disbelief as to his own evidence and that of his witness, who Hoser recounts coming under strong attack by the prosecutor.

In the final analysis, however, the charge of contempt does not require an analysis of the evidence on which Hoser was convicted and the merits of the arguments he made at trial or in his book. Hoser is entitled to protest to the world that his conviction was unjustified, and to argue his case as he wishes, with whatever selectivity of references to evidence that he choses. The issue before me is whether in seeking to argue that question he has gone beyond the boundaries of legitimate criticism of his court case and entered the area of contempt of court, by making baseless allegations of bias and impropriety against the trial judge.

(C) OUT OF HOURS CONTACT BETWEEN JUDGE AND PROSECUTOR

The gulf between Hoser's perception of his trial, and reality, is starkly demonstrated by his complaint in Book Two (being, also, one of the grounds of appeal which was not argued) that the judge and prosecutor were meeting after hours to discuss the evidence in his case[68]. This allegation was based on the fact that when the prosecutor and judge, in open court, were referring to transcript as to argument which had taken place at an earlier time during the trial, the judge spoke of having queried the prosecutor on some point "the other night". Hoser wrote that thereby the judge and prosecutor: " . . had together let the cat out of the bag. They had spoken about my case in my absence overnight!". Judge Neesham reported to the Court of Appeal that the suggestion that there had been such contact was entirely false. His Honour reported:

> "There is no truth in the allegations made, nor any basis for it. All contact between the prosecution and myself took place in court in the presence of the appellant."

(D) THE TRIAL JUDGE "MISLEADS" THE JURY

There are some instances where Hoser's perception of unfairness was probably due simply to his lack of experience in court procedures and practices. For example, in Book Two[69], he complained about remarks made to the jury by Judge Neesham during the course of the playing of a tape recording of a police raid on his premises, which he had covertly made at the time, and which he requested be played to the jury. Hoser was charged with perjury alleged to have been committed in February 1994. On the tape recording of the police raid a police officer was heard to speak of a file titled "Allegations of perjury 1993". Judge Neesham, who had not heard the tape before, immediately interrupted the playing to say to the jury:

> "Members of the jury you heard one of the members of the search party refer just a moment ago to hearing `Allegations of Perjury 1993'. You should not think anything, but, and it is agreed that those allegations relate to the very matter you are hearing, not something else."

At a break, and in the absence of the jury, Judge Neesham complained to Hoser that he should have warned him that there was a reference on the tape to a 1993 perjury file.

In his book[70] Hoser complained that: "Neesham had probably made a deliberate mistake here because the date 1993 would indicate that I had premeditated and planned the alleged perjury in early 1994. It was part of his not so subtle and deliberate campaign to sow the seeds of doubt in the minds of the jurors". To an observer familiar with criminal trials, however, what is quite obvious is that the incident probably arose from the judge's fear that the jury would conclude that Hoser had a prior conviction, or at least had been charged with another perjury on an earlier occasion, and his comment was his rather urgent, and possibly unwise, attempt to eliminate any risk of prejudice (and avoid the aborting of the trial) by giving an innocent explanation for the mention of a

1993 file. In fact, the file which was referred to by the police officer during the raid was one made by Hoser himself and its title reflected his assessment concerning the evidence of VicRoads officers in another case in which he had been involved.

During his evidence before me I asked Hoser whether he accepted that that was a possible explanation for the judge's intervention. He agreed it was possible, and said that: "I have always allowed the possibility that maybe there are other possibilities I have got wrong, or facts I have overlooked, or whatever, and that is why I have posted all the relevant transcripts and the list of all my sources, documents, inquest files, the whole box and dice, on the web; so that any given area of any of these books, not just the pictures, sections picked out by Mr Langmead, any section of the books, if a person thinks, "I think Hoser has got it wrong" they can then look at the whole lot and come to their own conclusion."

The difficulty with that explanation is that a non-lawyer would not be given any hint from what Hoser wrote that there may be an innocent explanation open as to what occurred. That is a fault which is constantly repeated throughout the book. In many instances it is highly likely that if more substantial extracts from transcript had been included in the book the innocent explanation would be obvious to the reader, but it is Hoser who decided how much of transcript was to appear in the books. It is highly unlikely that any reader would be minded to seek out the transcript, by using the web site, in order to check allegations for which Hoser does not suggest an alternative explanation may be open.

(D) "NOT INTERESTED IN THE TRUTH"

Hoser repeatedly asserts in Book Two[71] that Judge Neesham had no concern for the truth, and he quotes the judge, himself, saying to the jury when summing up the case that "A Criminal trial is not a search for the truth". That expression has been used by trial judges, when charging the jury, for a very long time. It is a good illustration of the dangers of the law's adherence to outmoded language.

The phrase is used by judges in a manner which is intended to be for the benefit of the accused person. Thus, the jury is told that their task is to decide only whether the Crown has proved the charge beyond reasonable doubt, and if they have such a doubt then the accused must be acquitted, even if that means that the public is left wondering what was the truth as to what happened. The phrase is also used at times to explain why a criminal trial does not seek to resolve all questions which might arise during a trial, as many issues are irrelevant to or remote from the issues which the Crown must prove. I consider that it is highly likely that the phrase that Hoser highlighted was used in the course of a longer explanation to the jury of the kind I have just suggested is the usual context for its use in a summing-up, and that would have been apparent had Hoser provided the full context of the phrase. Nonetheless, the phrase is capable of giving rise to the sort of misunderstanding that Hoser expresses, namely, the understanding that in determining the issues the jury are engaged in an exercise in which truth does not matter. The opposite is the case, and in assessing the evidence of witnesses in order to decide whether - having regard to the relevant issues of law and fact on which they have been directed - the Crown case has been proved beyond reasonable doubt, the jury is very much concerned to find the truth. In my opinion, it may be time for the phrase to be replaced when charging a jury.

(E) WAS THE TRUTH HIDDEN FROM THE JURY?

There are many examples of innocent conduct by the judge being misunderstood by Hoser, and treated as evidence of impropriety and bias. His complaint about the removal of the jury also arises from Hoser's ignorance of legal procedure. An unrepresented accused will often ask questions in cross-examination which a

barrister would know would be ruled inadmissible or irrelevant. The difficulty for the trial judge is that an inappropriate question might prove disastrous for the accused if allowed to be asked or answered, or it might simply be unfair to the prosecution to permit an irrelevant or inappropriate question to be asked. As inconvenient as it often is, it may be necessary to ask the jury to retire while the judge considers whether the proposed questions are admissible, and for that purpose the questioner will be asked to spell out what is intended to be asked. It is often preferable that the witness not be present during that process, but it is sometimes a matter of judgement as to whether it is necessary to remove the witness when considering whether to allow the question. To Hoser there was only one way to view such an incident:

> "Throughout the case he gave prosecution witnesses an advantage by asking me in their presence what evidence I sought to get from them and what questions I sought to ask. From Neesham's and the prosecution's point of view this was designed to allow these witnesses time to think of the best answers they could give knowing in advance the answers I sought. When doing this, Neesham made sure that the jury was hurriedly shifted from the Courtroom so that they'd never know how he was actively aiding and abetting the prosecution witnesses".[72]

SUMMARY AS TO ISSUES IN THE PERJURY TRIAL

That review of the complaints, while not exhaustive, demonstrates how ready Hoser was, in his book, to attribute dishonourable motives to the judge, in circumstances where the reader would have had difficulty appreciating that there may have been deficiencies and omissions in the narrative which he was providing.

Notwithstanding his conviction, Hoser is perfectly entitled to maintain his innocence and to attempt to persuade others as to that. He is not, however, entitled to make false accusations that the trial judge corruptly engineered a miscarriage of justice in order to convict an innocent man. To an experienced criminal lawyer a mere reading of the 26 grounds of appeal is enough to indicate that there could be no possibility of them establishing an error of law. No doubt counsel for Hoser on the appeal made that assessment, and substituted grounds which were arguable. Hoser is very unhappy with the fact that his own grounds were not argued, but they were, in the main, merely particulars of the themes that he had been denied a fair trial by the trial judge and also argument about the weight which should have been attached to various items of evidence.

It is appropriate to refer to the judgment of the Court of Appeal when assessing his complaint that he had been denied a fair trial and that his books should be regarded as the writings of a man who had a justified sense of grievance. Even allowing for the fact that his own grounds of appeal were not argued the impression of unfairness can not stand against the statements of the Court of Appeal.

Counsel for Hoser sought to address a range of his complaints under three grounds of appeal, one of which was a complaint that Judge Neesham failed to maintain judicial control over the admission of evidence. The President of the Court of Appeal (with whom Brooking and Callaway JJA agreed) said this, at 541:

> "This trial lasted for approximately a month. It generated nearly 2000 pages of transcript. Although I do not pretend to be familiar with the whole of that transcript, it would seem to me from such familiarity as I have gained that the learned judge was well alive to the difficulties faced by the applicant as an unrepresented person and also of the obligations which that circumstance imposed upon him to ensure that the applicant received a fair trial. On more than one occasion the learned judge referred to the difficulties which the applicant faced and reminded the jury that they needed to take account of those difficulties in assessing the evidence. It

> is also clear that his Honour was solicitous to ensure that where questions of law needed to be determined in the absence of the jury, the applicant was advised of that fact and that, where necessary, the questions should be determined in the absence of the jury. Where it appeared that the prosecutor was exceeding permissible limits in the questions which he asked, or their form, his Honour intervened to stifle the excesses. The fact that the only complaints made under this ground are the ones to which I have adverted tends to confirm the view which I have formed that his Honour did not fail in his obligations in the manner suggested by this ground of appeal."

EVALUATION OF THE EVIDENCE ON THE COUNTS OF CONTEMPT

Having regard to the principles of law discussed above I return to the passages which I have found establish a case to answer of contempt.

ANALYSIS OF PARTICULARS CONCERNING JUDGE NEESHAM

For the convenience of the reader I repeat the particulars:

[diamond] Particular (iii), page 260, in a Chapter titled, "A Hot Bed of Corruption":

> "Perhaps most tellingly, he was one of those judges who had refused to allow me to have the case tape recorded, thereby effectively stamping him as a crook judge who wanted his activities never to be opened up to scrutiny. My initial judgements of Neesham as corrupt and dishonest were further proven during the course of the trial and its aftermath, much of which will be explained in the material which follows."

[diamond] Particular (iv), page 274, in a chapter titled, "Another Can of Worms":

> "As soon as the trial proper commenced, Neesham's bias against me commenced in earnest and his desired result was clearly known. His whole modus operandi was to guide the jury towards a guilty verdict. Furthermore these actions were separate to others which also appeared to have been taken to ensure the jury's verdict was pre-determined."

[diamond] Particular (vii), page 329, in a chapter titled, "The Twenty Counts of Perjury":

> "Of course Connell had been doing effectively what Neesham had told him. It was a classic case of bent judge improperly helping a prosecution witness."

Each of the passages asserts that Judge Neesham was biased in the conduct of the case, and in pursuit of a desired outcome for the prosecution, and dishonestly made rulings so as to ensure that the jury returned a false verdict of guilt in the perjury count.

In his report to the Court of Appeal Judge Neesham said that while at the outset of the trial he recollected Hoser having been before him previously on an unsuccessful appeal, he had no recollection of the details of the previous case. As to the suggestion that he might have been biased on account of that previous contact, his Honour said that possibility had not entered his mind. On the previous appeal, Judge Neesham had followed the practice of there being no transcript or recording of appeals and refused a request Hoser said he made to be allowed to tape. That explains the reference in the first particular, above. The first passage accuses the judge of being "a crook judge who wanted his activities never to be opened up to scrutiny" and of being "corrupt and dishonest". Having regard to the legal authorities cited above, the passage amounts of scurrilous abuse, and also an accusation of bias and impropriety. The assertions are baseless. To apply the words of Mason CJ in Nationwide News v Wills[73], the facts forming the basis of the criticism are not accurately stated and the criticism is not fair and is distorted by malice. It is not "honest criticism based on rational grounds", to use the words of Rich J in R v Dunbabin[74], or to use the words of Dixon J it is not "fair and honest and not directed to lowering the authority of the court[75]".

The second passage accuses the judge of "guiding" the jury to a conviction, and of acting in a manner designed to ensure that result. Subject to my later

discussion of the question whether there was a real risk of undermining the administration of justice, those allegations of bias and impropriety constitute contempt by scandalising the court.

The final passage refers to the evidence of a prosecution witness, one Connell, a solicitor who was employed by VicRoads and acted as prosecutor in many VicRoads prosecutions. He was called simply to deny that he had sent to Hoser the forged fax which he claimed had been sent by VicRoads. Hoser cross examined him for two days, the task being prolonged, he asserts, because of the objections by the trial prosecutor and adverse rulings by the judge as to the relevance and admissibility of the questions. It appears from Hoser's own account that he was attempting to introduce onto the trial his allegations that VicRoads officers were corrupt and had a motive to discredit him, but was also attacking the credit of the witness. Those were quite legitimate pursuits on his part, and the judge did not suggest otherwise.

The laws of evidence relating to attacks on credit of witnesses - and the extent to which a questioner can explore collateral issues, or must be bound by the answer given by the witness - are quite complex, and most unrepresented parties experience extreme difficulty when cross examining on these topics. Within those areas the problems are at their most complex when the questioner seeks to put documents to a witness and to rely on the contents of the document to prove some fact. It is very obvious from his own account that Hoser was experiencing difficulty in cross examining Connell for these reasons, and was constantly and innocently in breach of the laws of evidence. As a general rule, where a witness is shown a document which is not his own, and denies that he is aware of its contents then cross examination will not be permitted on the document. Hoser was attempting to prove, among other things, that VicRoads officers had forged documents in previous cases. At one point in his cross examination Hoser sought to question Connell over documents produced by other officers in a case involving a person named Brygel, who was an ally of Hoser. The judge ruled the questions as to these documents inadmissible and three times Hoser sought to re-open the topic. The judge then sent the jury out and questioned Hoser about the relevance and purpose of his questions and of the documents. Connell had already denied knowledge of some or possibly all of the documents and he was present in court when Hoser was questioned by the judge.

The third passage, above, reflects the fact that the judge told Hoser that he would permit the documents to be put to the witness but that if he denied that he knew the contents of the documents then Hoser would be bound by that answer. Upon the return of the jury the witness gave that response to the questions about the documents.

However frustrated Hoser may have been about the situation, the statement in the third particular of contempt cannot be regarded as fair comment, having regard to his use of the words "bent judge" and to the fact that it accuses the judge of deliberately seeking to coach the witness so as to obtain answers to the detriment of Hoser. The accusation of the judge being "bent", when taken with the two other passages and in the context of the general attack on the trial and the judge made in the book, renders the passage contempt in my view, and discredits the claims of fair comment and good faith.

One must be careful not to penalise the author of a statement for the use of language which is merely a product of the author's lack of sophistication or inexperience as a writer, and must make due allowance for the emotional response of the writer to a disappointing legal outcome. In one respect it is similar to the situation which arose in Attorney-General v Butler[76] where the writer might have avoided a finding of contempt if in making the criticism that he did he used moderate language, however strongly, rather than employed "intemperate and inflammatory" language. Just as in that case, it was Hoser's choice as to the words used and they betray his lack of good faith in making

his comment. But the contempt in this case does not depend solely on the use of the words "bent judge", but arises because the passage represents a baseless allegation of serious and deliberate impropriety against the judge. Subject to my consideration whether in all the circumstances the statements constitute a real risk of undermining the administration of justice, in my opinion, each of the passages above constitutes contempt by scandalising the court.

ANALYSIS OF PARTICULARS CONCERNING JUDGE BALMFORD

The particulars relating to Judge Balmford were as follows:

[diamond] Page 142, in a chapter titled, "Forgeries, Forgeries, Forgeries":

> "Like I've noted, Balmford wanted to convict me and get the whole thing over with as soon as possible. After all she had obviously made up her mind before the case even started. Recall, she'd refused to allow the matter to be tape recorded."

[diamond] Page 144, in the same chapter:

> "Balmford's bias in favour of police and the DPP isn't just something I've noted. In fact three Supreme Court judges have noted it as well."

The first passage relates to a ruling made by Judge Balmford, towards the end of the appeal hearing, that she would not stand the case down while Hoser attempted to locate his witness, Brygel, whom he had expected to be at court to give evidence. Hoser had already completed his evidence. There is little doubt that the comments made about Judge Balmford were intended to convey the author's belief that her Honour had decided the appeal without regard to the evidence, and that she had adopted that approach because she was biased against Hoser. That is a serious allegation to make, and is based on no evidence apart from her Honour's conclusion that the appeal should be rejected, and upon her refusal to permit Hoser to tape the proceedings.

There is little doubt that Hoser has a particular fixation on the question of the tape recording of all proceedings, and it is a perfectly reasonable opinion to hold. It was, however, the practice in the County Court not to permit tape recording, a decision based on costs considerations, apparently. To an objective observer Hoser's request to tape proceedings may have seemed quite reasonable and the rejection of his application may have been considered unreasonable. However, even if the decision was unreasonable (and I do not suggest that it was), that would hardly demonstrate that it was motivated by bias and a desire to hide the truth.

The claim of bias is made significantly more serious by virtue of the additional assertion that her Honour had been held to be a biased judge by three judges of appeal. That suggestion was based, he said, on the decision of the Court of Appeal in R v DeMarco[77].

The Court of Appeal in DeMarco ordered a re-trial in what their Honours said was a very strong prosecution case of murder. At the time of that trial Justice Balmford had been appointed to the Supreme Court. The Court of Appeal held that her Honour had misdirected the jury on the question of lies told in consciousness of guilt. No ground of appeal alleged bias, and none of the judgments of the Court of Appeal mentioned bias. The suggestion that the Court noted "bias in favour of police and the DPP" is totally baseless.

When queried about the passage Hoser was decidedly uncomfortable. I have no doubt that he knew by the time of giving his evidence, at least, that the allegation was totally false. He said that when he wrote the comments he had probably not read the judgments of the Court of Appeal and he believed that he must have been told by a court journalist who had reported the decision in the media that the judgments spoke of "bias", or else he may have read that in a newspaper report of the decision. I do not believe that a court journalist would have made such a statement, and there is no possibility that a media report would have suggested that there had been a finding of bias.

As an alternative position, Hoser said that he had used the word "bias" in the

way a lay person would, not as a lawyer might. He said that the word was used in the same sense that it would be used to assert that there was bias in the system because magistrates and judges preferred the word of police to that of accused persons.

Hoser told me that he meant that her Honour had misdirected the jury in the DeMarco trial in a way that helped guide the jury to a conviction and "whether that was deliberate or otherwise doesn't matter". Immediately after the passage identified in the second particular, cited above, there was another passage in which Hoser identified the case by name and said that DeMarco was sentenced to 23 years imprisonment by her Honour. He wrote that all three judges had overturned the conviction and that "they said Balmford had misdirected the jury in a way that helped guide it to a guilty verdict". Although it was said that that passage lent support to Hoser's evidence as to what he meant when he said "bias", and thus removed the sting of the word, I do not accept that. In my view, the reader would simply take it that the two conclusions, bias and misdirection, were part of the finding of the Court of Appeal. In my opinion, Hoser intended the reader to have that understanding. To employ the words used in the decision of the Full Court of the Family Court in Fitzgibbon v Barker, the second particular represents "a gross distortion of the findings in the case... calculated to lessen or discredit the authority and prestige of the Court in the minds of reasonable people[78]". In this case the distortion of the finding of the court was directed not at the reputation of the Court of Appeal but against Justice Balmford.

I reject his explanations of the meaning and use of the word "bias" in the passage. In my view, it was intended to suggest that her Honour had been identified by the Court of Appeal to be a biased judge who favoured the prosecution. In my opinion, there is no possibility of this having been written in good faith. Hoser had an interest in discrediting the proceedings which were the origin of his charge of perjury, just as he had an interest in discrediting the magistrate who committed him for perjury, and the judge who presided over the trial at which he was convicted.

Although the name of the case was given and the date of judgment the Court of Appeal it is improbable that a member of the public reading that passage would have been alerted to the true position and have sought to investigate further. Had they done so then, as Hoser acknowledged, despite his claim that all sources were available so that the readers might make up their own minds, the DeMarco judgment was not on his web site.

Neither passage constitutes fair comment made in good faith. In alleging bias and prejudgment both comments were motivated by malice and betray an intention to lower the authority of the courts. The second particular also makes an untruthful statement of fact which, in itself, denies acceptance of a claim of good faith[79].

These two particulars constitute all of the elements of contempt by scandalising the court. Whether the jurisdiction to punish for contempt should be exercised will finally turn on whether the passages, and those others that similarly demonstrate the elements of contempt, constitute a real risk of undermining the administration of justice. I will discuss that question later.

ANALYSIS OF PARTICULARS CONCERNING MAGISTRATE HEFFEY

The passages concerning Ms Heffey were as follows:

[diamond] At page 208, in a chapter titled, "A Policeman's Magistrate":

> "In siding with the police, Heffey made her ruling where she goes through the motions of stating the alleged `facts' and `reasons' for her decision. She said she was going ahead because I had failed to notify the other side of my intention to seek an adjournment pending legal aid. That her statement was an obvious lie was demonstrated by the multiple letters in Hampel's files and Heffey's own court records. Then again, I suppose it was a case of not letting the truth get in the way of a pre-determined outcome."

[diamond] Page 212:

> "Oh and just in case you haven't yet worked it out, my committal to stand trial had clearly been well determined before a word of evidence was given."

The criticism of Magistrate Heffey is twofold, one being an accusation of bias and the other of dereliction of duty, in failing to have regard to the evidence in the case before her. The first passage relates to her Worship's refusal to grant an adjournment, which Hoser sought. Her Worship said that he had failed to give notice to the prosecution. Hoser asserts in his book that he had given notice by letters to the Crown and that there were letters to that effect on the court file. The second passage relates to the fact that he was committed for trial, and immediately follows a passage concerning an objection he made at the outset of the committal as to the order of witnesses. His application was rejected. Hoser records: "Heffey sided with the Police. They could do as they pleased".

It is by no means uncommon that persons whose evidence has been disbelieved by a judge or magistrate conclude that their word was given less weight than that of the police officers or other officials who prosecuted the case against them. It is the nature of the adversarial system that witnesses on both sides may be equally convinced of the truth of their evidence, and the dishonesty of their opponents, when, to the objective observer, it appeared that either only one side could be right, or else that truth was a moveable feast. The experience of "professional" witnesses, such as police officers, undoubtedly gives them an advantage in court and makes it more likely that their evidence will seem credible, especially when the defendant is unrepresented and is likely to have been as rambling a witness, and yet so self confident and argumentative an advocate of his own cause, as Hoser was before me.

Comments, merely, that a judge or magistrate has an apparent disposition to believing the evidence of police witnesses when that evidence is in conflict with the evidence of civilian witnesses would not, in my view, constitute contempt. Indeed, it is part of the skill and experience of legal practitioners (which they apply in advising clients and in their conduct of proceedings before courts) to make assessments of the inclinations, temperament and proclivities of judges and magistrates when confronted with particular issues and with witnesses in instances of such conflict of oath against oath.

In Mundey Hope JA drew the distinction between contempt and mere recognition of the differences in temperament, and attitude, of tribunals of fact, in the following way[80]:

> "Furthermore, it does not necessarily amount to a contempt of court to claim that a court or judge had been influenced, or too much influenced, whether consciously or unconsciously, by some particular consideration in respect of a matter which has been determined. Such criticism is frequently made in academic journals and books, and the right cannot be limited to academics; and although the use of particular language may reduce that which might otherwise be criticism to mere scurrility, the use of strong language will not convert permissible criticism into contempt, unless perhaps it is so wild and violent or outrageous as to be liable in a real sense to affect the administration of justice. On the other hand, it may and generally will constitute contempt to make unjustified allegations that a judge has been affected by some personal bias against a party, or has acted mala fide, or has failed to act with the impartiality required of the judicial office. However, the point at which other forms of criticism pass into the area of contempt is a matter in respect of which the opinions can differ, and differ quite strongly."

In R v Brett[81] O'Bryan J held:

> "It is clearly not a contempt of court merely to say that a judge may, in his approach to a problem, be influenced by his character and general

outlook."

The use of the word "lie" is capable of constituting contempt of court when directed at a judicial officer, but its use might be explained as being intended to imply merely that her Worship failed to check her file adequately (I am not accepting that such criticism is valid, for the purpose of this analysis). The context of these passages is important. There are many passages in Book Two concerning the committal proceedings which, quite apart from being couched in very offensive and insulting language against the magistrate, would suggest to a reader that Hoser was indeed intending, in both passages, to convey that the magistrate was acting in a deliberately biased and improper manner, so as to favour the prosecution, and that the use of the word "lie" was not intended to have an innocent connotation. Although those other passages give context to the passages in the particulars they did not form part of the charge, and Hoser was not cross examined about them.

The language employed by Hoser (apart from the words, "obvious lie") is less exaggerated and offensive than that employed by him elsewhere in his book. Indeed, the language is less offensive than some of the passages on which I ruled there was no case to answer. That ruling was made before I had received detailed submissions on the law from the Crown (more comprehensive submissions being made at the time of final addresses) and before I had conducted my own research. The Crown had also not addressed the passages in any detail in submissions, nor had I the opportunity to examine the book in detail, as I have subsequently been able to do. In hindsight, Hoser may have been rather fortunate to have received favourable rulings on some of the passages about which the Crown complained[82]. It is a tribute to the eloquence of Mr Maxwell, who presented his client's case both ably and frankly, that he succeeded as to those particulars. Mr Hoser's good fortune continues, because, in all the circumstances, I hold a reasonable doubt whether - adopting the words of Hope JA, in Mundey - the first passage might be interpreted as merely constituting strong language used in permissible criticism. I am not, therefore, satisfied beyond reasonable doubt that the first particular constitutes contempt by scandalising the court.

As to the second passage, an accusation that a magistrate decided a case without regard to the evidence is undoubtedly capable of constituting contempt. In context, however, I do not think it must necessarily be taken that way by the reader. Hoser only made brief reference in Book Two to the four days of evidence heard at the committal. He did not himself give evidence at the committal so it was not really a case of a complaint being made by Hoser about the word of prosecution witnesses being preferred to his own by Ms Heffey. I have a doubt as to whether he might be taken to be saying, merely, that her Worship was a person whose natural inclination was to accept the word of prosecution witnesses. That may be offensive but it does not constitute criminal contempt. In any event, the sensible reader would appreciate that given that she heard no defence evidence it would hardly be surprising that Magistrate Heffey concluded that the uncontradicted evidence was sufficient to constitute a prima facie case. As the trial before the jury was later to demonstrate, the evidence was capable of satisfying a jury beyond reasonable doubt.

I do not suggest or accept that her Worship decided the committal without regard to the evidence and, despite his words, above, I do not think any intelligent reader would reach that conclusion, even on Hoser's own account. I have a reasonable doubt, as to whether the second passage amounts to contempt.

BACKGROUND TO THE STATEMENTS CONCERNING MAGISTRATE ADAMS

In the book "The Hoser Files", Hoser details the events surrounding criminal charges which had been brought against him in the Magistrates' Court and where the informant was the police officer, Bingley. The magistrate was Mr Adams, who convicted Hoser and imposed a fine with respect to a count of theft and

sentenced him to a month's imprisonment on a charge of assault by kicking and 14 days imprisonment, concurrent, on a count of assault. On page 70 of the book, "The Hoser Files" (which was tendered before me), Hoser recounts what he says is a covertly taped conversation that he had with Bingley outside the court after Hoser had been released on bail pending an appeal. As recounted in the book, the conversation was as follows:

> "Bingley: I'm very, very happy. Hoser: So what dealings did you have with Roger Bowman before the case? Bingley: I can't say. and Hoser: You might have won this case, but you're gonna lose your job because of this. Bingley: Four weeks jail isn't it? Hoser: Glad you're pleased. Bingley: Very. and Bingley: Go ring my mates up at IID (Internal Investigations Division]. Hoser: At who? Bingley: IID. Hoser: Who's IID? Bingley: You don't know? Hoser: I just asked you, who's IID? Bingley: Oh well, it's a pity you don't know, mate. Hoser: You've done badly didn't you? You're probably going to be up for perjury now. Bingley: Who's doing a month's imprisonment? Hoser: But you did get done for lying in court. Bingley: Month's imprisonment. Am I going to prison? Am I going to prison? And later, after a 60-second break Hoser: Did you know I'd get found guilty from the word go? Bingley: Well I paid him off, didn't I, so of course I did. Hoser: The penalty was a bit severe. Bingley: We worked it out before. Three months, six months, nah, bit too much. We settled for one. Bingley repeatedly asserted he'd paid off the magistrate The whole aim of the case was summed up succinctly in the final lines of our conversation: Hoser: Well, I think you've certainly done a good job of finishing off my cab driving career. Bingley: Oh well, that's where we set out to do that. Hoser: Well you certainly succeeded. I can't see me driving cabs much longer. Bingley: No mate. end."

ANALYSIS OF PARTICULARS CONCERNING MAGISTRATE ADAMS

The particulars concerning Mr Adams were as follows:

[diamond] Book Two, Inside back cover (Count One):

> "Following the 1995 publication of Policeman Ross Bingley's confession that he had paid off Hugh Francis Patrick Adams to fix a case, some of his other rulings that seemingly flew in the face of the truth or logic have come under renewed scrutiny. This includes the bungled inquest into the murder of Jennifer Tanner, which police falsely alleged was suicide."

[diamond] Book One, page 57 (Count Two):

> "In a controversial decision he let corrupt policeman Paul John Strang walk free from court after he pled guilty to a charge related to planting explosives on an innocent man. He then put a suppression order on the penalty. In a separate matter, a Policeman admitted to paying a bribe to Adams to have an innocent man sentenced to jail."

Both passages allege corruption of a most serious kind against the magistrate. Hoser asserts that he was merely stating the fact that a policeman (whom he believed was corrupt) had made such an allegation concerning Mr Adams. In neither instance was it made clear that the "confession" or "admission" was not something which occurred as part of some court proceeding or official enquiry, but was a statement made to Hoser, in circumstances where Hoser now admits even he wondered at the time if he was "having his leg pulled". Given Hoser's enthusiasm for self promotion, it was, in my view, quite deliberate on his part that he did not mention his own role as the recipient of the "confession", and did not spell out that the references to "a case" and to "an innocent man" were to his case and to himself. He deliberately created an impression that the "bribery" of the magistrate had been exposed by some official process. Hoser denied to me that that was his intention.

When asked what the "separate matter" was that was referred to in the second passage, he said it was "the Bingley-Hoser matter". Hoser said he used the phrase "separate matter" in a non-legal way, and was merely intending to say that it was in a different court case. He said he believed that he had been

told the truth by Bingley as to the bribery of the magistrate because, having regard to the evidence in the case, it was "impossible for a reasonable judge to have convicted me".

As to the conversation with Bingley at which the "confession" was made I put to him that at page 52 of "The Hoser Files" he stated that during an earlier case the witness Bowman (who he contended was in league with Bingley, on both occasions, to frame him) would have had a strong suspicion that he was being secretly recorded). In those circumstances, Bingley is likely to have been similarly aware of Hoser's habit of covertly taping all conversations with a person such as himself.

I asked Hoser whether it occurred to him that Bingley might have been "pulling his leg" in the comments that he made. Hoser said that that had occurred to him at the time when the statements were made, and he agreed that it remained a possibility, but a remote one, he thought. He said that Bingley had, in fact, later claimed that he was, indeed, pulling Hoser's leg.

Hoser said that he had canvassed the possibility with other people, who had listened to the tapes, as to whether Bingley was pulling his leg but they had also formed the view that it was unlikely that Bingley was doing so. Hoser said that having regard to the fact that he had subsequently taped Bingley again (to Bingley's detriment, Hoser contended) it was unlikely that he had been aware of the tape recorder at this time. Hoser concluded that it was just "a bold admission because he was - he was just cocky and stupid for want of a better word".

I asked Hoser why, if the possibility remained that he was having his leg pulled, he did not say as much in his passages referring to Adams. He said he did not do so because it was a statement of fact, by the police officer who had admitted paying the bribe, so he gave no consideration to making such a qualification.

In saying he accepted the truth of what Bingley said Hoser also relied on the fact that the convictions before Mr Adams had been overturned on appeal. As emerged in the evidence before me, the Crown did not contest the appeal. I was not given the reasons but one can safely assume that the tape recorded statements of Bingley were a source of embarrassment to the Crown. That would have been so whether or not the Director of Public Prosecutions considered that Bingley had been telling the truth.

One of the complaints made by counsel for Hoser was that despite the fact that, at some time after publication of "The Hoser Files", Hoser supplied to the Attorney General a copy of the tape and transcript of what Bingley had said, the Crown did not cause any investigation to be conducted into the truth of his statements on the tape. It seems to me that that failure to act demonstrates that the Crown officials did not take the tape seriously.

The location of the photo and the comments on the inside back cover of Book Two - at a place where a browser might read them - accompanied by a full page photograph, was intended by Hoser to give maximum exposure to the allegation of corruption. The photograph in Book One and the comments made there gave the matter less exposure than in the second book but still gave greater prominence than to the allegations made against most others named in the book. In my opinion, in both books Hoser intended the reader to understand that Mr Adams had been exposed in some serious, official, investigation into corruption, or by a confession made in the context of a court case.

In Nationwide News v Wills, Mason C.J held that for fair comment to apply the facts forming the basis of the criticism must be accurately stated, and the criticism must be fair and not distorted by malice[83]. Brennan J adopted a similar approach and held that there was an obligation to state the critical facts truly[84]. In R v Brett[85] O'Bryan J held that an untruthful statement of facts upon which the comment was based may vitiate what would otherwise have been regarded as fair and justifiable comment. His Honour held that

"malice and an intention or tendency to impair the administration of justice are elements in contempt of the kind which scandalises the court or the judge".

I do not believe that Hoser then or now believed that the magistrate had, in fact, made a corrupt arrangement with Bingley to convict and imprison Hoser. Indeed, as was clear from his evidence, his position really is that he believes that it might be so. Whatever the truth of the events which led to the charges heard by Magistrate Adams, I accept that Hoser is convinced that he should not have been convicted. Thus, his true position is that, since he can not otherwise explain his conviction to himself, he is willing to accept that it could be because the magistrate had been bribed, and that the police officer, who he believed told lies on oath as a matter of course, had told him the truth, on this occasion. For the purpose of the defence of fair comment I would accept, therefore, that Hoser believed Bingley's statement might possibly have been true. I do not, however, consider that he even thought it was probable that it was true.

I do not therefore find that he published facts that he knew were untrue, and he does not lose the benefit of the defence of fair comment on that account. More difficult is the question whether he should be denied the defence by virtue of a finding that he was recklessly indifferent as to whether the allegation was true. Recklessness, as much as a knowledge or belief that a statement was untrue, would deny him the defence[86]. The statement in this case was more than just that a police officer had accused the magistrate of taking a bribe. The plain inference, brought about by the misleading way the circumstances of the "confession" were presented, was that the allegation had substance. In presenting the statement in that way in both books he was acting with reckless indifference as to whether the assertion was true.

In my view, Hoser did not disclose the circumstances of the "confession" because he was aware that a reader might be dismissive of his allegation had he done so. It was simply convenient for him to adopt Bingley's stupid comments and to place them before readers as truth. Furthermore, the passage which appeared at page 54 of Book One, reflects the lack of good faith. Hoser there stated: "Adams is well known for doing deals with prosecution to predetermine a trial". Even on his own account, the statement of Bingley could not support that assertion. Furthermore, in my view, the information which was not disclosed to the reader as to the circumstances of the "confession" constitutes a failure to meet the obligation suggested by Brennan J that the basis of the criticism be accurately stated[87]. The reader could not have known that to the author the allegation was, at its highest, merely, one that was possibly true.

The defence of fair comment would not be open in these circumstances, and were there no other defences to consider I would have been satisfied that the Crown had proved both particulars of contempt concerning Magistrate Adams. There remains, however, the question of the "defence" of truth.

As I earlier discussed, the question whether truth was a defence to a contempt charge has been a matter of controversy, but whilst not finally resolved statements in the High Court suggest that the defence should now be regarded as being available. What requires clarification is what is meant by the statement that truth is a "defence".

The respondents did not, in fact, contend that they relied on a defence of truth, rather they relied on a defence of fair comment, made in good faith, on matters of public interest and based on facts which they believed to be true. As may be seen, however, in arguing the fair comment defence the question of the truth of the assertions has been raised, and that, in turn, introduces questions concerning the onus of proof and the nature of the defence of "truth" which do not appear to have been decided in the authorities which I have considered.

Mr Graham accepted that if a statement was made that a magistrate had taken a bribe and that allegation was true then the person making the statement could not have committed a contempt. In R v Kopyto[88] Cory JA, obiter, observed that it would be "repugnant to a sense of justice and fairness" to hold otherwise, in such a situation. In my opinion, it would be a defence in such circumstances even if in making the allegation the person used scurrilous language of a kind which might constitute contempt had the allegation not been true (although it might still constitute contempt if, in making an allegation which stated the truth as to one matter, the author added embellishments which were untrue and which of themselves had the tendency to undermine public confidence in the administration of justice). Likewise, it seems to me that truth could not cease to be a defence if the author of the statement acted in bad faith or with the intention of undermining respect for the system of justice. If the allegation was true then the system was undermined by the truth, not by its exposure.

In the present case Hoser says that he can not prove that it is true that Magistrate Adams took a bribe, nor does he seek to prove the truth of that allegation. Hoser says that his motive in publishing the statements about the magistrate was "basically to flag an area of possible further investigation, if that makes sense".

The only evidence that he had as to whether the magistrate had been bribed was, first, what Bingley said, and secondly, the fact that, in his opinion, the case against him was so weak that it was impossible for a reasonable magistrate to have convicted him. The only explanation which had been offered to him for that outcome which made sense was the explanation offered by Bingley. (It would seem that Hoser rejects outright any explanation that the magistrate may have regarded him to be a liar, whether because he was or because he presented himself in such a manner as to lead the magistrate to that, false, conclusion. He also apparently rejects the possibility that what he regards as being the "overwhelming" evidence that he was innocent, may have seemed less than compelling to a disinterested observer). As a third factor, Hoser also pointed to the fact that the Crown had allowed his appeal to succeed against the convictions ordered by Magistrate Adams, without offering any defence to the appeal.

Thus, Hoser claims that he merely reported, in good faith, the fact that a police officer had claimed that the magistrate had been bribed, a proposition which he believed might be true because Hoser could see no reason why the magistrate would not have acquitted him. Having expressly disavowed that the respondents were taking a defence of "truth", Hoser's position, nonetheless makes truth a direct issue. The position adopted is that whilst he did not assert that what was said was, in fact, true, rather than being what he believed might be true, it was for the Crown to prove that it was not true. In raising facts which might, if true, mean that the charge was not proved the position adopted is very similar to that of the "defence" of provocation or self defence in a murder trial. No accused is obliged to prove a defence of provocation or self defence, but they are obliged to identify some credible evidence which fairly raises either question, and if the accused does so then the onus rests with the Crown to disprove the defence. If a reasonable doubt remains whether the accused was acting under provocation or in self defence then the charge of murder has not been proved.

Use of the word "defence" as a shorthand expression in discussion of a "defence" to a criminal charge does not mean that there is any onus on the accused person to prove that he or she is not guilty. It seems to me that once it is accepted that there is a "defence" of truth, then a similar position must pertain in the law of contempt by scandalising the court, as would pertain where a "defence" of provocation[89] or self defence[90] is raised in a murder trial. Thus, in this contempt case, whether or not Hoser seeks to

prove positively the truth of the allegation which has been made, if there is some credible evidence of the truth of the allegation, then the Crown must prove beyond reasonable doubt that the magistrate was not bribed or corrupted as alleged in the published statements.

There are compelling policy reasons why courts were reluctant to allow a defence of truth. As was discussed by the Australian Law Reform Commission in a research paper in 1986[91], to allow such a defence risked the court becoming embroiled in an investigation of the merits of the scandalising remarks, in effect, allowing the contempt proceedings to be used as the forum for an attempted re-trial of the original proceedings which had been the subject of criticism. On the other hand, the Law Reform Commission referred to the Street Royal Commission into allegations made by the ABC about the corruption of the Chief Magistrate in New South Wales and another magistrate. The Commissioner concluded they were corrupt. Had the ABC been charged with contempt and been denied a defence of truth it would probably have been convicted if truth was not a "defence"

It would be contrary to public policy and to the functioning of the administration of justice, and it would be inimical to judicial independence, that by making what seem to be scurrilous allegations an accused person could, in effect, when defending a contempt charge, seek to conduct a re-trial of the original proceedings and, in the process, to mount a trial of the magistrate or judge against whom the criticism had been directed. Since the complaint is about the conduct of the magistrate or judge would the question of bias or corruption be resolved without the judicial officer giving evidence? It has been suggested that it would be inimical to the interests of justice and the principles of judicial independence to have judicial officers called to give evidence in such circumstances. Whilst the position of magistrates is less clear, the authorities suggest that judges of both superior and inferior courts are not compellable witnesses, in any event[92].

Those are powerful considerations, which continue to carry weight once it is accepted that a "defence" of truth is permitted. Those considerations no doubt explain why the Solicitor-General complained that defence counsel were seeking to mount a collateral attack on the verdict of the jury, and why he and junior counsel for the plaintiff stoutly resisted any suggestion that the Crown was obliged to produce any evidence in disproof of the allegations made by Hoser concerning magistrate Adams. In seeking to defend the courts in that way, however, the Crown now faces a dilemma once it is accepted that the recent Australian authorities suggest that truth is now a "defence". By not producing such evidence in disproof of the claim of corruption it risks failing to prove the case beyond reasonable doubt.

What constitutes some credible evidence to raise the "defence" may require analysis in later cases. In my view, however, it could not be sufficient for an accused person to merely allege that he or she was the victim of bias and corruption, and to point to the transcript of the trial in order to raise the "defence", especially where the trial had been the subject of an unsuccessful appeal. In my view, a presumption of regularity would have application in that situation. It may be that an accused person, to raise the defence, would have to first point to some clear evidence of the kind contemplated in Ahnee v DPP[93] and by McHugh J in Nationwide News v Wills[94] when considering instances of patent bias which would constitute an exception to the general rule that it would always be contempt to accuse a judge or magistrate of bias or a lack of impartiality.

In this case Hoser points to the transcript of the statements by Bingley from the book "The Hoser Files". As is apparent from the extract in the book, the whole of the conversation is not set out. Hoser has sworn that that is an accurate record of what was said. It is not disputed by the Crown that a policeman made such statements. In those circumstances there is sufficient

material before me to raise the "defence". That places the onus squarely on the Crown to prove the allegation is not true. If a reasonable doubt remains then the accused must be acquitted.

Hoser says that he supplied the Crown with copies of the tape and the Crown has had his version of the allegation since the book "The Hoser Files" was published in 1995 and the Crown has chosen not to investigate the allegation at all. How then, his counsel submit, could the court be satisfied beyond reasonable doubt that the magistrate did not take a bribe, as Bingley claimed? There are very powerful factors which suggest that the allegation against the magistrate is complete nonsense. In the first place, the statement is made by a person whom Hoser regards as not a witness of truth, and who has subsequently denied that the statement was made seriously. Secondly, the statement itself strongly reeks of it being nonsense told contemptuously (and very unwisely) to stir up Hoser. Thirdly, there is an inherent improbability of a magistrate being bribed, at all, let alone with respect to such relatively minor offences, for an unknown fee, and in bizarre circumstances where, according to the Bingley tape, the prosecution was permitted to chose for itself what sentence of imprisonment it would like, in a range between a month and six months.

For the Crown, counsel relied on the presumption of regularity, but that does not seem to me to take the matter any further. If there was corruption then it would, indeed, be "irregular". The Crown relied on the failure of Hoser to tender his tape, as evidence that it could not have helped his cause, but it seems to me that I already had evidence of what was, in part at least, on the tape and I had evidence that the Crown had a copy of it, so the Crown itself could have used the tape to discredit the claims. Extracts of the published transcript hint that Hoser might have omitted passages which were not helpful to his cause (e.g, the cryptic "Bingley repeatedly asserted he'd paid off the magistrate". One wonders why, in a book of 320 pages, as "The Hoser Report" was, the author would omit such devastating material). Hoser was not cross examined, at all, about the content of the tape.

So the question remains, has the Crown, having chosen to call no evidence at all, and to have conducted very little cross examination on the allegations concerning the magistrate, removed all reasonable doubt as to whether the allegation of corruption was true? Is it a reasonable possibility that Bingley was a perjurer and was frankly admitting, in an unguarded moment, to an innocent man who had just been convicted upon that perjured evidence, that he had bribed the magistrate? If that was so then the conversation might well have been as appears on that portion of the transcript which was before me. Is it a reasonable possibility that the Crown abandoned the appeal because it believed it was possible that what Bingley had said was the truth?

I did not hear the tape, I can not say what tone of sarcasm may have been used by Bingley (although the words suggest that it was quite likely to have had that tone). I did not have any evidence as to the reasons why the Crown did not contest the appeal.

It is in many ways an unsatisfactory situation to reach, because the slur on the magistrate is a profound one, and is advanced by a person, Hoser, who, in my opinion, is demonstrably a person worthy of little credit as a reliable reporter of any case in which he has been involved, and who in publishing the allegations against Magistrate Adams in the way that he did, was not acting in good faith, because he was deliberately hiding from the reader important and relevant facts which might have had a significant bearing on whether the reader gave the allegation any credibility at all.

I believe the true explanation is very likely to have been that Bingley was making a stupid but false claim that he had suborned the magistrate. In so doing he has himself undermined the administration of justice and has placed the magistrate in a dreadful position. The damage to the magistrate is done

not by Hoser but by Bingley, whose stupidity has created the problem. With hindsight, the decision not to contest Hoser's appeal against the decision of Magistrate Adams was unfortunate, because it allowed Hoser to use that decision in support of his contention that there must have been truth in what Bingley said, but I have no knowledge of the circumstances in which that decision was taken or the reasons for it. It is highly likely that the Director of Public Prosecutions was motivated by considerations of fairness to Hoser.

I reach the point where, notwithstanding my conclusion that Hoser was acting cynically and was deliberately misleading his readers in his statements about the magistrate, I can not be persuaded beyond reasonable doubt that the allegation is untrue, and accordingly the second count (which has only one particular, and that relates to Magistrate Adams) and the particular (i) on the first count, have not been proved beyond reasonable doubt.

IS THERE A REAL RISK AND/OR A PRACTICAL REALITY OF UNDERMININING THE ADMINISTRATION OF JUSTICE?

Having concluded that some of the particulars do constitute the elements of the offence of contempt, some further questions arise before a finding of guilt would be appropriate.

In John Fairfax and Sons Pty Ltd v McRae[95] the High Court held that there must be no hesitation in exercising the summary jurisdiction for contempt "even to the point of great severity, whenever any act is done which is really calculated to embarrass the normal administration of justice". Their Honours held, however, that because of its exceptional nature the summary jurisdiction to punish for contempt should be exercised with great caution and "only if it is made quite clear to the court that the matter published has, as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case".

Their Honours held that sometimes the court might consider that a technical contempt had been committed but that because the tendency to embarrass the administration of justice was slight, or because of special circumstances, it should refuse to exercise its summary jurisdiction.

A closely related proposition (if it is not, in fact, merely an alternative way of stating the same proposition), is that there must be a real risk of prejudice to the due administration of justice rather than a mere remote possibility, if contempt was to be made out: Ahnee & Ors v DPP[96], and see Attorney-General v Times Newspapers Ltd[97]).

In the passage of the John Fairfax v McRae case in which the court discussed the requirement of there being a "practical reality" in the tendency to interfere with the administration of justice, a distinction is drawn between technical contempts which the court chooses not to punish and instances of contempt where punishment is appropriate. That case was not concerned with an allegation of contempt by scandalising the court but with a newspaper publication which was held by the trial judge to constitute contempt by having a tendency to interfere with a pending proceeding in a court. The tendency to interfere with justice with which the court was concerned related to the risk that the fair trial of the defendant in the other court proceedings would have been compromised by the offending publication.

The concept of technical contempts was one which Brooking JA held to be more commonly applied in cases of contempt arising from media publications which were said to have a tendency to prejudice the fair trial of the proceedings: see Re Perkins; Mesto v Galpin and Ors[98].

The analysis of conduct alleged to constitute contempt requires a balancing of the competing considerations of the right of free speech - and, in particular, the right to comment in good faith on matters of public importance, including the administration of justice - on the one hand, against the necessity, for the purpose of maintaining public confidence in the administration of justice,

of ensuring that the institutions be protected against baseless attacks on the integrity and impartiality of judges and magistrates, and against scandalous disparagement of those judges and magistrates: see Gallagher v Durack[99].
It is that balancing process which must be undertaken when considering whether to exercise the jurisdiction to punish for contempt. The concept of technical contempts has been doubted to now be relevant[100]. In Attorney-General (NSW) v John Fairfax & Sons & Bacon[101], McHugh JA, with whom Glass JA and Samuels JA agreed, held that the distinction between punishable contempts and those that would not be punished should no longer be applied, and contempts which were not worthy of being punished should be regarded as not being contempts at all. The court held that the test as to whether a publication did constitute contempt should be that stated in John Fairfax v McRae, namely, whether as a matter of practical reality it had a tendency to interfere with the course of justice.
Once again, I note that the decision of the NSW Court of Appeal, as was the case for the decision of the High Court in McRae, was concerned with a publication which dealt with pending court proceedings, and the issue was whether the publication had a tendency to interfere with the due conduct of those proceedings, and was not a case where the offence of scandalising the court was alleged. In both cases, passage in the judgments make it clear that the fact that the contempt related to pending court proceedings was the focus for the discussion about the need to demonstrate that the interference with justice was a practical reality. I accept, however, that for a finding of guilt beyond reasonable doubt I must be satisfied that the statements do have the tendency as a matter of practical reality to interfere with the due administration of justice, in the ways earlier discussed.
Mr Maxwell submitted that none of the comments in the present case met the requirement that as a matter of practical reality there was a real risk of interference with the administration of justice. Among the factors which he submitted were relevant were the fact that the author was a serious writer; the relatively small number of publications of the statements; the fact that readers would appreciate that he was writing as a disappointed litigant; the fact that he does not have a prominent public profile; the fact that in the two years since publication nothing has occurred which suggests that the standing of the courts or the administration of justice have been diminished; the lack of any sense of urgency in the Crown taking action; the fact that readers could go to the source material themselves. Common sense, it was submitted, will prevail, and the readers would be able to make allowance for Hoser's exaggerations and his blinkered perspective.
Allowance must be made for the fact that Hoser had been engaged in court battles over many years, and that his word had very frequently been rejected by judges and magistrates. He is a self opinionated and obsessive person with a highly developed sense that he is the victim of conspiracy. His many failures as a litigant and defendant have fuelled what appears to be a well developed sense of paranoia. In short, he is a person with a very blinkered perception of what is occurring in the cases in which he appears, and that would have been particularly so in a case where so much was at stake for him, defending the charge of perjury, and where his ignorance of court procedure and of the laws of evidence was bound to be a serious handicap in his appreciation of what was taking place during the month long trial. I have regard to these considerations.
As to the suggestion of Crown delay in prosecuting this matter, evidence was tendered that the Department of Justice had written to booksellers as early as July 2000 warning them of the risk they faced that legal proceedings for defamation or contempt might be taken against the books. There was also evidence that during that year the Crown sought formal confirmation from a number of bookstores as to the numbers of books they had sold. These

proceedings were commenced in May 2001. I do not know why proceedings were not taken sooner, but I do not draw an inference that the Crown did not regard the books as representing a real risk to the reputation of the courts, as they now contend. I accept that it is relevant, though, that two years have passed since the books were published and the reputation of the courts has not appreciably been diminished in that time. The reputation of the courts might, however, have been diminished in the eyes of those who read these books; it would be near impossible to determine that, as a matter of practicality. The relevant issue, however, is merely whether the publications had a tendency to produce that result.

Mr Maxwell submitted that trenchant criticism of judges and magistrates is often made by appellate judges, including findings that the tribunal had been guilty of actual or apprehended bias, and no suggestion is made that such criticism undermines the standing of the courts or their judicial officers. Similar leeway for criticism should be permitted to those who are participants in the judicial system, as litigants, he submitted, before it could be concluded that criticism would imperil the standing of the courts. The cases cited by counsel, and referred to by Hoser in his evidence[102], were, indeed, cases where either strong criticism was made by appellate judges (in some cases as to competence, rather than bias), or else where comment by counsel suggesting that a judge was biased was deemed not to constitute contempt, but in each instance publication of the matter was incapable of undermining the reputation of the courts or judges. In the first place, the public would regard the criticism as having been measured and justified, or at least (when made by counsel), to have been made in the exercise of the legitimate right of defending an accused person. The responses of the appellate courts would be regarded by the public as constituting a vindication of the system of justice, not its undermining. Criticism of judges and magistrates is not the sole province of appellate judges, but, on the other hand, the fact that a critic is neither a lawyer nor a judge does not render that which is plainly contempt to be something which is not contempt.

I accept, however, that in determining whether the offence has been proved beyond reasonable doubt as to any particular of contempt which is pleaded, the passage must be shown to have the real risk[103] (whether by itself or in combination with other particulars) of interfering with the administration of justice in the way discussed, or, put in the alternative way, must have the tendency to achieve that result as a matter of practical reality.

The suggestion that there was too limited a publication for these statements to cause any harm to the administration of justice requires closer examination. That, in my opinion, is not the case. It is, of course, true, that publication was not of the order of a newspaper or major organ of communication but there was a quite sophisticated marketing campaign and wide publication of the statements. Furthermore, Hoser has set himself up to be a person of eminence in the investigation of corruption, as a person whose statements may be relied on as accurate and as one whose opinions are sought by governments and by the broader community.

At page 693 of Book Two, Hoser described himself as "one who has made a study of police corruption Australia wide". Hoser said that he gets people coming to him daily wanting him to write books about corruption as it has affected them. It might be a disgruntled litigant or a policeman or ex-policeman offering to provide him with information, he said.

Hoser gave evidence before me both by affidavit and orally. In his affidavit he said of himself "I am an investigative author and zoologist by profession. I have written and published over 100 scientific articles and papers and journals and magazines in various parts of the world including Australia, the United States of America and Europe". He tendered a list of publications. He deposed that of 7,500 copies printed of Book One all but 500 had been sold and

of approximately 5,500 copies of Book Two all but 500 had been sold. In addition to the printed books, both books are contained on a CD and he has sold approximately 600 CDs.

He stresses his qualifications as a scientist[104], with the undoubted intention that his opinions on the legal system will be regarded as being equally objective and careful as might be expected of scientific enquiry. He said that at certain times he has been a member of two organisations, known as "Whistleblowers" and "Lawatch". He plainly regards himself as a focal point for such organisations and for any other persons disgruntled, for one reason or another, with the justice system.

The final chapter in Book Two is titled, "Blowing the Lid on Corruption, Beating Attacks by the Corrupt and Avoiding the Pitfalls". The author states that "The following chapter has been written here as a response to the thousands of requests for information I receive about how to insure oneself against the adverse effects of corruption and/or improper prosecution by government authorities and police". The author states that "I spend hundreds of hours a year explaining to people the best methods to combat corruption at the coalface". The chapter provides such advice as the necessity of taping other persons covertly, keeping copies of all documents, and sub-chapters giving such advice as "never believe a word a government official tells you (likewise for what is in the media)" and "always go through the motions of using the government's own system of "investigation of corruption eg Ombudsman, members of parliament, ICAC, etc", even though the odds of success are remote. He gives advice as to use of the media, and a variety of other suggestions.

He said that his list of sources runs to a hundred odd pages; they include court transcript, covert tapes, tabloid clippings, letters and other material. He said that a person using the Internet requesting information about a particular person or topic would be told what book it is in which that matter is referred to. He said the CD contains a list of sources so that people can download those if they want to do their own research. He said on the Internet he has also published the last chapter of Book Two and chapter 10 of Book One.

He agreed he had door knocked personally to sell the book to households.

He said of his publications:

> "I believe that the issues raised in the book such as the fair administration of justice, the smooth running of the court system, tape recording of courts in all jurisdictions, and those sorts of issues, corruption issues across the board, I think are addressed in the books reasonably well, they are matters of public interest and I believe that they are matters that should be discussed and addressed with the ultimate view as stated in the books to improving the system and I make no bones about that at all."

He said the book has been distributed all around the world with the main interest being in Victoria. He has travelled to conferences in New South Wales and addressed conferences in Victoria. As I said earlier, his books have been sold at major booksellers and by Internet advertising

PLACING RELIANCE ON THE GOOD SENSE OF THE READERS, AND NOT THE CONTEMPT POWERS?

The many statements of appellate courts about the need for restraint in the exercise of the contempt jurisdiction are of course important reminders that this is a criminal jurisdiction, and that the courts must be ever alert not to use a significant power to assuage the hurt feelings of judges and magistrates. But against that, in my opinion, the courts should not be so anxious to demonstrate their robustness and lofty disregard for trenchant criticism that they fail to recognise that a concerted campaign against the integrity of the courts and judicial officers, even if employing what the appellate courts might regard to be simplistic and patently absurd arguments

may, if unanswered, damage the reputation of the courts, especially at the trial level. It is, after all, more difficult to mount a credible argument that three or five appellate judges are all part of a conspiracy or are tainted by bias than it is to allege that against a magistrate or judge sitting alone.

In an article titled, "Attacks on Judges - A Universal Phenomenon"[105] Kirby J noted the ferocity of criticisms of the High Court of Australia following upon such contentious decisions as those relating to native title. Kirby J noted that of the critics few demonstrated any familiarity with what the judges had actually written in their judgments. He noted too that the attacks "the like of which we have never seen before in Australia" continued for months and were "unrepaired by an effective defence of the court by the traditional political guardian of judicial independence, the Attorney-General".

The earlier statements of appellate courts, stressing the extreme caution which must be exercised before punishing contempt, must be read now in the light of the new reality that organised and quite sophisticated campaigns against the integrity of the courts, if unchecked, may prove very effective in damaging the reputation of the courts. The "practical reality" of the judicial system being unreasonably damaged must today be considered against the backdrop of the means of mass communication provided by desktop publishing and the Internet. This is a case where such a sophisticated campaign is being waged.

Mr Maxwell submitted that if judges and magistrates have been defamed then they have their remedy; they may take defamation proceedings. Hoser himself both in evidence and in his books stresses the fact that he had not been successfully sued for defamation and that many of those he has attacked have not even issued proceedings against him. It must be recognised, however, that it would be very rare for a judge or magistrate to take such action. In the first place, the person who would make such unjustified attacks on the integrity of the judicial officer is unlikely to be worth suing. But more importantly, the costly, time consuming and distracting pursuit of defamation proceedings (and the great reluctance of the courts to grant an interlocutory injunction where a defendant, however, feebly, claims justification[106]) makes the pursuit of such proceedings entirely unattractive, for a judge or magistrate who may have no interest in gaining financial benefit but is simply wanting to defend the institution of the court against unfounded and damaging attack.

The reality, as Lord Denning observed in R v Metropolitan Police Commissioner; Ex parte Blackburn[107], is that judges by virtue of the nature of their office cannot reply to such criticisms or enter into political controversy. As McHugh J observed in his dissent in Mann v O'Neill[108], it is unseemly, and an approach which is inimical to public acceptance of the independence of the judiciary, for judges and magistrates to use the defamation laws to respond to scurrilous and contemptuous abuse. It is appropriate that the contempt laws should continue to be used in appropriate cases to protect the courts from such attacks which sap confidence in the administration of justice. There is, however, a longstanding alternative view, that in most instances the attacks can be ignored, on the basis that the good sense of the community can be relied on, so that the public will have no regard to them.

In Bell v Stewart, a case in which a judge of the Arbitration Court was criticised as being out of touch with industrial reality the court held[109] that it was ridiculous to suppose that the administration of the arbitration law could be in any way interfered with by virtue of the publication of the words of criticism. Knox CJ, Gavan Duffy and Stark JJ held, however, that:

> "So the case must rest upon the words being calculated to lessen or discredit the authority or prestige of the court in the minds of reasonable

> people. No reasonable man could attribute any charge of `false play' or injustice to the learned President on the words used."

Their Honours held that the words used, including satirical comments, could not "sap or undermine the authority of any court in the mind of any reasonable person". Their Honours added that "amongst reasoning men, we believe that the practice of the court would rather be supported and seemed to be well calculated to ensure a proper and just administration of the law free from the prejudices or want of knowledge of any particular officer".

In their separate judgment, Isaacs and Rich JJ in Bell v Stewart[110] held that the occasions on which the jurisdiction of contempt would be exercised would be exceptional. They added that that would be so because in this category of contempt what occurs "is primarily abuse only, from which the good sense of the community is ordinarily a sufficient safeguard, and, such contempt not touching any pending proceeding, its affect on the administration of justice must generally be remote".

In my view, these considerations have less weight when one is dealing with a lengthy, professionally produced, book written by an author professing to have credibility and to have a reputation for careful research, who purports to quote accurately from official transcript, but does so selectively and with malice. While the good sense of the public may be relied upon, to some extent, in identifying hyperbole and fatuous argument, it can not be assumed that Hoser's books would be dismissed as ridiculous, and his complaints of bias and corruption as unfounded. Notwithstanding his assertions that he makes his source material available to readers, the reader is not in a position to judge whether Hoser's use of transcript and other material is selective and whether his assertions give a frank analysis of competing arguments. If the test is whether the statements are likely to be believed[111], then in my view a significant section of the readership, even reasonable and intelligent readers, may believe the statements to be true.

The Foreword to Book Two is written by a former member of Parliament and although to a discerning reader it might, itself, be regarded as containing absurd statements, it nonetheless adopts entirely Hoser's view of the world and says he was wrongly convicted by a "knobbled jury" and asserts that the jury was directed to convict by the judge, and after the judge had "deliberately hidden from the jury. . . in clear violation of all legal morals, ethics and principals (sic)" a tape which constituted "proof of Hoser's innocence".

Hoser is not responsible for the statements of Mr Campbell, but they are given prominence, and might be regarded by some readers as worthy of credit. That presumably is why the Foreword is included. Assuming Mr Campbell to be a reasonable person, if he can be so gullible, should I assume that others would not be? I think not.

CONCLUSION

I conclude, beyond reasonable doubt, that there is a real risk that as a matter of practical reality the statements relating to Judge Neesham and Judge Balmford have a tendency to undermine the confidence of the public in the administration of justice and to lower the authority of the courts. I am satisfied beyond reasonable doubt that Count One of contempt by scandalising the court has been proved as against both respondents.

I am not satisfied beyond reasonable doubt that those particulars relating to Magistrate Heffey and Magistrate Adams constitute contempt by scandalising the court. Count Two will be dismissed.

I will hear submissions on sentence.

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[1] Book Two, p. 17.

[2] R v Phung [1999] 3 VR 313.

[3] [1998] 2 VR 535, at 538.

[4] Book Two, pp.462-463.
[5] Witham v Holloway (1995) 183 CLR 525, at 534; Hinch v Attorney-General (Victoria) [No.2] (1987) 164 CLR 15, at 49, per Deane J; Ambard v Attorney-General for Trinidad and Tobago [1936] AC 322, at 329.
[6] John Fairfax and Sons Pty Ltd v McRae (1955) 93 CLR 351, at 365.
[7] Nationwide News Pty Ltd v Wills (1992) 177 CLR 1, at 31-32; Re Colina and Anor; Ex parte Torney (1999) 200 CLR 386.
[8] (1935) 53 CLR 434, at 442
[9] See Borrie & Lowe, "The Law of Contempt" 3rd Ed, at p.340
[10] Or to call a judge an "imbecile": Re Quellet (1976) 72 DLR (3rd) 95, per Tremblay CJ Q, at 97 (Quebec Court of Appeal).
[11] See Borrie and Lowe, "Law of Contempt", 3rd Ed, at 343
[12] [1900] 2 QB 36, at 40.
[13] (1911) 12 CLR 280 at 285.
[14] (1972) 2 NSWLR 887 at 910-911.
[15] [1999] 2 AC 294 at 304-5.
[16] See the later discussion by McHugh J in Nationwide News v Wills at pars [79]-[80] herein; see, too, R v Nicholls (1911) 12 CLR 280, at 286, per Griffith CJ as quoted by McHugh J.
[17] [1968] 2 QB 150 at 155.
[18] [1972] 2 NSWLR 887, at 908.
[19] Saltalamacchia v Parsons [2000] VSCA 83, at [10].
[20] R v Brett [1950] VLR 226, at 232, per O'Bryan J.
[21] Bell v Stewart (1920) 28 CLR 419, at 425-426.
[22] Attorney-General (NSW) v Mundey, supra, at 911
[23] John Fairfax & Sons Pty Ltd v McRae, supra, at 371.
[24] Re Colina and Anor; Ex parte Torney (1999) 200 CLR 386, at 391, per Gleeson CJ and Gummow J, at 428, per Hayne J; MacLeod v St Aubyn [1899] AC 549, at 561, per Lord Morris.
[25] John Fairfax Pty Ltd v McRae, supra, at 370.
[26] See Ahnee v Director of Public Prosecutions, at 306.
[27] [1900] 2 QB 36.
[28] "Judges", Oxford University Press 1987, David Pannick at 111-112.
[29] See Dictionary of National Biography, at 211 ("He was not a great judge"); and "May It Please Your Lordship" by E.S. Turner, 1971, at 225-228.
[30] "Law of Contempt" 3rd Ed, at 356-357,
[31] "Contempt of Court", 3rd Ed, C.J. Miller, (2000), at 584-587.
[32] [1936] AC 322 at 335.
[33] [1999] 2 AC 294.
[34] [1900] 2 QB 36, 40.
[35] [1936] AC 322 at 335.
[36] [1983] 2 AC 297.
[37] (1911) 12 CLR 280 at 286.
[38] (1935) 52 CLR 248.
[39] [1978] 1 NZLR 225 at 231.
[40] Citing Borrie & Lowe, 1976 Ed, at 383-384.
[41] (1983) 152 CLR 238 at 243.
[42] (1935) 53 CLR 419 at 447.
[43] (1992) 177 CLR 1.
[44] Ibid, per, Brennan J at 39.
[45] Citing Gallagher v Durack, supra, at 245.
[46] Citing R v Fletcher; Ex parte Kisch, at 257.
[47] (1911) 12 CLR 280, at 286.
[48] Note, too, the requirement that the comment be "baseless", as stated in Gallagher v Durack, supra, at 243.
[49] At 390, citing, among other cases, Regina v Kopyto, (1987) 39 CCC (3rd) 1.

[50] (1987) 39 CCC (3d) 1 at 14.
[51] Ibid, at 14-15.
[52] (1997) 189 CLR 520.
[53] Ibid, at 560
[54] Ibid, at 560.
[55] Ibid, at 561.
[56] Ibid, at 567.
[57] [2000] 181 ALR 694.
[58] (1994) 182 CLR 104, at 187.
[59] (1994) 37 NSWLR 81, at 110-111.
[60] (1998) 19 WAR 316, at 325.
[61] (2001) 75 ALJR 1316, at 1329, 1333-1336.
[62] See Gallagher v Durack, supra, at 243; Ahnee v DPP, supra, at 305-306; Attorney-General v Times Newspapers [1974] A.C. 273, at 315; Nationwide News v Wills, supra, at 34.
[63] [2001] VSCA 152 at par. [16].
[64] [1998] 4 VR 505.
[65] [1978] 1 NZLR 225, at 231.
[66] "The Law of Contempt", 3rd Ed. at 349
[67] (1808) 1 Camp 359n.
[68] Book Two, p. 448.
[69] Book Two, p. 367.
[70] Book Two, p. 367.
[71] Book Two, p.304, as one illustration.
[72] Book Two, p. 280.
[73] Supra, at 32-33.
[74] R v Dunbabin, Ex parte Williams, at 442.
[75] Ibid, at 437-438.
[76] [1953] NZLR 944, at 948.
[77] Unreported decision of Court of Appeal, (Winneke P, Tadgell and Charles JJA), 26 June 1997.
[78] Fitzgibbon v Barker (1992) FLR 191, at 201.
[79] See Nationwide News v Wills, supra, at 31-33, 38-39, 78, 103; R v Brett, supra, at 229.
[80] Attorney-General NSW v Mundey, at 910.
[81] [1950] VLR 226, at 231.
[82] As I noted in my reasons, delivered on 30 October 2001, when ruling, on the no-case submission, I did not accept the truth of any of the particulars on which I ruled there was no case to answer, and I also observed that most were "arguably defamatory, and constitute offensive and extravagant abuse".
[83] Nationwide News v Wills, at 32.
[84] Ibid, at 53.
[85] [1950] VLR 226 at 229.
[86] See R v Kopyto, supra, per Goodman JA, at 48.
[87] Nationwide News v Wills, at 38.
[88] R v Kopyto, at 32.
[89] Masciantonio v R (1995) 183 CLR 58, at 67-68.
[90] Zecevic v DPP (1987) 162 CLR 645, at 657.
[91] "Contempt and the Media", The law reform Commission, Discussion paper No.26, March 1986.
[92] Cross on Evidence, 1996, par [27205].
[93] [1999] 2 AC 294, at 306, speaking of "extensive and plainly biased questioning".
[94] At 80; see too R v Nicholls, supra, at 286.
[95] (1955) 93 CLR 351, at 370.
[96] At 304-5.
[97] [1974] AC 273 at 312 per Lord Diplock.

[98] Unreported Court of Appeal, 3 April 1998 at p. 11
[99] (1983) 152 CLR 238 at 243.
[100] See Borrie & Lowe, 3rd Ed, at 77-78.
[101] (1985) 6 NSWLR 695 at 708.
[102] Magistrates Court of Victoria v Robinson [2000] VSCA 198; Gillfillen v County Court of Victoria [2000] VSC 569, unreported decision of Nathan J; Lewis v Judge Ogden (1984) 153 CLR 682; R v Crockett [2001] VSCA 95.
[103] I consider that that phrase, as used in Ahnee v Director of Public Prosecutions, should be regarded as being to the same effect as the requirement for there to be a "practical reality".
[104] As to his qualifications as a zoologist, Hoser said he has an applied Herpetology certificate from Sydney Technical College.
[105] 72 ALJ 599.
[106] See National Mutual Life Association of Australasia v GTV Corp. Pty Ltd (1989) VR 747, at 764; Holley v Smythe (1998) QB 726, at 743.
[107] Supra, at 155.
[108] Mann v O'Neill (1997) 71 ALJR 903, at 920; (1997) 145 ALR 682, at 704.
[109] At 425.
[110] (1920) 28 CLR 419, at 429.
[111] Gallagher v Durack, at 244.