
TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF VICTORIA

COMMON LAW DIVISION

MELBOURNE

TUESDAY 04 DECEMBER 2001

(2nd day of hearing)

BEFORE THE HONOURABLE JUSTICE EAMES

B E T W E E N

THE QUEEN (ex parte ATTORNEY-GENERAL
FOR THE STATE OF VICTORIA)

Applicant

- and -

RAYMOND TERRENCE HOSER

First Respondent

- and -

KOTABI PTY LTD

Second Respondent

1 HIS HONOUR: Yes, Mr Graham?

2 MR GRAHAM: As Your Honour pleases. Yesterday we filed an
3 affidavit by Allison Patricia Kate O'Brien, to which were
4 exhibited a series of extracts from what I think I can
5 safely now refer to as Mr Hoser's web site. I understand
6 from Your Honour's Associate that that affidavit didn't
7 find its way to Your Honour.

8 HIS HONOUR: No, unfortunately it didn't, and I just had a very
9 quick look through then, but I haven't completed looking
10 at them, you will have to take me to any passages you
11 want me to have regard to.

12 MR GRAHAM: Yes. Your Honour has the exhibits, I understand?

13 HIS HONOUR: Yes, I do.

14 MR GRAHAM: Before I go to the affidavit and the exhibits, I
15 should refer to the fact that there is a further
16 affidavit sworn by the same deponent, rectifying an
17 omission that she made in preparing the first affidavit.
18 She failed physically to mark each of the exhibited
19 documents with the relevant exhibit number, AOB1 through
20 to 15, but she shows, by means of her second affidavit
21 and the exhibit notes, that they are what she says they
22 are, so that point of proof is rectified.

23 MR MAXWELL: Your Honour, before my learned friend goes any
24 further, may I object to the admissibility of any
25 evidence of this kind.

26 HIS HONOUR: Yes. What is the basis of the objection?

27 MR GRAHAM: Your Honour, that the matter which is before the
28 court this morning is the question of penalty and costs.
29 In respect of the matters the subject of Your Honour's
30 judgment, these extracts are mostly, if not all, of
31 documents which were created before the trial ended.

1 That is to say, these were contemporaneous notes
2 published on his web site during the trial and with
3 reference to the transcript as it became available.

4 Just as Your Honour has noted that the cross-
5 examination of Mr Hoser was surprisingly limited, so we
6 would respectfully submit that it is surprising that the
7 Crown, if it wanted to make some point about this
8 material, did not supply it to the court by way of cross-
9 examination of Mr Hoser at the time. Just as on the
10 first day, Your Honour disallowed an application for
11 amendment, on my submission that the Crown should not be
12 allowed to tidy up its case at the last minute, so it is
13 respectfully submitted that Your Honour should not allow
14 the late introduction of material, the purpose of which
15 has yet to be elaborated but which if it had any bearing
16 on the matters for which Your Honour now has to consider
17 penalty, should have been put in issue when Mr Hoser was
18 in the witness box with an opportunity to answer it, and
19 that is not now available and it should not be permitted.
20 It is not, in our respectful submission, relevant to
21 adduce evidence now, of what he was saying while the
22 trial was going on in my respectful submission.

23 HIS HONOUR: How was it put, Mr Graham?

24 MR GRAHAM: Your Honour, we rely upon - we place this material
25 before Your Honour because it is clearly relevant to the
26 question of what penalty would be appropriate and how
27 Your Honour should approach the sentencing process. The
28 material that was placed before Your Honour, or sought to
29 be placed before Your Honour, goes firstly, we would
30 submit, to the question of whether the first respondent
31 has demonstrated any remorse whatsoever and we would draw

1 this material to Your Honour's attention in order to
2 suggest that Your Honour might conclude that there is a
3 complete absence of remorse on the part of the first
4 defendant in this case. The second way in which Your
5 Honour may find this material of assistance, is on the
6 question of specific deterrents, and Your Honour may find
7 this material helpful in forming a few as to what penalty
8 would be appropriate to achieve specific deterrents in
9 this case.

10 HIS HONOUR: I gather from what was just said by Mr Maxwell
11 that the material falls into two categories. Material
12 which existed prior to the hearing and material which has
13 come into existence post the hearing. Is that the case?

14 MR GRAHAM: Perhaps even three categories, Your Honour. Some
15 material, prior to the commencement of the trial, some
16 during the trial, and one on the day when Your Honour
17 delivered judgment. One of the publications during the
18 trial made observations concerning the no case
19 submission.

20 In the course of the conduct of the trial proper,
21 there may have been real questions as to whether on
22 balance it was appropriate to challenge Mr Hoser in
23 relation to what he was publishing on the web site before
24 and during the trial, and questions of balancing fairness
25 and prejudice might have arisen. Further, nothing much
26 would perhaps have turned upon these extracts anyway. We
27 don't suggest that for the purposes of proving guilt or
28 innocence very much does. But we submit this material
29 does bear upon the two questions, namely, remorse and
30 specific deterrents, and do have relevance outweighing
31 any possible prejudice at this stage.

1 It is clear, of course, that anything which bears
2 upon those two issues which was published by Mr Hoser
3 after Your Honour delivered judgment last week which
4 bears upon those issues, clearly is not - doesn't fall
5 within my learned friend's submissions about material
6 which could have been put to Mr Hoser during the course
7 of his evidence and cross-examination.

8 I should also indicate to Your Honour at this stage
9 so I can alert my learned friend to this in case it comes
10 as any surprise to him, in addition to the affidavits of
11 Ms O'Brien, we wish to tender certificates of conviction
12 in relation to Mr Hoser. One in relation to the perjury
13 conviction about which Your Honour has heard and read a
14 good deal, and one in relation to another matter which
15 took place in July 1993, a summary matter, involving a
16 recording of guilt without conviction and fine. It is
17 perhaps necessary for me to tell Your Honour what that is
18 about because it's having regard - the offence was an
19 offence of assaulting - - -

20 HIS HONOUR: Before you do, I will need to hear whether there
21 is any resistance to the tendering of certificates, if
22 there is, I'd need to deal with that, if there's not,
23 I'll deal with the substance.

24 MR GRAHAM: Yes, if Your Honour please.

25 HIS HONOUR: Is there?

26 MR MAXWELL: Your Honour, certainly not as to the perjury. I
27 would've thought it was entirely redundant in view of
28 Your Honour's careful treatment of that perjury matter in
29 the judgment. We don't understand at all, why it's
30 necessary to tender that certificate, the conviction is a
31 matter of common ground in the proceeding. As to the

1 other matter, my learned friend has just now informed me
2 to what it relates and in our respectful submission
3 there's no basis, whatever for that matter being referred
4 to in this plea hearing.

5 HIS HONOUR: That's a different question. You might want to
6 argue that it's got no bearing on the matters before me.

7 MR MAXWELL: Yes, Your Honour. Subject to that, Your Honour,
8 the certificate itself, and subject to seeing it, I don't
9 doubt that it is what my learned friend says it is.

10 HIS HONOUR: Yes, very well.

11 MR GRAHAM: Be it redundant or not, Your Honour, perhaps these
12 things ought to be done with complete correctness and so
13 I would tender a certificate given by the deputy
14 registrar of the County Court on 18 October 2001
15 concerning the perjury conviction. That finds its way
16 into evidence, Your Honour, under provisions of the
17 Evidence Act with which Your Honour is no doubt familiar.

18 HIS HONOUR: I am, but I'm not sure that they apply to this
19 case, do they?

20 MR GRAHAM: I think that they apply in any case, Your Honour,
21 I've got them here.

22 HIS HONOUR: I thought they applied only in indictment and
23 presentments.

24 MR GRAHAM: No, Your Honour, with respect, in any legal
25 proceeding whatsoever.

26 HIS HONOUR: What is the section?

27 MR GRAHAM: That is s.87 of the Evidence Act 1958, and if I may
28 say with respect, Your Honour, it is not surprising,
29 because prior convictions sometimes have to be proved in
30 civil cases to impeach credit.

31 HIS HONOUR: I'm sorry, what was the sentence?

1 MR GRAHAM: Section 87 of the Evidence Act 1958.

2 HIS HONOUR: Yes, it refers to any indictable offence, I see.

3 MR GRAHAM: Your Honour had in mind what the conviction was for
4 not what the proceedings were about.

5 HIS HONOUR: Yes.

6 MR GRAHAM: I'm sorry, Your Honour. I was going to say before
7 Your Honour puts that volume aside, Your Honour also
8 needs to have s.89 of the Evidence Act which deals with
9 proof of summary convictions, and I would seek to tender
10 the certified extract signed by the registrar of the
11 Magistrates' Court dated 3 December 2001 concerning the
12 offence to which I referred, of assault police or a
13 person assisting police.

14 HIS HONOUR: Very well. I will receive both of those
15 documents.

16

17 #EXHIBIT P1 - Certificate from County Court of 18/10/01.
18

19 #EXHIBIT P2 - Certificate of Magistrates' Court of
20 03/12/01.

21 MR GRAHAM: As Your Honour pleases. Should I go to the
22 passages in the Exhibits AOB9 to AOB15.

23 HIS HONOUR: Are these the ones today, are they?

24 MR GRAHAM: Yes, Your Honour.

25 HIS HONOUR: Yes.

26 MR GRAHAM: To indicate what we say are the passages of
27 relevance to Your Honour that perhaps will assist Your
28 Honour in ruling upon my learned friend's objection, I
29 think they start - perhaps I should start with AOB1 just
30 to show Your Honour how the - or perhaps I should start
31 with the affidavit and ask Your Honour to look through
32 that if Your Honour hasn't had an opportunity of doing
33 so, it makes more sense to those familiar with working

1 web sites than those who are not. Perhaps I can draw
2 Your Honour's attention particularly to paragraph 3 of
3 the first affidavit - - -

4 HIS HONOUR: I've just put it down, I'm just trying to find it
5 - yes, go on.

6 MR GRAHAM: Starting in paragraph 2, Ms O'Brien deposes as to a
7 visit to the website address, www.smuggling.dot.com, that
8 indicates that there are a number of clickable headings
9 and indicates what one of those headings is, and that
10 took her to another heading, which she sets out further
11 down in paragraph 2, and she exhibits a printout of the
12 first two website pages to which she has referred, and
13 then she goes on to indicate what happened when she
14 clicked on other headings on the same web page, which she
15 sets out in chronological order, and Your Honour will see
16 that paragraph 3 has a table, and the table finishes 29
17 November 2001, one free speech case final judgement and
18 then she exhibits as exhibited on AOB3 to 15, what she
19 has printed from the site.

20 In the absence of hearing any objection from my
21 learned friend, I am assuming that there's no issue about
22 the connection between the first respondent and these web
23 sites. The identity of the web sites appears in the fly
24 leaves of both the two books and referred to in the
25 course of evidence before Your Honour more than once. At
26 one point, p.408, Mr Hoser, in his re-examination, gave
27 the full web site address, so we take it that's not an
28 issue.

29 Can I then take Your Honour to Exhibit AOB3, that's
30 headed, "Rob Hulls is now trying to gaol leading
31 corruption author - for immediate release - May 27 2001."

1 It starts with the line: "In an Australian first and in
2 a step reminiscent of Stalinist Russian, Victoria's
3 attorney-general has instructed his government to
4 initiate proceedings against Australia's leading
5 corruption author, Raymond Hoser, with a view to having
6 him imprisoned."

7 Then about ten lines further down says: "The same
8 allegation" - perhaps I should go back a line: "The
9 charge of contempt alleges that Hoser and publisher have
10 scandalised the Victorian courts. The same allegation
11 was pursued unsuccessfully against Hoser in a related
12 defamation action in April 2001 when Justice Bill Gillard
13 ruled the application was improper and awarded costs in
14 Hoser's favour." Your Honour will recall something about
15 that.

16 HIS HONOUR: Yes. It's a complete mis-statement - - -

17 MR GRAHAM: Yes, it is, Your Honour.

18 HIS HONOUR: - - - of what occurred in that case.

19 MR GRAHAM: Yes. Then there is reference to, six months later:

20 "Hulls has broken the agreement." Your Honour doesn't
21 have evidence of the agreement referred to in the
22 preceding sentence, so we haven't got the opportunity of
23 exploring that if it matters.

24 MR MAXWELL: Might I just supplement my objection before my
25 learned friend goes any further. Any letter (indistinct)
26 is too late for this. It is that this has a release date
27 of 27 May.

28 HIS HONOUR: Yes. I think that I should deal with that perhaps
29 first. I will come back to you on that.

30 MR MAXWELL: Your Honour, might I just open it. My learned
31 friend says we don't have information about the

1 agreement, but that's classically a matter which could
2 have been explored if it were relevant, and after all, my
3 learned friends are instructed by the attorney-general
4 who is said to have been a party to this agreement.

5 As Your Honour knows, this case was brought on, on
6 the basis of tendering the books, that was the only work
7 that was done to get this case ready for trial. There
8 wasn't a writ of investigation of any of the matters, and
9 this is just all of a piece with a case which was brought
10 on under the misapprehension that if you tendered the
11 books, you'd get a conviction.

12 This was available - I'm repeating myself - for
13 months before the case began, and in our respectful
14 submission, shouldn't now be brought in - - -

15 HIS HONOUR: Perhaps whilst you are on your feet, I can direct
16 the question to you and you might wish to defer it until
17 after Mr Graham has dealt with it.

18 MR MAXWELL: Yes, Your Honour.

19 HIS HONOUR: It seems to me there's at least a potential in a
20 couple of relevant issues for the purpose of penalty,
21 which I have now got before me. One is, if the material
22 relating to the web site has any relevant information,
23 relevant to such matters as you have raised yourself in
24 your written outline which you tendered, which would seem
25 to me to be factors both as to the income which has been
26 raised in your outline.

27 MR MAXWELL: Yes, Your Honour.

28 HIS HONOUR: Also the extent of distribution might be a
29 relevant factor as well. But it would seem to me that
30 there might also be a relevance for material - I accept
31 the force of what you say about material that was in

1 existence at the time when the hearing was taking place -
2 but material which has come into existence after the
3 hearing had taken place, it would seem to me, potentially
4 at least and subject to what the material had, to have
5 relevance where the question of penalty arises because it
6 is fundamental to the question of penalty and indeed
7 fundamental to the submission which you're putting
8 yourself in your written outline, that notwithstanding
9 the express findings I made as to lack of good faith, I
10 should otherwise generally accept the good faith, using
11 that in the broad sense, of the author of the
12 publication.

13 MR MAXWELL: Yes, Your Honour.

14 HIS HONOUR: If that is the case which has been put on penalty
15 by the defence then it would seem to me that if the Crown
16 is wanting to assert that subsequent to the hearing,
17 material has come into existence which is inconsistent
18 with those positions, is that not relevant?

19 MR MAXWELL: Yes, Your Honour. I make no submission about
20 that.

21 HIS HONOUR: No.

22 MR MAXWELL: That, if I might, with respect, separate the two.

23 HIS HONOUR: Yes, I think probably it should be separated.

24 MR MAXWELL: I accept that - - -

25 HIS HONOUR: I think there's force in what you say about
26 matters not being put to him at the time he was in the
27 witness box.

28 MR MAXWELL: Yes, Your Honour. As I understand it, in this
29 large exhibit, there is but one subsequently created
30 document, and my submissions about failure to use at the
31 time claim that it can't apply to that, and I'm not

1 submitting that Your Honour should regard that as wholly
2 irrelevant. I make submissions about what's to be drawn
3 from it, but my submission is really directed to the
4 balance of the material.

5 HIS HONOUR: Yes. I mean if I hadn't made it clear, what I'm
6 saying is that - and again, subject to Mr Graham, it
7 would seem to me that there's force in what you say about
8 material which came into existence prior, unless it has
9 got some direct bearing on the issues which are now
10 before me, such as extent of publication or finances or
11 matters of that sort.

12 MR MAXWELL: Yes, Your Honour.

13 HIS HONOUR: But if it is simply material which might have been
14 the subject of cross-examination as to a defence of good
15 faith et cetera, then it seems to me your point is well
16 made.

17 MR MAXWELL: If Your Honour pleases. If I might then, just
18 return to how my learned friend has put the material, he
19 puts it on two bases. First, as to whether Hoser has
20 demonstrated remorse - no, you've made your submissions
21 and you moved on to a different matter being the
22 certificates of conviction - - -

23 HIS HONOUR: I didn't take it that he'd finished, I've really
24 interrupted because - in fact, you interrupted - - -

25 MR MAXWELL: So, with respect, have I.

26 HIS HONOUR: Yes.

27 MR MAXWELL: But only because in my respectful submission, this
28 is prejudicial material, or it wants to be put
29 prejudicially and before Your Honour is taken further
30 through it, subject of course to Your Honour's direction,
31 I thought it appropriate to make a point about that. But

1 if I might then sit down, subject to anything further my
2 learned friend says, his primary grounds for this
3 material were to remorse and deterrents. As to remorse,
4 Your Honour knows how the case was put and Your Honour
5 will have to - - -

6 HIS HONOUR: It seems to me, these are matters you can deal
7 with in response. I think that I should deal with the
8 threshold issue which is how any of the material, prior
9 to the conclusion of the hearing is being put.

10 MR MAXWELL: Yes, Your Honour.

11 HIS HONOUR: So if it comes into the categories that seem to me
12 relevant directly then they arguably would be admissible,
13 if it doesn't, and it's merely on the sorts of issues
14 I've discussed, then on the face of it, it seems to me,
15 not admissible.

16 MR MAXWELL: Yes, Your Honour. If I might, with Your Honour's
17 leave, just say these two things. As to remorse, the
18 witness could have been asked about remorse in the
19 witness box, the web site material or not, he wasn't. He
20 wasn't asked as Your Honour as noted, about any of his
21 statements about intention, good faith, (indistinct) of
22 the system, and so forth, surprisingly. Secondly, what
23 he said before conviction is irrelevant to any state of
24 remorse after conviction. He was putting a case as
25 articulated by his counsel that he had acted in good
26 faith, and was making fair comment on that as he believed
27 to be true. Your Honour has taken an adverse view of
28 that defence, but it would be odd to say at the time he
29 was putting a case, which you've accepted would not have
30 rendered remorse appropriate, it's difficult to say he
31 wasn't expressing remorse at the time. Because of

1 course, the case put forward on oath and - - -
2 HIS HONOUR: I think you should hear the submissions - - -
3 MR MAXWELL: If Your Honour pleases. As finally to
4 circulation, that was a fact in issue in the proceeding.
5 HIS HONOUR: Yes.
6 MR MAXWELL: This bears on the evidence. Your Honour will
7 recall we, in chief, filled in a gap which the
8 prosecution had inadvertently left in their own evidence
9 of publication, my client said as to the second book - -
10 -
11 HIS HONOUR: You will get your chance anyway - - -
12 MR MAXWELL: - - - as to the CD, and if there was - if that was
13 to be challenged - - -
14 HIS HONOUR: Mr Maxwell, you will get your chance.
15 MR MAXWELL: If Your Honour pleases.
16 HIS HONOUR: All right.
17 MR GRAHAM: If Your Honour pleases. It's probably best for me
18 to say something about the timing of publication before I
19 go on to the particular aspects.
20 HIS HONOUR: I want to deal with the threshold question.
21 MR GRAHAM: Yes.
22 HIS HONOUR: It doesn't seem to me, and as you have just heard
23 me say, that material which was generated before the
24 conclusion of the case, should be used or be relevant for
25 the purposes of sentence, unless, it seems to me, they
26 fell into some specific categories which have now become
27 relevant. But if the point of using them is to simply
28 demonstrate the attitudes of Mr Hoser et cetera, it seems
29 to me that was all grist for the mill and the conduct of
30 the hearing.
31 MR GRAHAM: If I can deal with that point directly. It was not

1 part of the issue before Your Honour, prior to Your
2 Honour's finding of guilt, to explore the questions of
3 remorse or the need for specific deterrents. That
4 would've been entirely an irrelevant pair of
5 considerations and if I endeavoured to use those bases to
6 support cross-examination, or Mr Langmead had, we
7 would've been ruled out of order. I am putting this
8 material only in relation to matters affecting penalty.
9 The fact that we had the opportunity, or may have had the
10 opportunity, although questions of relevance make this
11 doubtful, doesn't detract from the need for Your Honour
12 to look at this material if it be relevant on those two
13 points.

14 My learned friend, as I noted something he said a
15 moment ago, that remorse before conviction was
16 irrelevant, it is only remorse after conviction that
17 matters, and with respect to my learned friend, that has
18 to be nonsense. And cases that Your Honour would be far
19 more familiar with than I am, remorse demonstrated from
20 either the person giving himself or herself up to the
21 police, showing remorse upon apprehension, showing
22 remorse before confession, showing remorse by pleading
23 guilty before the magistrate, showing remorse in the
24 conduct of the defence at the plea hearing and pleading
25 guilty, all those are matters which pre-date the finding
26 of guilt.

27 HIS HONOUR: Yes, but you're starting with an assumption that,
28 as part of the plea here, there is any suggestion of
29 remorse. If that was the case, then your point might be
30 well made, but the outline which is just the outline at
31 this stage, doesn't suggest to me that it will be put to

1 me that there is any question of remorse as to any of the
2 publications, and if that is the case, then it's a non-
3 issue, is it not, because I would start on the assumption
4 that you don't need to prove what is accepted.

5 MR GRAHAM: I am just checking again, Your Honour.

6 HIS HONOUR: Subject to that, I might say, I agree with you.

7 Obviously, the question of remorse, if it is an issue in
8 sentence, can be put forward and be contradicted on the
9 basis of whatever material exists, whether immediately
10 after an event or after conclusion of the hearing.

11 MR GRAHAM: Yes. I think what caused me to make that
12 submission is what appeared under the heading,
13 "Mitigating factors" at p.3 of the submission and also
14 and specifically what's in paragraph 14.

15 HIS HONOUR: I am sure I will be told by Mr Maxwell, but I
16 didn't read any of his outline as indicating what
17 remorse, as it would be understood in the law, was going
18 to be a basis for the plea.

19 MR GRAHAM: If that is disclaimed, then I need go no further on
20 that topic.

21 HIS HONOUR: Can I assume that - yes.

22 MR GRAHAM: I think that should be recorded, Your Honour.

23 HIS HONOUR: Mr Maxwell has conceded that - I put the question
24 to him and he's conceded that remorse is not going to be
25 argued before me, so that being so, it seems to me you
26 don't need to establish any material which re-emphasises
27 the fact.

28 MR MAXWELL: And, Your Honour, since it's important since the
29 transcript is recording what I record, that that
30 concession should be read subject to the submission that
31 I'll make in - I'm not qualifying the concession - but

1 it's important, in my respectful submission, that the
2 singular nature of this proceeding be borne in mind in
3 relation to - and the manner of the defence articulated,
4 be borne in mind in relation to the question of remorse,
5 and I'll develop that in submission. It won't be said
6 that there is remorse in the sense - - -

7 HIS HONOUR: Remorse, you've either got it or you ain't - and
8 you can put whatever submissions you like as to what sort
9 of circumstances there might be. I understand what you
10 are putting. But I am taking it as you made it clear,
11 that as the question would be understood, for purposes of
12 sentencing, you are not submitting remorse.

13 MR GRAHAM: Your Honour, perhaps I can proceed more easily and
14 less contentiously to the remaining matter of specific
15 deterrents. In that regard, it is probably then only
16 necessary for us to - for Your Honour's assistance, to
17 refer to the comments which were published on 29 November
18 2001, later on in the day when Your Honour gave judgment,
19 that's Exhibit AOB15. What I want to say about that is
20 that Your Honour would be assisted by that on the subject
21 of deterrence because the publication represents what
22 Your Honour might regard as a total misapprehension of
23 what the proceedings were about, what Your Honour's
24 findings meant, and what the significance of Your
25 Honour's findings were and what the need for this type of
26 proceedings happens to be.

27 In the absence of any such comprehension as
28 demonstrated by what the first respondent has said
29 following Your Honour's judgment, Your Honour might be
30 assisted with forming a view on the question of whether
31 there is a need for specific deterrents in this case.

1 So what I'll do, Your Honour, is to confine my
2 tender of the exhibits to Exhibit AOB15, which was the
3 media report - sorry, the Internet report of Your
4 Honour's judgment of 29 November 2001.

5 As I understand my role here today, Your Honour, it
6 is not for me to submit an argument, save to say that
7 what appears in that exhibit indicates a state of mind
8 and comprehension on the part of the respondent of the
9 form that I have suggested.

10 Your Honour, I said something last time about the
11 sentencing options available and the questions which had
12 arisen concerning the availability under the Sentencing
13 Act, of certain options. I referred Your Honour to what
14 was said by the Court of Appeal in Rich's case. Rich has
15 now found itself into a series of law reports, I don't
16 know if these are any more accessible than the media
17 neutral version, but Rich's case is a 1999 103 A.Crim.R.
18 261, and Your Honour will recall I said that the
19 president in whose judgment at paragraphs 46 and 47
20 suggested that certain provisions of the Sentencing Act,
21 namely ss.11, 15, were available in a contempt case,
22 those sections - which I don't think we've brought with
23 us - related, as Your Honour would know, to the fixing of
24 a non parole period and the accumulation of head
25 sentences for the purpose of the non parole period where
26 more than one head sentence is fixed.

27 We should also refer Your Honour to something which
28 we haven't touched on before. Rule 75 of this court
29 contains its own set of provisions concerning
30 penalties - - -

31 HIS HONOUR: Yes, I looked at those. It doesn't say much

1 though.

2 MR GRAHAM: But it does overcome one possible problem, Your
3 Honour, as well as indicating the availabilities of fine
4 and imprisonment in the case of a natural person, Rule
5 75.11.4, enables Your Honour to impose a suspended
6 sentence, and aside from anything in the Sentencing Act
7 about suspended sentences, that may be a provision
8 relevant to Your Honour's sentencing process, as there
9 can be no doubt about the power. Those are the matters
10 that we seek to place before Your Honour, in the course
11 of this part of the proceeding.

12 HIS HONOUR: Just before you sit down, Mr Graham. You have
13 seen the outline of submissions which has come in, raises
14 the question of fines. Does the Crown have anything to
15 say as to that, as to both my power, and as to the
16 proposition which is put forward.

17 MR GRAHAM: The proposition in part being, Your Honour,
18 inability to pay.

19 HIS HONOUR: Yes.

20 MR GRAHAM: Having regard to the restricted role that we occupy
21 at this point, I am reluctant to go too far into this.
22 If the fact of the matter is that a fine would be an
23 empty exercise, that may be a reason for adopting that
24 course. It may be that - - -

25 HIS HONOUR: I would want to know what the other course was
26 because - - -

27 MR GRAHAM: Your Honour, I'm reluctant to urge a course upon
28 Your Honour, but - - -

29 HIS HONOUR: Well, that's what I'm putting to you.

30 MR GRAHAM: - - - but if Your Honour asks, I would say that a
31 suspended sentence would fill two aspects of the case.

1 One would be that it would provide a form of deterrence,
2 and two, it wouldn't be open to the objection that the
3 fine wouldn't be paid and therefore it would have to be
4 an actual imprisonment for non payment of fine.

5 HIS HONOUR: The provisions, as I understand them, for non
6 payments of fine have ameliorated the situation where a
7 person would be imprisoned, includes community-based
8 orders and matters of that sort. So is the submission
9 that you're making predicated on the fact that non
10 payment of a fine would lead to imprisonment?

11 MR GRAHAM: May lead to imprisonment anyway, Your Honour.

12 Again, leaving up in the air, a question of whether those
13 alternative provisions in the Sentencing Act enabling
14 those alternative types of infringement order for non
15 payment of fine are available. I confess I haven't
16 looked at them, but if President Winneke is right in
17 Rich's case, there seems to be no reason for thinking the
18 whole mechanism of the Sentencing Act wouldn't follow.

19 HIS HONOUR: I am not sure if I read that judgment or the other
20 one you referred me to - - -

21 MR GRAHAM: Is Hinch's case.

22 HIS HONOUR: Yes, and this is rather saying that, and it seemed
23 to me that - or tended to be rather saying the contrary.

24 MR GRAHAM: So far as there's a clear unanimous statement from
25 the Full Court about this, it's the general powers under
26 the Sentencing Act would not be available, there was the
27 (indistinct) statement by President Winneke not supported
28 by his two colleagues and not dissented from by his two
29 colleagues. In Rich's case the two sections of the
30 Sentencing Act are available. But I think there's
31 nothing in the Sentencing Act beyond that which would

1 indicate that Your Honour in default of a payment of a
2 fine couldn't award a community-based order or one of
3 those other - - -

4 HIS HONOUR: What do you say my powers are to fine and where do
5 they come from?

6 MR GRAHAM: We say that they come from - the starting point is
7 the common law. Fines have been imposed for as long as
8 one can remember, as long as the reports go back, for
9 contempts of court. I think Your Honour may recall the
10 almost remarkable case of R v. Gray concerning Mr Justice
11 Darling, the publisher of the newspaper in question was
12 fine one hundred pounds in 1900, that seemed to be
13 regarded by those concerned as an appropriate penalty.

14 HIS HONOUR: It's probably consistent with the view - and I
15 didn't really make my question clear - that it's plainly
16 the rules themselves give power for a fine in addition to
17 or separate to imprisonment or other penalty, but they
18 don't provide any figure. Fines under the Sentencing
19 Act, do have a range which is set, but it's a range which
20 is set by reference to the penalty which is capable of
21 being imposed and given the statements that have been
22 made in Hinch's case and in Rich's case, it would seem to
23 me to be very doubtful that those provisions, as defined,
24 apply to the contempt powers, which have been exercised
25 as the traditional common law powers. In other words, it
26 seems to me that the power of fine which is imposed under
27 Order 76, is one in which the court is not restricted by
28 any statutory requirement, obviously restricted by all
29 the relevant common law principles that would apply to
30 penalty in any case.

31 MR GRAHAM: Yes.

1 HIS HONOUR: And one might say, all of the relevant principles
2 as to fines which are set out in the Sentencing Act,
3 could be taken as being manifest good sense on sentencing
4 anyway, even if those principles weren't statutory
5 requirements for a contempt penalty.

6 MR GRAHAM: Certainly, Your Honour, I would agree with that and
7 say that regardless of what the attitudes might have been
8 a long time ago, a judge exercising the common law powers
9 in the year 2001 should be guided by principles derived
10 by analogy at least from the Sentencing Act. There would
11 be no difficulty, I would submit, about adopting that
12 submission.

13 The common law situation, as I have read it, over
14 and over again, is that the penalty was a final unlimited
15 amount and imprisonment for unlimited period. But as we
16 know, those statements are subject to implied control as
17 we can discern from Hinch's case itself, where the Full
18 Court stepped in and reduced the sentence. I think it
19 might've reduced the fines on the company as well. And
20 so that there must be some limits even though they're not
21 specified.

22 HIS HONOUR: I dealt with you specifically, and we've been
23 discussing it upon all sides, specifically with respect,
24 I suspect, to Mr Hoser without looking at the question of
25 the second respondent here. Does the Crown - when the
26 case was opened the Crown spoke in term of sequestration
27 as far as the company was concerned, but is the Crown
28 putting any submission to me as to what, if any, course
29 should apply with respect to the company.

30 MR GRAHAM: Your Honour, given the identity between Mr Hoser
31 and the company, there would seem to be little purpose in

1 separately penalising the company as a matter of common
2 sense, but if any order is to be made as to costs, a
3 matter later to be discussed, one certainly would submit
4 that there should be a conviction recorded against the
5 company and any order for costs should go as against both
6 respondents.

7 HIS HONOUR: It's probably relevant, I think, in advance of
8 what has been foreshadowed in the outline by Mr Maxwell
9 who is going to address, to know what the Crown's
10 position would be on costs. I take it the Crown will be
11 seeking costs.

12 MR GRAHAM: We do seek costs, Your Honour. I don't know if
13 it's convenient to say more than that at this stage.

14 HIS HONOUR: I wanted to know if it's on the traditional basis
15 or if you're seeking any variation for costs in this
16 case.

17 MR GRAHAM: Your Honour, there is ample precedent in contempt
18 cases for the court to award costs on a solicitor/client
19 basis, and our application is that costs be awarded
20 against both respondents on that basis. I can take Your
21 Honour to some examples where that's been done.

22 HIS HONOUR: No, I don't think you need to. But that's
23 sufficient for my purposes and no doubt for Mr Maxwell at
24 this stage, to know what is going to be contended. It
25 may be relevant to the other submissions that he will
26 make.

27 MR GRAHAM: Yes. I also have to meet a submission based upon
28 the dismissal of the second count.

29 HIS HONOUR: Yes.

30 MR GRAHAM: But I'll reserve that, I think, for a later time.
31 If Your Honour pleases.

1 HIS HONOUR: Yes. Mr Maxwell.

2 MR MAXWELL: Your Honour has read the outline. I don't propose
3 to read that or rehearse in any detail, the propositions
4 that are made. We've endeavoured to put as shortly and
5 clearly as we can, the matters which, in our respectful
6 submission, justify Your Honour taking the view set out
7 in paragraph 2 that is that a custodial sentence is not
8 called for and that the appropriate disposition of the
9 case is that each of the respondents be fined.

10 Your Honour has made serious adverse findings
11 against Mr Hoser. Although, as we've pointed out, almost
12 80 per cent of the sub-counts have been dismissed, that
13 is 18 out of 23, Your Honour has found in respect of the
14 statements concerning Judge Neesham and Judge Balmford as
15 she was, that Mr Hoser did intend to lower the reputation
16 of the justice system and that contrary to his evidence
17 and the submissions made on his behalf, he was not in
18 good faith.

19 Nevertheless, there was an endeavour to convey in
20 the written outline, in no way seeking to diminish the
21 seriousness of those findings, it is submitted that for
22 the reasons set out in the outline and some matters to
23 which I will now refer, it would not be an appropriate
24 exercise of the court's sentencing discretion to send
25 this man to gaol.

26 To summarise the submission, in the light of
27 everything Your Honour has said about these publications,
28 this conduct does not, in our submission, warrant
29 imprisonment.

30 HIS HONOUR: And you're putting that as either by way of a
31 suspended sentence or as a non suspended sentence.

1 MR MAXWELL: I'm putting it principally as an operative
2 sentence, we recognise that if Your Honour was of the
3 view that the seriousness of the matters warrant
4 conviction, although defence has to be found to be
5 proved, warranted - I will put that better - it was Your
6 Honour's view that the court should mark its view of the
7 seriousness of those matters by attaching what is in form
8 and substance, a custodial sentence, that being the most
9 severe sentencing option available, then it would be
10 appropriate, and with respect, we don't disagree with
11 what our learned friend said as to deterrents in that
12 regard, for any such sentence to be suspended.

13 HIS HONOUR: The rules would, of course, provide for both, it
14 could be both a suspended sentence and a fine, just as
15 the rules provide expressly there could be an immediate
16 sentence, imprisonment and the fine.

17 MR MAXWELL: Yes, Your Honour. We respectfully accept that.
18 It should be said, and I'll come back to the question of
19 the financial position later, that the material with
20 respect to financial position - we should importantly say
21 it's incomplete - - -

22 HIS HONOUR: Yes, I - - -

23 MR MAXWELL: - - - (indistinct) has no figures with respect to
24 the company, I do now have some figures and I will
25 mention those to Your Honour in a moment.

26 HIS HONOUR: Yes. I was puzzled by - there's a footnote
27 reference - I wasn't sure what it was a reference to
28 where the income is given in paragraph 17.

29 MR MAXWELL: I do have copies of tax returns for that financial
30 year, those being the most recent filed tax returns on my
31 instructions. But before I come to the detail in that

1 regard, the - it's important to acknowledge immediately
2 that the trading position of the company shows a trading
3 profit for that year of \$62,734.

4 HIS HONOUR: Would you just excuse me one second. I am told
5 there is a problem with the transcript at the moment.
6 The transcript writers have asked for a short break.

7 MR MAXWELL: If Your Honour pleases.

8 HIS HONOUR: While they fix that up I will just leave the
9 Bench.

10 (Short adjournment.)

11 MR MAXWELL: Your Honour, I was just mentioning that Katarbi in
12 its accounts for 99/2000, which have been prepared by an
13 accountant, had a gross profit on trading of \$62,734, but
14 its net profit after payment of salary was nil. And
15 there is a long series of business expenses of the kind
16 Your Honour would expect in the financial statements. I
17 will come back to that later in the submission.

18 The point to correct is that it is not suggested
19 that the fine would be an empty exercise, on the
20 contrary. The material is put, as it is every day in the
21 courts, as to capacity to pay. Your Honour ought -
22 accepting our submission that a fine is appropriate -
23 have regard to the financial position of the respondents.

24 HIS HONOUR: And what do you say that is with respect to Mr
25 Hoser?

26 MR MAXWELL: Very low income on those figures. Your Honour
27 will see that in the - I'll tender these documents. As
28 you would expect, the company shows revenue for sales of
29 the books, but there are of course costs of production,
30 so that the accounts show wages of 10,000 and writer's
31 fees of 25,000. So we're talking about at or below

1 average weekly income.

2 HIS HONOUR: One of the documents which was tendered in the
3 course of the case was the affidavit in the Zucoli
4 matter. And in that Mr Hoser deposes that his profit
5 from the sales - this was of the first book - was \$20 for
6 each book sold. I've been told that there's in the order
7 of 7,000 copies of that book been sold, and in the order
8 of five or five and a half thousand copies sold of the
9 second book.

10 That would seem to suggest, if his statement is
11 correct in that affidavit that he had been making fairly
12 substantial profits from the sales of those books.
13 Indeed the material which is before me seems to boast
14 that he's one of the greatest authors of publication
15 distribution networks in Australia. It suggests he's got
16 a very high income from the sale of books.

17 How am I to regard that sort of material with the
18 suggestion that his income is apparently very low to
19 negligible?

20 MR MAXWELL: Your Honour, without seeking to do a computation,
21 in my respectful submission that is probably to be
22 explained by the first figure I gave Your Honour that in
23 the year to 30 June 2000, there was a gross profit on
24 sales of nearly 63,000. That is to say, as these figures
25 show, the proceeds of sale in that year were 112,000; the
26 costs of sales was 50,000; hence the gross profit before
27 other business expenses of 63,000.

28 If that reflected a sale of 3,000 books in the year
29 to 30 June 2000, that would be a gross profit of \$20 per
30 book. And it would be as true to say what Your Honour's
31 quoted from the affidavit, as it is true to describe that

1 in this trading statement as a gross profit on trading.

2 In short, the person is saying "Well, it costs me
3 \$20 less to have each book printed than I can sell it
4 for", as a matter of the cost of production, but that
5 isn't a proper accounting of the expenses of running the
6 business as the full profit and loss statement shows.
7 Your Honour, my learned friend says he's going to raise a
8 question of proof before I tender these.

9 The other way of describing what I've put to Your
10 Honour is that \$20 is the margin on the book. That is to
11 say the difference between the cost of producing it and
12 the sale price.

13 HIS HONOUR: That would be profit, wouldn't it?

14 MR MAXWELL: Yes.

15 HIS HONOUR: That's how he described it, as profit. And it
16 sounds like profit to me.

17 MR MAXWELL: Yes, Your Honour. I'm only drawing the
18 distinction between the notion of gross profit on the
19 items, which is to subtract the cost of those items from
20 the revenue generated by them, which is the figure shown
21 as gross profit on trading on the one hand and the actual
22 position of the business at the end of the financial
23 year, where a whole range of other expenses are taken
24 into account.

25 HIS HONOUR: He dealt with expenses in that last occasion. It
26 does seem to me that on that occasion it was in his
27 interests to stress the loss in profit that he would
28 suffer by virtue of what was then perceived to be an
29 application to stop publication, or further publication
30 of the books.

31 He appeared to have referred to costs, fuel,

1 deliveries, et cetera on that occasion in giving his
2 profit estimate at that time of 40 to \$60,000.

3 MR MAXWELL: Yes, Your Honour. I don't have that affidavit in
4 front of me. Your Honour is right to infer that the
5 adverse impact on him and his company was something which
6 he sought to emphasise. If my rough calculation is
7 right, then he was correct to say every book which is
8 enjoined from sale will cost us and the company, net
9 revenue of \$20. That's right. That is absolutely
10 correct - assuming the arithmetic to be right - as a
11 statement of the adverse impact of the injunction sought.

12 The fact that, as these accounts show - and subject
13 of course to adjusting downwards the salary component
14 which is - as in any small business, private company
15 operation - determined by what's left after other
16 expenses have been paid. Subject to that, if that
17 revenue had not come in, then the cost of production
18 would have already been incurred ex hypothesi, and the
19 other fixed expenses of the business like insurance,
20 telephone and so on would've been incurred such that the
21 business goes into loss by virtue of the loss of that net
22 revenue on sales.

23 So in my respectful submission there's nothing
24 inconsistent with what was then said, and indeed these
25 materials which I will now, subject to my learned
26 friend's objection, tender, provide important
27 verification of this gross margin notion in support of
28 what he was saying.

29 Your Honour, I propose to tender a copy of the - or
30 the first respondent's copy of his income tax return for
31 the financial year ended 30 June 2000, and the second

1 respondent's copy of its tax return for that year,
2 together with a copy of its financial statements for that
3 year.

4 MR GRAHAM: There seems to be an issue between us, or in this
5 court at the very least, as to what was the level of the
6 respondents income. And to seek to prove matter relating
7 to that topic simply by handing up tax returns without
8 the assistance of any provision in an Evidence Act, for
9 example, is not, in our submission, competent. There's a
10 way of doing this, and it's not a difficult way. The
11 person who knows about this is the first respondent.

12 This is not something that he would've been asked
13 about and needed to have been asked about before, and if
14 they wish to prove that the respondents are lacking in
15 means, then that should be the matter of oral evidence.

16 HIS HONOUR: Yes.

17 MR MAXWELL: Your Honour, I'm content to call Mr Hoser, if Your
18 Honour is otherwise minded to uphold the objection.
19 However, I sought informal advice from those who practise
20 in the Superior Courts in criminal matters, and as I
21 understand the position - Your Honour knows this far
22 better than any of us at the Bar table - it's a matter
23 for the court whether evidence on a plea is proved by
24 affidavit or not. And as often as not, it isn't.

25 Your Honour would accept without question that I
26 have instructions that these are what they purport to be
27 - income tax returns in the standard form lodged. They
28 are abundantly plain, in our respectful submission, and
29 perhaps as my learned friend did, I'll hand up the
30 documents before Your Honour rules on the objection.

31 HIS HONOUR: I can indicate to you that I think it would assist

1 the cause of Mr Hoser if he was to give evidence with
2 respect to these documents.

3 MR MAXWELL: If Your Honour pleases.

4 <RAYMOND TERRENCE HOSER, sworn and examined:

5 HIS HONOUR: Sorry, you want the witness to have them, yes, all
6 right.

7 MR MAXWELL: Yes, just leave them for a moment, Mr Hoser. Mr
8 Hoser, is your full name, Raymond Terrence, with two "Rs"
9 Hoser?---Yes.

10 And your address is 488 Park Road, Park Orchards, Victoria?---
11 Yes, Your Honour.

12 And you are by profession, an author and zoologist?---Yes.

13 Would you look at the three documents which are in front of you
14 and tell His Honour, dealing with your own first and then
15 the company's second, what those documents are?---Bear
16 with me for a minute, I'll - - -

17 HIS HONOUR: I'm sorry, I can't hear you?---Sorry. They're tax
18 returns. They came from my accountant, whose name is on
19 their, Daniel Mann & Associates, and his office is
20 actually just down the road in Lonsdale Street. He has a
21 post office box in Mitcham, but his office is Lonsdale
22 Street, and the first return in my hand is, I assume it's
23 a copy that he gave me. The second document - - -

24 MR MAXWELL: Just before you move on to the others?---Sorry.

25 The first document is a copy of what?---Yeah - of, sorry, of a
26 tax return.

27 And in whose name is the tax return, who is identified in the
28 tax - - -?---It's got - me, me. It says, Mr Raymond
29 Hoser.

30 And did you supply information to your accountant for the
31 purposes of his preparation of those returns?---Yes.

1 And did you - were you asked to sign those returns before they
2 were submitted to the tax office?---Yes, and I assume for
3 the purposes of this court, I assume Your Honour, if you
4 wish to check up the tax office of the accountant, you'll
5 find originals, yes. And that would be the same as this
6 - - -
7 And you provided, did you, the signed versions to your
8 accountant?---Yes.
9 And is it your understanding that he was to lodge the signed
10 versions with the tax office?---Well, I presume he has
11 because first he told me he had, and my understanding is,
12 is when you lodge a tax return, the tax office then send
13 you a bit of paper that tells you whether you have to pay
14 the money, or not.
15 And in relation to - you've mentioned the two tax returns,
16 there is a third document under the name of Katarbi Pty
17 Ltd?---Yes.
18 The front page of which has figures which include a reference
19 to gross trading profit?---Yes.
20 Would you tell His Honour what that document is as far as you
21 know?---Your Honour, just to qualify this, when we do the
22 tax, I basically just give everything to the accountant
23 and he does it, and he sends me the things and I put them
24 in the filing cabinet and tend to forget about them until
25 the time comes. This is the first time I've looked at
26 them for a long time, but on the face of it, it's just a
27 load of numbers and it says "Profit on trading. Cost of
28 stock. Closing sales." It speaks for itself basically.
29 And was that provided to you as a - were you told by your
30 accountant that that was a set of financial statements
31 for the company for the '99/2000 year?---Yes, my

1 accountant I've had for - - -

2 HIS HONOUR: I think that's the answer to the question, was
3 yes?---Sorry, Your Honour, I was trying to elaborate for
4 you.

5 MR MAXWELL: And to the best of your knowledge, is the
6 information in the returns and the financial statements,
7 true and correct?---Yes.

8 And while you're there, Mr Hoser, how many breadwinners are
9 there in your family?---Essentially it's myself.

10 And do you have any children?---Two.

11 And what are their ages?---Six months and two and a half years.

12 HIS HONOUR: Do you tender those?

13 MR MAXWELL: I tender those if Your Honour please.

14 HIS HONOUR: Are there three or two?

15 MR MAXWELL: There were three, Your Honour. Two tax returns
16 and one set of financial statements.

17
18 #EXHIBIT D3 - Income tax returns for the first and second
19 respondents and financial statements for the
20 second respondent.

21 HIS HONOUR: Yes, could you hand those down. You have a copy,
22 do you?

23 MR GRAHAM: I haven't seen them, Your Honour.

24 HIS HONOUR: Hand those down. I'm told it's D3.

25 MR GRAHAM: Would Your Honour excuse me just a moment.

26 HIS HONOUR: Whilst Mr Graham is looking at that, Mr Hoser,
27 have the taxation returns for the last financial year
28 been completed?---I don't think so. With the tax return
29 things, my wife usually handles that and the usual
30 pattern is, is the accountant sends us material. We fit
31 it all in, send it back. Do whatever we have to do and
32 that's the end of it. I don't think they've been lodged.
33 She said they haven't been lodged, I believe her. They

1 sit in a filing cabinet with all the other documents, and
2 Your Honour, in case you hadn't worked it out from
3 reading the books, I deal with a vast amount of
4 information. It is not within my capacity to recall
5 every single thing, and I recall it on a need to know
6 basis; those tax returns have sat in a filing cabinet
7 with every other tax return I've done for my entire
8 working life, and they've just gathered dust and it's the
9 first time I've ever had to pull any out, and I just make
10 that point that if you want a detailed cross-examination
11 as to the tax returns - - -

12 Mr Hoser, the question I asked you was whether the tax returns
13 had been done for the last financial year?---My
14 apologies, Your Honour.

15 Have they been - - -?---No, my understanding is - - -

16 Just a second please. Have they been submitted to the Taxation
17 Department for the last financial year?---My
18 understanding is, is we don't have them. I assume the
19 accountant has not submitted them. Now I just say that
20 as my understanding because I can't state that as an
21 emphatic statement of fact, Your Honour, and I don't want
22 you to say, Mr Hoser's misled me, because I don't know
23 the answer to that question, Your Honour pleases.

24 <CROSS-EXAMINED BY MR GRAHAM:

25 Mr Hoser, would you look at - - -

26 HIS HONOUR: I don't think he has a copy.

27 MR GRAHAM: No, Your Honour, I'm going to have to hand this to
28 him and hope that I can remember what it says and hope
29 that Your Honour will follow the question put in that
30 way.

31 MR MAXWELL: Another course, Your Honour, would be - I

1 appreciate it's difficult for Your Honour as well as my
2 learned friend, to simply defer this part of the
3 proceeding while we have some copies made - - -

4 HIS HONOUR: I think that makes sense.

5 MR MAXWELL: Mr Hoser of course will remain in court and we'll
6 - I'll sit down as soon as those copies come back.

7 HIS HONOUR: I will leave the Bench while that is done. I
8 think we could get that done in a couple of minutes.
9 (Short adjournment.)

10 MR GRAHAM: Your Honour, I perhaps should say that I'm going to
11 confine myself to this material rather than to embark
12 upon cross-examination at large. I would expect Your
13 Honour would confine me if I proceeded any further, but I
14 say that in glance of any comment that I fail to go into
15 areas that it might be said that I should have gone into.
16 (To witness) Mr Hoser, would you go to the document
17 forming part of the most recent exhibit, Exhibit D3, the
18 one headed "Katarbi Pty Ltd" in largish print?---Sorry,
19 the top one?

20 Yes?---Sorry - right, they're in different - I don't know which
21 order you've got them in. You mean this one?

22 The one with "Katarbi Pty Ltd" on the top of it in large
23 print?---Right, yes, got it.

24 That's the - starts with a trading statement for the second
25 respondent for the year ending 30 June 2000; is that
26 right?---Yes.

27 If you look at the first, and I think the second page may be
28 identical to the first in my copy, do you see gross
29 profit on trading for the year ended 30 June 2000 of
30 \$62,734?---Yes, yes.

31 That includes the cost of production of books, doesn't

1 it?---I'm just thinking, gross profit on trading - that -
2 I'll be quite frank with you, Mr Graham, is it - sorry,
3 Your Honour, I don't know who I'm met to be addressing,
4 sorry, those figures, look, I'll be quite frank, when I
5 say they're gobbledy-gook, I don't handle that, I give my
6 accountant all the certificates and stuff, and over the
7 last couple of years in particular, my wife has tended to
8 handle that - my role is merely paying bills, writing out
9 cheques and collecting receipts - but if I can give you
10 some perspective into - - -

11 No, I don't want perspective.

12 HIS HONOUR: Just listen to the question?---I'm trying to answer
13 to the question.

14 MR GRAHAM: No you're not.

15 HIS HONOUR: Just listen to the question, Mr Hoser?---Okay,
16 sorry, well - - -

17 MR GRAHAM: You're still not.

18 HIS HONOUR: Would you wait for the question please. Yes?

19 MR GRAHAM: If Your Honour pleases. (To witness) Do you see
20 the bottom line on the first page, "Gross profit on
21 trading", with the figure of \$62,734?---Yeah.

22 Do you see the item immediately above it, "Cost of sales"
23 \$50,040, you see that?---Yes.

24 Does the figure in your understanding, cost of sales, represent
25 the cost of producing the books that you publish?---I
26 have no - sorry, Your Honour, I don't know what those
27 figures specifically mean. They sound like accounting
28 terms.

29 HIS HONOUR: All right, if you don't know you don't know.

30 MR GRAHAM: Does that mean then, that you signed and submitted
31 to the Commissioner of Taxation of this country, a

1 document that you didn't understand?---(No audible
2 response.)

3 Yes or no?---To an extent, to an extent.

4 MR MAXWELL: Mr Graham, how could that be relevant on - - -

5 WITNESS: To an extent.

6 HIS HONOUR: I think that's relevant. If the witness is
7 disclaiming any knowledge of it I think he's entitled to
8 - - -

9 WITNESS: No, I'm not disclaiming knowledge of it.

10 HIS HONOUR: Just - could you wait please, Mr Hoser, for the
11 questions, and when there's an objection could you please
12 stop talking?

13 MR MAXWELL: With respect, he's not disclaiming knowledge, he's
14 positively affirmed sine, the circumstance that a lay tax
15 payer does not understand financial statements is common
16 place.

17 HIS HONOUR: He's entitled to be tested on the matter, that's -
18 you can make that comment if you wish. Whatever his
19 answer might be, might go to the weight of the answer,
20 but it's a perfectly legitimate question to put in cross-
21 examination.

22 MR MAXWELL: If Your Honour pleases.

23 MR GRAHAM: Mr Hoser, did you sign and submit to the
24 Commissioner of Taxation of this country, the two tax
25 returns, copies of which you have in your hand, not
26 knowing that the contents were true or false?---I don't
27 think I can answer the question by the way it's put, if
28 that helps you, Your Honour.

29 Did you - when you signed the document, the documents, did you
30 believe that the contents were true?---Yes.

31 But you said a moment ago that you found the figures were

1 gobbledy-gook, to quote you, didn't you?---That's also
2 correct.

3 So how can you know that the contents are true at the same time
4 finding the contents of the documents gobbledy-gook?

5 MR MAXWELL: I objection to the question, I object to the
6 question. It was put on a false basis.

7 HIS HONOUR: Yes, the witness said he believed it to be true.

8 MR MAXWELL: Fundamental distinction, Your Honour.

9 HIS HONOUR: I understand, the objection is upheld.

10 MR GRAHAM: You believed the contents to be true, is that
11 right?---Yes.

12 But you had no basis for that belief whatever, did you?---I
13 most certainly did have a basis of belief, thank you very
14 much.

15 But you found the contents of the documents to be gobbledy-
16 gook, didn't you?---I still believe them to be true
17 because I have used the same accountant for, I think
18 about 11 years, I have complete faith in my accountant,
19 and he submits the figures for me to look at, he says he
20 has done them, and he says, "Within your ability tell me
21 if there's anything you see that's right or wrong" and he
22 is a very meticulous man, he's an Asian man, and like a
23 lot of Asian people he is very particular, and if he
24 says, "I have done your tax return properly" and he
25 charges for it, I accept his word, and that's why,
26 although I don't understand the document, just like a
27 person would with an interpreter, they have their faith
28 in me.

29 You said a moment ago in the course of that answer, that the
30 accountant submitted the documents to you and asked you
31 whether they were right or wrong, is that right?---Within

1 the best of my ability.

2 Did you do that?---Within the best of my ability, yes.

3 What was the point of you going over them if you found them to

4 be gobbledy-gook, Mr Hoser?---When I say I found them to

5 be - not - it's like - if I can answer the question a bit

6 long-windedly, Your Honour, it's like when you're in a

7 foreign country hearing a person talking in a foreign

8 language. You may understand some of the words, but you

9 do not understand all of them. The words that you

10 understand you try to make sense out of and those that

11 you don't understand, you, for want of a better purpose,

12 just overlook, and that's basically the relationship we

13 had. By way of example, if I can be allowed to continue

14 - - -

15 Your Honour, I submit the witness doesn't need to go to an

16 example responding, or explaining.

17 HIS HONOUR: Yes, wait for the questions please.

18 MR GRAHAM: Mr Hoser, have you submitted the material necessary

19 to prepare tax returns for Katarbi and yourself for the

20 year ended 30 June 2001?---On the most recent financial

21 year?

22 Yes?---That's a good question, I don't know.

23 You don't know?---No, my wife handles that.

24 I thought the accountant handled this?---No, my wife - as I

25 said to you, the role over the last couple of years has

26 been - my role has tended more so to be I sell the books,

27 I pay the bills, I do all that side of the operation, and

28 my wife tends to organise receipts - feed them into the

29 computer, because of the GST and MYOB and all that sort

30 of thing, which is a program I don't have a grasp on very

31 well. And she sends it into the accountant and the

1 accountant goes through it, and it goes backwards and
2 forwards and when they've got their things right, they
3 give them to me and I - well, the ones I have to sign - I
4 assume she has to sign something as well for her - for
5 herself, and the accountant notifies me when it's due,
6 and the trend - I don't know if you know, but there's
7 always extensions with GST, which we pay quarterly now.

8 I think the witness is going beyond his explanation, Your
9 Honour?---I apologise, Your Honour.

10 Are you able to say one way or the other whether the gross
11 profit of Katarbi Pty Ltd for the year ended 30 June 2001
12 ought to be greater than it was for the previous year?---
13 No, it'd be substantially less, actually. Perhaps I
14 could explain.

15 How are you able - you don't handle the books, do you?---I sell
16 the books.

17 I'm sorry, the books of account. You don't look after the
18 books of account?---No, I don't handle the intricacies of
19 the accountant side of things, that's correct.

20 I'm putting it to you, Mr Hoser, you have no idea whether
21 Katarbi had a better year than the most recent year than
22 in the years shown in these documents?---He's wrong, I
23 sell the books, I know exactly how many books we sell
24 each year.

25 Are you saying that in the year ending 30 June 2000 you had an
26 especially good year of selling books, did you?---Most
27 certainly. The Victoria Police Corruption books came out
28 in August 1999, and books always sell exceptionally well
29 in their first year. The sales tend to decline after the
30 second year, which is one of the reasons I'm perplexed I
31 got the writ when I did. And having said that, in the

1 second year we printed - it was released in October last
2 year - two books called Taxi 1 and 2, which cost the same
3 price as the Victoria Police Corruption books to produce,
4 and they haven't sold anywhere near as well.

5 These were books published in your other capacity as a
6 zoologist, are they?---The titles are Taxi, and they are
7 published in my capacity as a former taxi driver.

8 Taxi driver, I'm sorry?---And I think I was charged with
9 perjury in a red light case, as my capacity as a taxi
10 driver as well.

11 I ask that the witness be shown Exhibit F to Mr Stephen Joseph
12 Lee's affidavit of 18 May 2001. That was the affidavit
13 of Mr Hoser sworn in the proceedings brought by Mr
14 Zucoli.

15 HIS HONOUR: I've got - I think I actually have the affidavit
16 here.

17 MR GRAHAM: Do you have that affidavit?---Yes.

18 Would you go to - let me ask you another question first.

19 You're familiar with that affidavit still, are you not,
20 Mr Hoser?---Not terribly familiar, but yes, I've seen it
21 before. I have looked at it, I have read it, yes.

22 The purpose of filing it was to - - -?---Right. Sorry, I
23 didn't even realise whose it was. But I saw all the
24 affidavits in the case, yes, including my own, of course.

25 Your affidavit was designed to persuade the Supreme Court not
26 to grant an injunction against the publication of the two
27 books in question here. Is that right?---No, my
28 affidavit, from my perspective, was to state the facts.
29 And the lawyers that were briefed by the insurance
30 company's role was to stop the affidavit.

31 HIS HONOUR: I think that was with respect to one book, was it

1 not, just the first book?---That's correct, Your Honour.
2 MR GRAHAM: Your Honour is quite right, I was in error. (To
3 witness) So you're saying that your purpose in swearing
4 this affidavit had nothing to do with discouraging the
5 grant of an injunction against publishing your books?---
6 Well, I obviously had a vested interest, and I was
7 opposing the application. So to that extent, yes. But
8 if the - if the question is - and I suppose it's a legal
9 thing - if your question is put that I have somehow
10 framed it improperly - it's just a statement of facts in
11 terms of what I have stated. I don't dispute the factual
12 basis of this. If I've said it's fact, it is.
13 If you would be kind enough to just read paragraphs 6, 7 and 8
14 to yourself, please, Mr Hoser, and I'll ask you a
15 question about them?---Yes, that sounds - I don't see any
16 problem with any of those ball park figures.
17 They're ball park figures?---I say ball park.
18 You swore to them, Mr Hoser?---Yes.
19 HIS HONOUR: You haven't been asked a question?---Sorry, I
20 apologise, Your Honour.
21 MR GRAHAM: Are these figures your best estimates of what sales
22 have been achieved and best estimates of the other
23 matters deposed to? Or are they just ball park figures?--
24 --No, they're very reasonable estimates. I used the word
25 "average" as a profit for each book sold, and if I'm
26 allowed to elaborate - books are sold in different
27 circumstances and they have different mark ups in
28 different places.
29 So they're not ball park figures?---They are an average figure
30 per book.
31 And they were your best estimates as at the time when you swore

1 the affidavit?---Yes, most certainly.

2 I would suggest to you that what you are seeking to convey by

3 your affidavit was that you and Katarbi Pty Ltd would

4 suffer financial loss if an injunction were granted

5 against further publication of Victoria Police

6 Corruption. Is that right?---Most definitely.

7 Because the sale of that book was yielding substantial profits

8 to Katarbi Pty Ltd, is that right?---Most definitely.

9 And did Victoria Police Corruption 2 yield substantial profits

10 as well?---To a lesser extent, yes.

11 Is it still, those books still being sold as of today, 4

12 December?---People in this courtroom have approached me

13 to buy them, yes.

14 That's not quite an answer, Mr Hoser?---Sorry, yes, in answer

15 to your question, yes.

16 And you actively seek to sell copies of these two books at the

17 present time, don't you?

18 MR MAXWELL: With respect, how does that go to any matter in

19 the financial statements? It goes, in my respectful

20 submission to a different matter altogether, which could

21 well have been the subject of cross-examination at the

22 time. There was, as I've already submitted, and Your

23 Honour knows, evidence about what was being done.

24 HIS HONOUR: I presume it is being put to the question of what

25 his source or range of income is at the moment.

26 MR MAXWELL: Your Honour please.

27 MR GRAHAM: Mr Hoser, are the two books Victoria Police

28 Corruption and Victoria Police Corruption 2, still being

29 actively marketed for sale at this moment?---Well - - -

30 Yes or no?---They are on the market and being sold around the

31 place, yes. If you call that active, but most books are

1 passively sold, they sit on shelves, people browse
2 through them and decide if they want to buy them, but
3 they are being sold. I would most certainly - I couldn't
4 dispute that.

5 They are offered for sale via the websites that we know about
6 on the Internet, aren't they?---They're sold all over the
7 place, in the city bookshops - - -

8 Just a moment, Mr Hoser. One thing at a time?---Sorry, I
9 apologise.

10 These two books, Victoria Police Corruption and Victoria Police
11 Corruption 2, are available for sale through your site on
12 the Internet, is that right?---Most definitely.

13 And I, or His Honour, or Mr Maxwell, could buy one by placing
14 an order today, couldn't they?

15 MR MAXWELL: Your Honour, in my respectful submission it's
16 become apparent that this is not about sources of income.
17 It's about making and remaking a point that as at this
18 date, those books are on sale. That's not about sources
19 of income. It's about apparently some aspect of Mr
20 Hoser's conduct on which the prosecution thinks Your
21 Honour should - - -

22 HIS HONOUR: I'm only treating it as relevant and it must at
23 least have, if you say there's a second purpose to it,
24 I'm only treating it as relevant to the purpose which Mr
25 Graham said it was being put; namely, as to the question
26 of what his income is. If there's a subsidiary question,
27 I can assure you, I'm not concerned about that.

28 MR GRAHAM: I'll withdraw that question, because it probably
29 was answered by the previous - answer to the previous
30 question. (To witness) Mr Hoser, during the year ended
31 30 June 2001, both Victoria Police Corruption and

1 Victoria Police Corruption 2, were being actively
2 marketed and promoted for sale by you and Katarbi Pty
3 Ltd, weren't they?---We were certainly selling them, yes.
4 The word "active" I think is - implies that we're like
5 running around bashing down people's doors and shoving
6 them in their face, and to that extent the word is no.
7 But we most certainly want people to buy them, that pays
8 the bills, keeps the food on the table, feeds the wife
9 and children, and does everything else that the normal
10 working class person does.

11 Mr Hoser, these books have been offered for sale by you at
12 stalls in markets over the last couple of years, haven't
13 they?---We have sold them everywhere.

14 By you?---I have personally sold them at markets on a few
15 occasions, but decided there's better ways to sell them
16 at markets, but we try various options, marketing options
17 like any marketing publishing company would, make no
18 bones about it. Pan McMillan do the same thing. And
19 Labor members of Parliament even do it, Jim Cairns.

20 Looking now at the position as it stands in December 2001, it's
21 your intention, and the intention of Katarbi through you,
22 to continue to sell as many books as you possibly can,
23 including copies of Victoria Police Corruption and
24 Victoria Police Corruption 2, as long as you have stock
25 available?---We sell seven different books and CDs on top
26 of that. And - - -

27 That's not an answer?---Sorry, and obviously the Victoria
28 Police Corruption ones, yes, we will keep selling them,
29 indefinitely, I presume, until we run out.

30 And generate as much income as your stock of the seven titles
31 available will yield?---Presumably, yes.

1 Your Honour pleases.

2 <RE-EXAMINED BY MR MAXWELL:

3 Mr Hoser, questions have been asked which you haven't been able
4 to answer about whether financial statements and tax
5 returns have been prepared for the financial year just
6 ended?---I did actually - - -

7 Just a minute, let me ask the question. I want to ask you so
8 you can tell His Honour direct; do you say to the court
9 that if any such statements have been prepared, and/or
10 tax returns, you will authorise your accountant to
11 provide them, so that the up to date financial position
12 of yourself and the company can be demonstrated to the
13 court?---I could make that undertaking, but if I can
14 assist you, Your Honour, and I think I might have
15 actually broken some court rule inadvertently. I did ask
16 my wife the question, have this year's tax returns been
17 done, and she said to me, no, we don't have to do them
18 till next year. And I think that basically answered the
19 question. But then she did say to me, Daniel will be in
20 his office now, ring him up.

21 Now next question, Mr Hoser you were asked about the trading
22 results of the company as the seller of the books in the
23 financial year just ended, and you told my learned
24 friend, Mr Graham, that the trading results had been
25 significantly less positive - - -?---Yes.

26 - - - in this year. I want to ask you two questions, because
27 you explained that you'd also incurred the cost of
28 publishing the taxi books. Dealing with the Police
29 Corruption books first, would you tell His Honour as best
30 you can estimate it, what proportion - let's say the
31 sales of those corruption books in the first year

1 '99/2000, were 100; so we're talking percentages. What
2 would be the corresponding figure in the year just
3 ended?---Percentage wise we sell a lot less.
4 Have you sold half as many, a third as many, have you sold - -
5 -?---No, we're probably down to - off the top of my head,
6 and this is a guess, off the top of my head without the
7 figures, I'm just trying to think - probably about a
8 third - on a week to week basis, like it fluctuates, it
9 goes up and down and all that, but on a week to week
10 basis of the Police Corruption titles, we'd be to about a
11 third and a quarter per week now, to what we were back in
12 end of '99, early 2000, and that's excluding some of
13 those weeks in 1999, especially when it first came out.
14 We'd have some weeks where we'd sell like, you know,
15 several thousand dollars worth of book, the demand was
16 huge. And - - -
17 Just to make sure I understand you, you're telling His Honour
18 that sales of those books in the financial year ended
19 would represent approximately between 25 and 33 and a
20 third per cent of the sales for the previous year?---Yes,
21 but I don't - just - so I'm not accused of misleading
22 anyone. We have also published the taxi books.
23 Yes, I want to ask you about that; again using 100, being the
24 sales of the police books in the '99/2000 year, what
25 corresponding figure in volume, would you give His Honour
26 for the taxi books in the year just ended?---It's lower
27 and it's substantially lower. I would suggest - - -
28 Well you provide a figure which reflects the proportions?---
29 Proportions - probably 30 to 40 per cent, so when you add
30 the two books together, we're probably running, sales
31 wise, about 60 to 70 per cent what it was the year

1 before. And just again so I'm not accused of misleading
2 the courts. We do sell Smuggled, the Hoser Files,
3 Smuggle 2 and the books on CD ROM, but relative to the
4 sales of the other four books, they tend to be negligible
5 because they are, with the exception of the CDs which we
6 don't sell many of, those books are eight years old,
7 seven years old, and five years old. I think my mass is
8 out, but they're a lot older.

9 And just to be clear, you said in respect of the taxi books it
10 was lower, but I think your - the figures you've given
11 show that the volume of the taxi books is greater in the
12 year just ended, than the volume of the police books?---

13 In this current - we sell more taxi books now, yes.

14 And adding them together, we're looking at about 60 or so per
15 cent compared to 100 in the previous year?---Yes, yes.

16 And if I can just qualify it, I don't think it's
17 necessarily a reflection on the title, The Taxi Book, in
18 the last three years there's been a very strong shift
19 towards Internet usage, and that has really knocked the
20 book market around big time because people when they want
21 things they just click on the mouse they don't buy books
22 the way they used to.

23 When you were asked about the reference in your affidavit and
24 defamation proceeding, you answered in terms of mark-up,
25 different mark-up, depending on who you're selling to.
26 Tell His Honour what you understand or mean by mark-up?
27 What does the mark-up represent?---That's a question
28 which I really haven't even turned myself to, but usually
29 with a book actually it's a mark-down. If a book is - -
30 -

31 Let me give you a couple of alternatives. Is it the difference

1 between the cost of producing the book and the sale
2 price, or something else?---That is a good question.
3 Sometimes when you talk mark-up, you talk what you make
4 as profit after you have actually paid your ongoing
5 weekly running costs. Sometimes you talk mark-up as into
6 the straight print - ink and paper cost versus the cost
7 of selling, and other times you would talk the mark-up,
8 what each book owes you in terms of the work and effort
9 and all the stuff that went on beforehand in terms of
10 your price. As most authors will tell you, Your Honour,
11 you don't make - well, you'd probably know, Your Honour,
12 most authors don't make a lot of money when they write
13 books, and the work is usually a labour of love and so on
14 a per hour basis, you don't make a huge amount of money.
15 But in terms of the way I look at it, I tend to say,
16 well, the Police Corruption books, the physical,
17 excluding the time spent preparing them, the physical
18 production cost is six or seven dollars per book unit
19 cost, when the odds and sods are done, taken out of the
20 factors in terms of printing. And then you've got other
21 incidentals like paying for photos from photographers and
22 newspapers, photocopying fees from government departments
23 and whatever. So you say that just the physical
24 production cost of the book is ten dollars, and then you
25 - if you say you've got a profit of \$20, it's reasonable
26 if you're selling them at 30, because you have a
27 situation where you have already bought the books and
28 you've already paid those costs, even if you still have a
29 loan out on them, because the Police Corruption books, we
30 actually had no money in the bank when they were printed,
31 and the printing company did it for us, I think on spec,

1 that they would get paid - - -
2 Wind up your answer please?---Sorry.
3 I think you've answered the question?---All right, okay.
4 Your Honour, I have no further questions.
5 HIS HONOUR: Could I just ask you the - I know that you've said
6 you don't know the books of account, but you might know
7 the answer to this; the books for Katarbi show that the
8 profit and loss statements shows wages of 10,000 and
9 writer's fees of 25,000. I think I understood - I might
10 have misheard what was said earlier, but do I take it
11 that that is income which comes to yourself, those two
12 figures?---My understanding, and I could be wrong on
13 this, the 25,000 or whatever it is, would go to me, and
14 the other money would be my wife's, but I - I would
15 assume that's the case. I could be wrong on that though.
16 I could be wrong on whether - - -
17 Does your wife receive an income from Katarbi?---I think she
18 does. I certainly know that currently that's the
19 situation, but I can't answer whether that was in the
20 previous year.
21 And the financials of Katarbi show additionally payments to
22 related entities of \$10,000; do you know what that
23 is?---Sorry, which page?
24 It's on the tax return for the company on p.3?---One, two - - -
25 Under paragraph 7?---I think I've lost it. Sorry, it's on the
26 financial statements here?
27 No, go to the taxation return for Katarbi onto p.3.
28 MR GRAHAM: That figure of \$10,000, Your Honour.
29 WITNESS: Pardon me, sorry, the question was - - -
30 MR GRAHAM: That's the figure of \$10,000.
31 HIS HONOUR: Yes?---Item - - -

1 At the very bottom of paragraph 7, "Payments to related
2 entities" - - -?---Right, yes - - -
3 - - - 10,000 - - -?---Yes, I see - I see the number - - -
4 Can you tell me what that is - - -?--I've got to say they're -
5 they're all relatively meaningless to me all those
6 numbers on the entire - - -
7 You are the sole shareholder and director, aren't you, of the
8 company?---Yes.
9 Do you not know what \$10,000 is being paid to as a related
10 entity of the company?---I know it sounds like a stupid
11 question - when you hit me with a question in court you
12 say, "There's \$10,000 on the statement, where's it from?"
13 I would have to say I have no idea - - -
14 Where's it going to?---Where's it going to, sorry?
15 Who's the related entity?---That I have no idea. I - I assume
16 it's probably my wife. I haven't looked at her tax
17 return, but - - -
18 Well you'll see that above salary and wage expenses are shown
19 in the immediate item above of \$10,000?---So this is over
20 and above that?
21 Yes, this is something else. Do you know what it is?---Not off
22 the top of my head. It - it could be - it - it could be
23 - and I say "could" - it could be part payment of a print
24 bill that was owing, or something to that effect, but
25 that's purely hypothetical.
26 Well, it's not an expense, it's a payment to a related entity?--
27 --I - 10,000 is - no, I was thinking maybe it was super
28 but - - -
29 Well are there any related entities to Katarbi?---As in other
30 companies?
31 Yes?---No. No, there's - there's no other like cross companies

1 or anything like that. Katarbi is a standard loan, that's
2 it. I - - -

3 So you've got no idea what related entity could be receiving
4 \$10,000 from Katarbi?---On face value no idea, no.

5 Yes, thank you, you may stand down.

6 MR GRAHAM: Might Mr Hoser be excused.

7 HIS HONOUR: Yes.

8 <(THE WITNESS WITHDREW)

9 (Witness excused.)

10 MR GRAHAM: Your Honour, with my learned friend's permission I
11 want to cure an oversight that I made this morning, and I
12 mentioned the Sentencing Act. I haven't looked closely
13 at division 4 of part 3 dealing with fines. For
14 completeness I should refer Your Honour to s.49 - - -

15 HIS HONOUR: Yes, that was the section I was referring to
16 earlier.

17 MR GRAHAM: Yes, Your Honour was I think.

18 HIS HONOUR: And since there is no provision to which that can
19 relate for this offence when it says: "If no maximum was
20 specified that specified s.52" - well, I think 52 takes
21 you back, doesn't it, to - - -

22 MR GRAHAM: Yes it does and as 52's not going to assist, Your
23 Honour, but I think s.62 still will provide - I'm sorry -
24 simply assuming that there's a power either at common law
25 defined, then this Act is open to the interpretation that
26 the procedural provisions which apply subsequent to the
27 imposition of a fine are available and do apply.

28 HIS HONOUR: I think there's probably an argument for the
29 procedural provisions applying in that way. What I'm not
30 so sure about is whether the substantive provisions apply
31 as to the imposition of fines which are plainly related

1 to offences which are not of the type of common law
2 offence, which is - - -

3 MR GRAHAM: Indeed - - -

4 HIS HONOUR: - - - involved in the Crimes Act or elsewhere. It
5 would seem to me those cases that you referred to must
6 raise a bit of a query as to whether those fine
7 provisions, 49 in particular, do apply.

8 MR GRAHAM: But Your Honour the point that I was leading to is
9 s.62, which deals with the enforcement of fines against
10 natural persons certainly can be construed as applying to
11 a fine of any kind, and that would take you to sub-s.(10)
12 which provides for the procedure to be followed where
13 there's a default in payment of a fine - - -

14 HIS HONOUR: Yes.

15 MR GRAHAM: - - - and that brings you back within the statutory
16 regime - - -

17 HIS HONOUR: Yes.

18 MR GRAHAM: - - - so a community based order - - -

19 HIS HONOUR: Yes, I would think that probably does apply.

20 MR GRAHAM: And an order for imprisonment under s.63(1) which I
21 refer to, because it - perhaps not in this case, but
22 certainly could be of assistance to a person facing a
23 fine for contempt of court. It stipulates a maximum
24 amount of length of imprisonment that might follow the
25 non payment of a fine. I haven't done the calculation but
26 it stipulates a maximum of 24 months no matter how large
27 the fine is, and presumably service of that term would
28 result in expiation of the fine, so that would be the end
29 of the matter.

30 HIS HONOUR: Yes.

31 MR GRAHAM: I should have referred Your Honour to that before,

1 I was error.

2 HIS HONOUR: Yes, thank you. Are you going to deal with the
3 question of costs as well?

4 MR MAXWELL: Yes, Your Honour. It's my submission that there
5 should be no order as to costs. That is put on two
6 bases. The first is that as the Crown conceded from the
7 outset, this is a criminal proceeding. It was conceded
8 appropriately and unconditionally. In my respectful
9 submission, Mr Hoser should stand in no different
10 position from any other defendant in this court on a
11 criminal charge as these are, this is a charge of
12 criminal contempt albeit that it's brought under rules of
13 civil procedure.

14 HIS HONOUR: You would accept though, would you not, that costs
15 have been treated as an inevitable consequence of all
16 contempt cases. In fact, I can't think of any contempt
17 cases that I've looked at, which hasn't treated the order
18 of costs as being a part and parcel of the feature of the
19 offence of contempt. I mean, it doesn't mean it will
20 necessarily always be granted but its exceptional first
21 and foremost because the general rule is it's
22 solicitor/client costs, indemnity cost, so it is always
23 as different to the standard rule as to costs in criminal
24 proceedings.

25 MR MAXWELL: Yes, Your Honour.

26 HIS HONOUR: That's its history.

27 MR MAXWELL: But in our respectful submission, just as Your
28 Honour has very importantly addressed and developed the
29 law on the defence of truth, so this is a matter in
30 respect of which Your Honour's discretion should be
31 exercised unconstrained by precedent, because as a matter

1 - - -

2 HIS HONOUR: I should have added, I must say, not just
3 precedent, the provision itself under which the contempt
4 proceedings are brought, expressly provides for costs.

5 MR MAXWELL: Provides for costs to be awarded.

6 HIS HONOUR: Rule 74, 75.

7 MR MAXWELL: But here, as in every proceeding, Your Honour, it
8 must ultimately be a matter of Your Honour's discretion.

9 HIS HONOUR: I accept that.

10 MR MAXWELL: It would lie on the party seeking the costs, to
11 persuade the court that precedent notwithstanding, there
12 is some logical basis as a matter of legal policy, for
13 treating a defendant who, in every other respect, is
14 vulnerable to the processes of the law and the punishment
15 powers of this court to an order for costs, which if he'd
16 been charged with armed robbery, for example, he would
17 not be subject to, and in our respectful submission, to
18 refer to the routine nature of an order for costs, is
19 only to underline the anomalous nature of that precedent,
20 in that Your Honour will sentence these defendants for
21 the offences of which Your Honour has found them guilty
22 and they face the full force of that detriment whatever
23 it is. How, in our respectful submission, could it be
24 just, that they also pay prosecution costs which no other
25 criminal defendant in Victoria pays.

26 If that alone weren't enough to persuade Your
27 Honour to make no order as to costs, we do rely on the
28 substantial failure of the prosecution and we've made
29 that submission in writing and the arithmetic is, in our
30 respectful submission, very powerful.

31 This case was in substantial part, misconceived.

1 For 14 or 23 to be struck out without the defence going
2 into its case at all, emphatically demonstrates that.
3 I'm not, of course, and Your Honour will know this,
4 endeavouring to submit out of existence the findings Your
5 Honour has made, they've been made, and the Crown will
6 say that vindicates the bringing of the proceeding and I
7 can't be heard to say that that's not open to them to
8 say.

9 Nor can I say that the defence has been put to
10 greater difficulty or trouble because of the number of
11 particulars, that took more time in submission naturally,
12 but the case would have had to be run in essentially the
13 same way, whether it had been the five that have
14 succeeded or the 23 with which we started, but in my
15 respectful submission, my client was entitled to defend
16 the proceeding vigorously and has been vindicated by Your
17 Honour's dismissal of nearly 80 per cent of, what we can
18 call the charges, and having done so, it would be doubly
19 unfair, in our respectful submission, for him
20 nevertheless to be ordered to pay the costs of the
21 prosecution. That's all we have to say on costs. If
22 Your Honour pleases.

23 HIS HONOUR: All right, thank you.

24 MR MAXWELL: There are financial issues going to fine, they
25 would also go to costs, naturally, the costs, even on the
26 tax basis, of a four or five day hearing would be
27 substantial, and if Your Honour was not persuaded to make
28 no order as to costs, then we would ask Your Honour to
29 take into account the likely quantum of the costs in
30 fixing any amount of a fine.

31 HIS HONOUR: Yes. Yes, thank you.

1 MR GRAHAM: May I be heard on the subject of costs, Your
2 Honour. My learned friend is wrong in his first
3 submission in saying that because this is a criminal
4 proceeding, there is a general rule, as it were, that
5 costs are not to be awarded. The High Court in Hinch's
6 case, 164 C.L.R and the passage at p.89, gave written
7 reasons on the question of costs in that case in the High
8 Court. If Your Honour goes to the bottom of p.89, Your
9 Honour will see that an analogy had been attempted to be
10 drawn about costs in criminal cases, citing R v. Martin,
11 which I understand to have been a case arising from a
12 trial on indictment. Their Honours went on: "However,
13 in our view ... (reads) ... ex parte Roach." And then
14 they go on to refer to a case in the Privy Council which
15 was concerned with the distinction that when an appeal
16 following a trial on indictment, that no proceeding for
17 contempt of court, is the distinction we seek to draw.

18 I should say two things following my reference to
19 that case, Your Honour. Firstly, the passage which
20 appears in p.89, needs to be read, bearing in mind what
21 the High Court later said in Witham v. Holloway. I
22 haven't the reference to it, but Your Honour will recall
23 that was what the court said that for certain purposes a
24 distinction between criminal and civil contempts should
25 no longer be observed in Australia, but it doesn't
26 detract from the proposition which appears in the passage
27 that I've quoted.

28 I suppose also I should refer to what the High
29 Court said in Latoudis v. Casey concerning costs in
30 criminal cases in summary jurisdiction. I haven't
31 brought that reference either, and I apologise. And,

1 finally, and perhaps most importantly, there is Order
2 75.14 to which Your Honour referred, where there is an
3 express jurisdiction. It simply indicates as Your Honour
4 instantly agreed that it's a matter of the discretion of
5 the court.

6 It's true, as Your Honour observed, that costs are
7 normally awarded against an unsuccessful party in
8 contempt cases, whether it be the unsuccessful prosecutor
9 or the unsuccessful defendant.

10 There are a host of cases, and I don't propose to
11 take Your Honour through them, where costs have been
12 awarded in this court and by other courts in Australia in
13 contempt matters.

14 The only question which might exercise Your Honour
15 in this case, leaving aside the question of the
16 consequences of the Crown not having been totally
17 successful, is whether costs should be on a
18 solicitor/client basis or on a party/party basis, I've
19 been provided with a reference to a case before Your
20 Honour of R v. Spectator Staff Pty Ltd & Ors 1999
21 Victorian Supreme Court 107, where you awarded
22 party/party costs following an admission of contempt,
23 publication of an apology and other mitigating factors.
24 Your Honour said, "There is no fixed rule or practice
25 that costs be awarded on a solicitor/client basis," we
26 accept that, but each case has to be judged on its own
27 merits.

28 Another case not so long ago involved the Herald &
29 Weekly Times. Solicitor/client costs were paid, but by
30 agreement. But it's difficult to discern a principle
31 from the cases that we've looked at, Your Honour.

1 On the question of the degree of success or not, of
2 the prosecution, we say, Your Honour that one doesn't add
3 up the particulars, one looks at the whole picture.
4 There weren't 23 charges, there were two. One succeeded,
5 and one, a lesser charge, involving only one particular,
6 failed, as did the related particular in the first
7 charge. We submit that the Crown has enjoyed substantial
8 success in the matters concerning Count 1 and costs
9 should follow that event. If Your Honour pleases.

10 HIS HONOUR: Thank you.

11 MR MAXWELL: Your Honour, just briefly in relation to that. I
12 overstated my learned friend's concession with respect to
13 the criminal character of the proceeding. At p.6 in the
14 opening, the learned solicitor said that we were agreed,
15 as we were, that the contempt alleged was a criminal
16 contempt and that the standard of proof was the criminal
17 standard.

18 It is important, however, to note that those
19 matters apart, the proceeding was conducted as a criminal
20 trial before judge alone in these two additional senses.
21 One, that the submission of no case to answer was treated
22 in accordance with the principles applicable to that
23 submission in a criminal trial, and secondly,
24 notwithstanding that orders had been made that the
25 respondents file affidavits if they propose to give
26 evidence.

27 The Crown, properly, did not raise any objection to
28 the defence, making the decision upon the conclusion of
29 the no case submission and Your Honour's ruling about
30 giving evidence and the affidavit was tendered then and
31 there, that being consistent with criminal character

1 rather than civil where the material would, in the
2 ordinary way, have had to be filed in advance.

3 HIS HONOUR: Yes, thank you.

4 MR MAXWELL: And it's ultimately a matter for Your Honour, of
5 course, how to view the apportioning of the charges, but
6 the notion of the successful prosecutor or the successful
7 defendant, in our respectful submission, doesn't readily
8 apply in the events which have happened.

9 Your Honour, for someone like Mr Hoser whose
10 currency is the written word, the judgment Your Honour
11 has delivered is, in itself, a very significant
12 punishment, because Your Honour has found - or the
13 adverse findings which Your Honour has made, go to the
14 heart of that by which Mr Hoser, as Your Honour has
15 noted, sets great store, that is, that he is a genuine,
16 sincere, well intention critic of the judicial and police
17 system, who sees himself as acting for the betterment of
18 those related systems or for the criminal justice system
19 as a whole.

20 HIS HONOUR: Well, who says that he sees himself on that basis.

21 MR MAXWELL: Yes, Your Honour. He is someone, as Your Honour
22 knows, who has made a virtue of supporting his claims by
23 specifics, and a virtue of having those sources
24 identified and unusually publicly accessible. Your
25 Honour knows that footnotes in books are only a pointer
26 to the library where material might be found. Your
27 Honour has made a finding that it's unlikely that readers
28 of these books would have occasion to check but the fact
29 that the material is itself electronically accessible,
30 puts it in a most unusual category compared to the
31 ordinary run, as I say, footnoted material, where a much

1 greater degree of diligence would be required.

2 Your Honour has said that Mr Hoser is selective and
3 unfair in his accounts of events or the characterisations
4 which he places on them. Your Honour has found that he
5 makes exaggerated claims based on flimsy evidence, and
6 that he is manipulative in his presentation of material.

7 The effect of Your Honour's judgment is publicly
8 and authoritatively to discredit Mr Hoser in those very
9 matters on which he has staked his reputation as an
10 advocate of reform of those systems.

11 In that way, unlike the run of criminal matters
12 that Your Honour would deal with, the nature of the
13 finding, but more particularly the terms in which Your
14 Honour's careful judgment has couched those findings,
15 have their own punitive effect, and in a way which will
16 continue indefinitely into the future. That is to say,
17 every time in the future, Hoser says, "Believe me this is
18 what happened," someone will say, "Well, the Supreme
19 Court didn't believe you, why should we?"

20 We add by way of reinforcement of that, Your Honour
21 will know that there has been and will continue to be,
22 press reporting of the judgment and no doubt of the
23 penalty, in which the adverse nature of the findings has
24 been exposed far more widely through mass circulation
25 tabloid newspapers than the books themselves.

26 A related point, Your Honour, is that what Your
27 Honour has said in respect of the statements concerning
28 Judge Neesham and Judge Balmford, is itself, to a very
29 large extent, though naturally not entirely, but to a
30 large extent, curative of any damage caused by the
31 publication.

1 Your Honour, in our respectful submission,
2 correctly, has drawn cautious views about the status of
3 any damage and we've referred to those passages in the
4 outline.

5 Your Honour has found that there has been no
6 discernible damage to the system in the two years and
7 likewise that it would be impossible to know in respect
8 of any given reader, whether that reader would have had
9 his or her view of the courts reduced, diminished, by
10 virtue of these publications, and we do rely heavily on
11 those findings in counterpoint to Your Honour's critical
12 finding that the statements had the requisite tendency to
13 cause such damage, but those other inconclusive
14 statements about actual damage are relevant, in our
15 respectful submission, to the seriousness or otherwise of
16 the contempts.

17 In that area, which is unknowable, of the
18 diminution of the court's reputation or the reputation of
19 those judges, Your Honour's judgment, which is on Mr
20 Hoser's web site as well as on this court's, has already
21 begun to undo that damage to restore the balance, to say,
22 or to record, as was the case, that it was not asserted
23 in Mr Hoser and his company's defence that there was
24 actual bias on the part of those judges as a matter of
25 truth, but it was put as a fair comment case, that was
26 how I saw it from my position as the defendant in the
27 respective courts, and Your Honour has, in the findings,
28 scotched altogether, any hint of a suggestion that the
29 allegations of bias or pre-judgement were justified.

30 It might be said to be a bit circular that a
31 defendant who has been convicted relies on the judgment

1 convicting him in mitigation of sentence, but in our
2 respectful submission, not so. The fact of prosecution
3 and conviction is powerful in itself. The fact of a
4 judgment expressed in trenchant terms in respect of this
5 individual's conduct, but as I am submitting more
6 particularly in relation to the substance of the
7 allegations made against those judges, is itself - the
8 publication of the judgment is itself a factor in
9 assessing what the consequences of the offending conduct
10 are.

11 Your Honour has found that Mr Hoser did intend to
12 bring down the reputation of the courts as part of his
13 avowed objective of asserting that his conviction for
14 perjury was unfair.

15 But, in our respectful submission, the fact remains
16 that consistently with Your Honour's finding, his attacks
17 were specific rather than general, and it is important in
18 mitigation to draw attention again to the disclaimers
19 made in the book and in his evidence, his evidence as
20 Your Honour has noted, only implicitly challenged by the
21 Crown not explicitly. And what he has said is, "The fact
22 that I'm criticising some particular people in the system
23 in these books, does not mean that I am attacking the
24 system in its entirety, and I'm not."

25 Your Honour has found that those attacks in two of
26 the instances, fell into the category of criminal
27 contempt, but in our respectful submission, that doesn't
28 wholly discredit his, or it doesn't necessarily discredit
29 his statement that he has a belief in and a regard for
30 the justice system, albeit that he has, in all the ways
31 Your Honour has criticised, selectively, manipulatively,

1 portrayed these particular events concerning him so as to
2 show the judges in question in a dishonourable light.

3 That is, in our respectful submission, compatible
4 with it being a true and sincere statement that he does
5 not want others to experience the unfairness which he
6 perceives he experienced and that is a prime objective
7 apart from vindicating himself for the publication of
8 these books.

9 It is at that point in the submission that we draw
10 attention to what's in the section of the outline on
11 mitigating factors, and Your Honour, in particular,
12 paragraph 13 and 15 which I will come to - I am conscious
13 of the time, Your Honour, I'll be about another 20
14 minutes.

15 HIS HONOUR: I think I will break and return at 2.15 in that
16 case.

17 LUNCHEON ADJOURNMENT

1
2 UPON RESUMING AT 2.15 P.M.:

3 MR MAXWELL: If Your Honour please. I was about to take you to
4 paragraph 13, and this is a submission in mitigation, but
5 also in support of the earlier submission about the
6 sincerity of Mr Hoser's concern with aspects or elements
7 of the criminal justice process.

8 In our respectful submission, what Your Honour has
9 said in the judgment about the matters we have
10 identified, in particular at (a) and (b), is of
11 considerable public importance. That is to say in the
12 course of considering the tendency of these passages in
13 particular and the approach of the writer in general,
14 Your Honour has accepted that there are real issues
15 about, on the one hand, the tendency of certain things
16 that lawyers take for granted to create serious
17 misapprehensions in the ears and eyes of the lay observer
18 and in particular the unrepresented defendant. And
19 likewise, as to 13(a), what Your Honour has said in
20 strong terms about the way that trial was conducted by
21 the prosecutor on the material that Your Honour has seen,
22 what Your Honour has said there is salutary and we trust
23 that it will be read by all those who have that heavy
24 responsibility of being prosecutors for the Queen.

25 In those two respects in particular, but also in
26 relation to the tape recording of proceedings where Your
27 Honour has described Mr Hoser's preoccupation with that
28 issue as reasonable, what Your Honour has not accepted is
29 the inference which he has drawn from the refusal of
30 taping, but Your Honour has, as Your Honour did in
31 argument, accepted the patent good sense of having tape

1 recording, but in particular in relation to (a) and (b),
2 Your Honour has identified the kernel of truth which
3 underlay the impermissible connotations, and it's the
4 latter for which Mr Hoser has been found guilty. The
5 former, which is the exposure of which, that is to say,
6 the underlying unfairness as he observed it in the one
7 case, because of the apparent cosiness between the
8 prosecutor and the jury in the other, from the statement
9 that the criminal trial is not a search for the truth, it
10 was part of his avowed purpose to expose those matters,
11 and Your Honour has vindicated that part of his exercise,
12 in our respectful submission.

13 Likewise in relation to paragraph 15 which as a
14 matter of the order should probably have followed 13,
15 because it's a submission to the same effect, I've
16 already referred to the significance of what Your Honour
17 has said in the reasons about the defence of truth, the
18 analogy drawn with the raising of a defence in an
19 indictable criminal trial and the shifting of the burden
20 to the prosecution, and in our respectful submission,
21 implicitly what Your Honour has acknowledged there with
22 the heavy qualifications that Your Honour has imposed
23 about doubting or regarding the allegations of actual
24 corruption as improbable, Your Honour has implicitly said
25 this was a matter which merited investigation.

26 That is to say, if this - if the Crown wanted to
27 convict these respondents of an offence in respect of
28 those matters, then it fell to them to prove that what he
29 had said was untrue. That's what Your Honour has found
30 in terms. Not a task for the prosecution essayed as was
31 candidly admitted in the evidence.

1 Your Honour, with respect, correctly applied what
2 the learned solicitors aid that if the statement of
3 taking bribes was true, then it couldn't be contempt.
4 Your Honour gave this respondent the benefit of that
5 doubt, not finding the corruption allegations proved in
6 any way to the contrary, expressing the gravest of doubts
7 about them, but implicitly saying as a matter of justice,
8 this ought to have been investigated if it was to be said
9 that he should be convicted of these matters.

10 It is, in our respectful submission, in the public
11 interest that Your Honour has said that. Who knows how
12 the Crown will react to what Your Honour has said about
13 that. It may be that the allegations will again go
14 uninvestigated. But Your Honour's highlighting of the
15 sufficiency of the material in the unchallenged Hoser
16 Files book, that is to say the unprocessed book, to shift
17 the onus, is of great public importance and is again, in
18 its own way, a vindication of Mr Hoser having raised that
19 matter publicly.

20 As to the matters in paragraph 14, Your Honour will
21 accord such weight to those as seems appropriate, having
22 heard and seen Mr Hoser now on two occasions, and it is
23 important, in our respectful submission, that he gave
24 evidence in his own defence and he has again given sworn
25 evidence today - this is 14(a) - in respect of the
26 financial position.

27 14(c) is, it might be said, an equivocal matter in
28 that it is not the submission for the respondents that if
29 you have a preoccupation with a certain grievance that
30 entitles you to a more lenient view of what you're
31 entitled to publish.

1 Your Honour hasn't taken that view. Your Honour
2 has said: "I accept that he is aggrieved and that he is
3 entitled to proclaim to the world that he was wrongfully
4 convicted and he is entitled for that purpose to be as
5 selective as he likes. But," Your Honour then asks the,
6 with respect, the only question which matters in this
7 proceeding and that is whether, in so doing, he has
8 crossed the line into criminal liability and Your Honour
9 has found that he has. So the offence is committed, but
10 in our respectful submission, it is a mitigating factor,
11 that he has been writing in these books passionately
12 about his own grievances.

13 We submitted that those self-evident attributes of
14 the book would reduce the impact on the sensible reader,
15 and Your Honour has expressed views about that, but we
16 do, for the purpose of mitigation, reiterate that
17 submission that Your Honour has concluded as a reader of
18 this book, that he has a highly developed belief that he
19 is the victim of multiple conspiracies. He is, to a
20 degree, paranoid. He believes - I think Your Honour put
21 the question to him in the witness box: "Isn't the
22 difficulty that you see things through this perspective
23 that they're always out to get you and everything has a
24 hidden intent which is antagonistic towards you?" And
25 that's what Your Honour has found, that he does have that
26 distorted view of the world. It is not the fact that he
27 is the victim of multiple conspiracies, but Your Honour
28 has found that he believes he is, and this is a highly
29 developed belief, and we use the phrase, "can't take a
30 trick" and in our respectful submission, it's a belief
31 which is not without some reasonable foundation, given

1 his run abouts in proceedings at almost every level.

2 But the character of the writing in that sense is,
3 in our respectful submission, relevant to the degree of
4 opprobrium which the court would attach to writing which
5 had crossed the line.

6 The crossing the line when you are passionately
7 advocating your own cause is less deserving of censure
8 than crossing the line in a cool, dispassionate, academic
9 article about somebody else's trial, and that leads me,
10 Your Honour, to the matter of remorse, and the concession
11 unconditionally made before.

12 Your Honour, the nature of this case is that in
13 view of the evidence which Mr Hoser gave and the
14 submissions which I made, Your Honour would appreciate
15 that remorse is both - an expression of remorse now would
16 be implausible. This would have been an entirely
17 different case if, and there are some in the authorities
18 that Your Honour has had, if this was something said
19 hastily and later regretted, and then a defendant might
20 say, "I'm sorry that I said that, I meant no offence," or
21 some such.

22 This case has been conducted for the respondents on
23 the basis that they meant what they said, it was a
24 deliberate publication, and the defence was that it was
25 within the range of criticism which the cases permit,
26 criticism made, so it was contended, in good faith on the
27 basis of events which had occurred and giving expression
28 to Mr Hoser's perception of those events.

29 Your Honour has found against him as to good faith,
30 but he swore before Your Honour that he was in good
31 faith, that he had checked the facts, that he based his

1 opinions on those facts, that he did honestly hold those
2 opinions.

3 If I was to stand up now and say, "Well, Mr Hoser
4 now admits that he didn't really believe any of that and
5 is sorry for having said things which he didn't mean,"
6 Your Honour would look askance.

7 A different matter as to what his future intentions
8 are, that's an altogether different question which I will
9 come to, but Your Honour would not find it credible in
10 our submission, for a man of this degree of commitment to
11 his task, that he would publish two times 700 pages on
12 topics of this kind. The fervour is only too evident in
13 the pages and in the answers he gives in this court. So
14 he's not saying through me that he regrets having
15 published those books, he doesn't. And for the reasons
16 we've already submitted, Your Honour should be satisfied
17 that some good has come of their publication. And that
18 there is a public interest served by those who regard the
19 system as having malfunctioned saying so.

20 The system, in our respectful submission would be
21 aided if others who bare grievances - and there are
22 plenty - had the time or the sources, or the
23 articulateness to do so. None of which is to say that
24 someone who does that is entitled to cross the line. But
25 his evidence was that he held those beliefs and opinions,
26 and he believed the factual material to be accurate, that
27 was his position at trial, and it is his position now.
28 Again, to avoid a misunderstanding, that does not mean
29 that my clients don't accept Your Honour's findings, they
30 do.

31 Your Honour has made those findings, not satisfied

1 that this was in good faith and for all the reasons that
2 I highlighted earlier, took the view that this was done
3 selectively, manipulatively and so on. The other aspect
4 of this, Your Honour, is the quantitative point of about
5 18 out of 23 having been dismissed is that there are only
6 very small portions of one very long book, and no
7 portions of the other very long book which are the
8 subject of conviction.

9 Mr Hoser would have said at the start that he meant
10 to be highly critical of those judges that he criticised
11 for the reasons he gave. He would say that now. Your
12 Honour said, no, that was not - unlike some of the ones
13 where the particulars were dismissed, that was across the
14 line. But that's a view going to - and he didn't disavow
15 any intention to be critical. He wanted to argue, as the
16 books made clear, that these decisions against him were
17 wrong and unfair.

18 So Your Honour would not expect him to have changed
19 his view of that. What Your Honour has found him guilty
20 of is expressing that himself, unfairly - attributing
21 unfairly improper motives to the two judges. But with
22 those exceptions, these books can continue to be sold.
23 That question was asked in cross-examination and answered
24 affirmatively, that is to say these books will continue
25 to be sold.

26 But since it was not apparent to Your Honour from
27 that evidence what the status of the offending passages
28 would be in the future, I'm instructed to give an
29 undertaking to the court on behalf of the respondents who
30 are aware of the significance of an undertaking by
31 counsel to the court, that is to say breach of it carries

1 its own contempt consequences. That future copies of
2 book 2, that which contains the five offending passages
3 will have those passages blacked out. That of course,
4 Your Honour, is subject to the steps being put in train
5 upon the conclusion of this hearing for that to occur,
6 but Your Honour understands the tenor of that
7 undertaking. It is not to be thought that the books will
8 continue to be sold with the offending passages in them.

9 Now, Your Honour, our learned friends have tendered
10 some documents from Mr Hoser's web site, and as we would
11 understand it, in view of the position on remorse, the
12 only document relied on is the Exhibit AOB15, being the
13 remarks published on 29 November. Your Honour will of
14 course read that and see that Mr Hoser has expressed in
15 strong terms, criticisms of the judgment. Your Honour
16 will, in our respectful submission, conclude that there
17 as in other respects in relation to the offending
18 passages, it was at best for Mr Hoser poor judgment to
19 publish any criticism of the judgment, and Your Honour
20 would be entitled to form that view.

21 HIS HONOUR: (Indistinct) of the judgment. (Indistinct) of
22 course can deal with that if they will, or he can publish
23 what he likes about the judgment. What troubles me is,
24 the demonstration yet again of an incapacity to read the
25 written word and accurately convey what it says.

26 MR MAXWELL: I accept that, with respect. And what's
27 important, Your Honour - - -

28 HIS HONOUR: Which rather suggests that one would have to be
29 expecting that the sort of publications that got him into
30 trouble on this occasion are of great risk of being
31 repeated.

1 MR MAXWELL: Yes, Your Honour, I'm about to address that
2 matter. I understand Your Honour's concern. What Mr
3 Hoser wrote on that day is to be categorised in the same
4 class as things said on the steps of the court, that is
5 to say, remarks made in the heat of the moment and what
6 Your Honour would understand is the shock of conviction.
7 Remarks made without - just as a matter of the time - the
8 benefit of a careful review, let alone, and in this
9 sense, poor judgment again, the benefit of considered
10 legal advice about the judgment.

11 HIS HONOUR: Well, in fact it rather demonstrates the contrary,
12 I think, that he had good legal advice to avoid doing the
13 very thing that he done, and rather than it being
14 material written off - or a statement made in the heat of
15 moment, which as you say, is the door stop interview type
16 which has got people into trouble before even in those
17 circumstances. This is one which is much more
18 calculated, you have to sit down and do some typing. And
19 when you sit down and do some typing and say, "Now, I'm
20 going to say more later on. This is as much as I can get
21 away with in effect at the moment, because of my legal
22 advice."

23 It doesn't fill me with a lot of confidence.
24 I'm not troubled about the fact that he's referring to
25 me. My concern is the administration of justice - - -

26 MR MAXWELL: Yes, Your Honour.

27 HIS HONOUR: - - - it carries a very strong suggestion that
28 even with the best of advice - as I'm sure he got - he's
29 incapable of listening to it.

30 MR MAXWELL: Well, Your Honour, the fact is that it wasn't - I
31 withdraw that. The advice to which I was referring, that

1 is to say advice which Mr Hoser hadn't had, was advice
2 which none of us was in a position to give him on that
3 day, because of the length and details of Your Honour's
4 reasons. Yes Your Honour can infer from what's been
5 published that interim advice had been given with respect
6 to public comment.

7 But Your Honour can, I trust, accept from me that
8 at the time of that publication he had not had the
9 benefit of considered, or advice from advisers who had
10 had a chance to - - -

11 HIS HONOUR: I accept that - - -

12 MR MAXWELL: - - - (indistinct) Your Honour's reason - - -

13 HIS HONOUR: - - - obviously so.

14 MR MAXWELL: And that is - it's therein, in our respectful
15 submission, that Your Honour can derive some assurance,
16 no guarantee, plainly, but Your Honour knows that on Mr
17 Hoser's behalf his legal representatives have attended
18 carefully to the issues in the case, and are in a
19 position to explain to Mr Hoser in very clear terms what
20 our view is of the judgment, and what our view is of the
21 criticisms made in that document. Plainly it's not
22 appropriate for me to canvass any of those matters in
23 this submission, but Your Honour must, in our respectful
24 submission, allow as a real probability, not a certainty,
25 that Mr Hoser - who is, as Your Honour noted in the
26 judgment - is an intelligent man, will attend closely to
27 what we tell him about the basis of Your Honour's
28 judgment, findings, consideration, expressions of view
29 and so on.

30 I can't make the point any better than that, but
31 the risk of which Your Honour speaks is in our respectful

1 submission, not nearly as great as Your Honour might be
2 entitled to infer if I hadn't said what I've just said
3 about what is to occur between the respondents and his
4 legal advisers, myself included, in the days which
5 follow. Viewed objectively, whatever - let me put that
6 differently - Your Honour would not be surprised that
7 someone who's been criticised - in the way Your Honour
8 has found it necessary to criticise Mr Hoser in the
9 judgment - would be upset by that.

10 That's an altogether different thing from saying
11 that the findings were without justification. I don't of
12 course wish to debate those, we accept Your Honour's
13 findings. But for the reason I mentioned at the
14 beginning of my submission, Your Honour's judgment goes
15 to the heart of what Mr Hoser stands for, and what he put
16 himself forward in the witness box as standing for, and
17 has discredited him and Your Honour would not be
18 surprised that he would have felt that keenly on the day
19 on which that judgment was published.

20 HIS HONOUR: Well, he might have, but it didn't appear to
21 trouble him so far as those persons who are referred to
22 in his book. I mean, there may be passages in there
23 which didn't amount to contempt, but they certainly were
24 passages which were put into sting I would have thought.

25 MR MAXWELL: Yes, Your Honour, there is a sting in the language
26 on any view. But accepting that, the point I simply wish
27 to make in seeking to mitigate the adverse effect of the
28 publication of last Thursday is that it was at a time
29 when the sting was at its most acute for my clients.

30 Your Honour, might I then move on to sentencing
31 options. Does Your Honour have - - -

1 HIS HONOUR: Can I just ask you about the personal
2 circumstances which are referred to - I'm not sure that
3 I've ever been told how old Mr Hoser is?

4 MR MAXWELL: In time honoured fashion I should have begun the
5 plea by saying my client is 47 years and - 39, Your
6 Honour.

7 HIS HONOUR: Thank you.

8 MR MAXWELL: And as Your Honour can see, and as he verified in
9 the witness box, he is married with two small children.
10 He is the sole breadwinner as Your Honour has had
11 clarified through the financial statements, his wife is
12 the recipient of income from the business, but - and so
13 to that extent, paragraph 16 should be qualified, but
14 Your Honour has heard the nature of Mrs Hoser's
15 employment; that is as providing administrative services
16 and those services, it would seem, are ancillary to a
17 publishing business which if the writer is not himself
18 active in the business, will not itself function as a
19 business.

20 And Your Honour will know that paragraph 16 is
21 directed principally at the question of imprisonment
22 because if Mr Hoser were to be gaoled for any period, his
23 wife would be left in the position of caring for the two
24 children on her own, and with the business itself
25 stalled, although again one would concede that the books
26 which are already on sale, would presumably continue to
27 be sold at some rate.

28 Your Honour, Gallagher v. Durac - I don't have the
29 tab number, it was in this folder - Your Honour there's a
30 useful discussion at p.245 in the joint judgment of the
31 reasons, or permissible reasons for imposing a sentence

1 of imprisonment.

2 Your Honour will see, in the second paragraph, an
3 independent ground on which special leave to appeal was
4 sought. And the point taken for Mr Gallagher was that a
5 sentence of imprisonment had been imposed, not because it
6 was merited, but because of a belief that Mr Gallagher
7 would not pay a fine out of his own funds, because the
8 Union would pay, and Their Honours say the present case
9 was one whose circumstances were most exceptional. "The
10 applicant in the course of the interview made it clear
11 that the Federation would not pay the fine." And it can
12 be inferred from these further remarks that moneys to pay
13 that fine would be provided by employers. "The Full
14 Court did not rely on later circumstance, although it was
15 entitled to do so," and then follows the passage we rely
16 on as of general application. "The object of the
17 imposition ...(reads)... and will not be repeated."

18 "In the present case the applicant, who - " I
19 interpolate, unlike Mr Hoser, "Did not go into the
20 ...(reads)... but has chosen not to do so."

21 And then again we rely on the next sentence as of
22 general application. "If the court comes to
23 ...(reads)... only an additional consideration."

24 Now as to those matters, Your Honour, it is our
25 respectful submission that Mr Hoser will personally
26 suffer and will be deterred by a fine. He has given
27 evidence that the publishing business, putting it
28 generally, does not return a large income.

29 Your Honour has seen the figures, with the
30 exception of the unexplained extra amount to a related
31 party entity, Your Honour should accept the financial

1 material, financial information, as giving a fair picture
2 of the financial circumstances of this family, and the
3 family company.

4 And there is a substantial sum shown for sale
5 proceeds of the books in the first year of their sale.
6 And the figures, in our respectful submission have a ring
7 of truth about them, both because of their content, and
8 because - that is to say the figures look exactly as you
9 would expect a set of figures for a small trading company
10 to be, but also because on the face of them, they are
11 copies of tax returns and copies of accounts prepared as
12 the witness said, in the course of a relationship of more
13 than a decade with an accountant.

14 A question was raised about a possible
15 inconsistency with the affidavit in the defamation
16 proceeding; I ventured an explanation for that, and Mr
17 Hoser, Your Honour will have noticed, a conniving witness
18 might have said, "Well, I heard what Mr Maxwell said, and
19 that was right." But he gave a fuller and candid answer,
20 in our respectful submission, by saying, "Well, when I
21 use 'margin' it might mean one of several things, but - "
22 which he explained, and then - "But when I'm talking
23 about a profit of \$20, I mean, well, the printing's \$8,
24 and there's \$2 for photographs and so on, which is 10,
25 and I sell them for 30, so it's a margin of 20." Which
26 is what he put in the affidavit in the other proceeding.
27 And that as I had speculated, is what Your Honour would
28 see in the raw gross profit figures on the front page of
29 the financial statements. That is, cost of publication
30 and proceeds of sale, giving you that \$60,000 gross
31 profit. Then you work out whether there's any net

1 profit, by bringing in all the other business expenses
2 which appear in the profit and loss statement.

3 So there is in our respectful submission, a
4 corroboration, that it's possible to have no net profit
5 and say truthfully to a court, "We make \$20 on each
6 book," because that's exactly what they do make. But as
7 I tried to explain to Your Honour before, that's the net
8 revenue against which all the costs of the business have
9 to be set, and once a salary notional or otherwise, is
10 paid to husband and wife, then there's no net profit,
11 though there was a gross trading profit of a substantial
12 amount.

13 And if Your Honour accepts those figures, then as I
14 submitted earlier, this is a low income family. The
15 combination - let's assume the 10,000 - there's a total
16 of 45,000 - 25,000 for the writer's fee, 10,000 to Mrs
17 Hoser, 10,000 to a related entity; 45,000 before tax.

18 And that is a modest family income on any view, in
19 our respectful submission. So that a fine will directly
20 and seriously penalise this family, punish these
21 respondents, and those who - and the dependants of Mr
22 Hoser. No question of anybody else stepping in and
23 paying it, or any refusal to pay. This will be - this
24 will hurt.

25 And Your Honour's entitled to assume that a fine
26 fixed so that it does hurt in that way, will be a very
27 effective deterrent. Because however much of a crusader
28 Mr Hoser may perceive himself as being, it's a very quick
29 way to go out of business to publish books in respect of
30 which substantial fines have to be paid.

31 And Your Honour has defined very clearly in the

1 judgment, what the line is, though in every instance
2 there will be a judgment about whether it's been crossed
3 or not, but that - the combination of a financial penalty
4 and that definition of what's permissible, and what's
5 not, will work in our respectful submission, subject to
6 the kind of advice that I foreshadowed, a very effective
7 deterrent.

8 Your Honour had an opportunity to observe Mr Hoser
9 in the box this morning, visibly upset. Your Honour
10 makes your own judgment about Mr Hoser, as Your Honour
11 has, having seen him, but that in my respectful
12 submission is to be taken as an indication that already
13 this has had a very significant impact on him.

14 Your Honour will know that confronting the
15 possibility of going to gaol and leaving wife and
16 children on their own, has a very powerful effect in
17 concentrating the mind, and Your Honour would be entitled
18 to say to me, "Well, that's just the way it goes," but
19 I'm conveying to Your Honour that even having come this
20 far, Mr Hoser has had to learn a very salutary lesson
21 about these kinds of publications.

22 Your Honour please.

23 HIS HONOUR: Yes, thank you.

24 MR GRAHAM: Your Honour, I don't wish to be heard in reply and
25 I don't think I'm entitled to be heard, but there is one
26 matter that catches me totally by surprise, and that
27 concerns the profit undertaking.

28 I would simply say to Your Honour that that
29 position should be rejected at once. A last minute
30 proffer and something which cannot be - and is unlikely
31 at least to be implemented.

1 It was imprecisely formulated. It deals with books
2 that are no longer being printed, with books which are
3 out in the public domain as we know; whether they're on
4 bookshelves for sale or not, we don't know.

5 HIS HONOUR: I might say, Mr Graham, just by looking at the
6 books, it's apparent that there's been other occasions on
7 which sections have been deleted and blacked out. I'm
8 perfectly prepared to proceed on the assumption that the
9 undertaking has been given with advice that as was said
10 to me and that I should take it on face value that it
11 will be - the extracts will be deleted.

12 I mean, perhaps more significant in some ways,
13 something which might be taken as reflecting that Mr
14 Hoser has the courage of his convictions, even if they're
15 pointed out to him repeatedly that he appears to be
16 incapable of relating facts to statements which are read.
17 But it might have been if he wanted to go further and
18 away, which might have gained him rather more kudos would
19 have been to say, "Well, as to those other passages,
20 which weren't contempt, but which are nonetheless plainly
21 been regarded as being on their face, defamatory, wrong
22 and having no basis whatsoever, I'm prepared to go
23 further and remove all of those as well."

24 Now, he's not saying that, and given that he's not
25 saying that, I will take it on face value that he will
26 have removed those passages and the line in the sand as
27 it were is, "Until a court tells me that it's in fact
28 contempt, then - " which he's perfectly entitled to do -
29 "Then it's not contempt." And the only relevance of that
30 factor, it seems to be, is the question which I discussed
31 with Mr Maxwell, and that is the question of how

1 confident can I be that if he is choosing to run that
2 very narrow line in future, with the best advice in the
3 world, he is not going to fall over it.

4 MR GRAHAM: Your Honour, I don't need to say that. It was the
5 last point that I wished to add, that one can have, with
6 respect, little confidence, despite the quality of the
7 advice that Mr Hoser has undoubtedly received, and the
8 confidence that one would have, and the quality and
9 accuracy of that advice; all we can say is that we can
10 have no confidence that it would be taken into account or
11 implemented.

12 That's all we wish to add, Your Honour.

13 HIS HONOUR: Yes, all right. I'll consider the matter. I
14 won't be able to give a decision today, or for that
15 matter, tomorrow now, but I will give my decision to you
16 on Thursday. I was about to say Thursday at ten o'clock.
17 Is that a difficulty?

18 MR GRAHAM: It is, Your Honour, yes. I have a matter starting
19 at 10.15.

20 HIS HONOUR: I'll make it earlier if that's convenient.

21 MR GRAHAM: Yes, Your Honour, would 9.30 be convenient.

22 HIS HONOUR: I think that's okay, yes. I'll make it 9.30
23 Thursday.

24 MR GRAHAM: Indebted to Your Honour.

25 MR MAXWELL: My learned junior will be here, Your Honour.

26 MR GRAHAM: I'm indebted to the court for that indulgence.

27 HIS HONOUR: 9.30 Thursday I'll give my decisions then.

28 ADJOURNED UNTIL THURSDAY 6 DECEMBER 2001