

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE

COMMON LAW DIVISION

BETWEEN

No. 5928 of 2001

THE QUEEN

(Ex Parte THE ATTORNEY-GENERAL for the STATE OF VICTORIA)

Applicant - and -

RAYMOND TERRENCE HOSER

First Respondent - and -

KOTABI PTY LTD (ACN 007 395 048)

Second Respondent

Official Court Transcript.

TranscriptMR GRAHAM: May it please the court, I appear with my learned friend Mr Langmead for the applicant in this proceeding.

HIS HONOUR: Yes. Thank you.

MR MAXWELL: May it please the court, I appear with my learned friends Mr Nicholas, Mr Perkins and Mr Manetta, who is not in court, for the respondents.

HIS HONOUR: Yes. Thank you. Yes, Mr Graham?

MR GRAHAM: Your Honour, before opening the case, for reasons which will not be conveniently apparent to Your Honour, I would seek to call upon a subpoena which was directed to the firm of Messrs Minter Ellison, who acted in a proceeding in this court last year, in which the first respondent filed an affidavit. Mr Henderson, a partner of that firm, was subpoenaed to produce the exhibits to that affidavit. I ask that he be permitted to do so, and to do so from the floor of the court if there is no objection.

HIS HONOUR: Yes. Does someone appear for Minter Ellison in response?

SOLICITOR: I do, Your Honour.

HIS HONOUR: Yes. Could you come forward. What is your full name? --- Kenneth Wallace Anderson.

Do you respond to a subpoena served on your firm to produce documents in this case? --- I do.

And do you produce those documents? --- I do.

Is there any objection to their production? --- No.

MR GRAHAM: Perhaps if Your Honour could ask one more question: are these the exhibits to the affidavit of Raymond

Terrence Hoser sworn on 7th April 2000? --- They are,
Your Honour.

HIS HONOUR: All right. Thank you very much. I will receive
those.

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MR GRAHAM: May Mr Anderson be excused?

HIS HONOUR: Yes. Yes, you may indeed.

MR GRAHAM: I believe Your Honour may have had some opportunity
to look at the papers, but it is necessary, I think, to
open the case.

HIS HONOUR: Very briefly. There was, I think, one affidavit
on file, was there? Is that - - -

MR GRAHAM: There are now more than one, Your Honour. There
should now be five. I am instructed, Your Honour, that
these affidavits were sworn in the last few days.

HIS HONOUR: I don't have them.

MR GRAHAM: They are not on the file, as I understand it.
Perhaps that can be sorted out in a moment.

HIS HONOUR: Yes.

MR GRAHAM: We are not apparently dealing with what I understand
to be contentious matters. They are directed to some
aspects of the publication and the books in question.
Your Honour, the first respondent, Raymond Terrence
Hoser, is the author of two publications: firstly, a book
entitled Victoria Police Corruption, published in 1999,
which is Exhibit A to the affidavit of Stephen Joseph Lee,
sworn on the 18th of May of this year. I will call that
Mr Lee's affidavit.
The second publication is a book entitled Victoria
Police Corruption 2, also published in 1999, although we
understand later than the earlier book, and that is
Exhibit B to Mr Lee's affidavit.
The second respondent is the publisher of the two
publications, that is the company, Kotabi Pty Ltd. Each
respondent has, according to the evidence which we will
lead to the court, publicly and extensively disseminated

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or caused to be disseminated each publication. It is

contended by the applicant that these publications contain material which constitute a contempt of court, being the contempt long described as scandalising the court.

There is one such passage in Exhibit A of which complaint is made, and there are 22 passages in Exhibit B of which complaint is made.

The content and source of each of the relevant passages appears in the originating motion and is repeated in the summons. These passages, in summary, assert in varying but clear terms that two Magistrates of this State and three Judges of the County Court of this State were dishonest and corrupt in the discharge of their judicial functions.

If I may remind Your Honour, the gist of the offence of contempt consisting of scandalising the court is, in general terms, publication of material which has a tendency to interfere with the general administration of justice.

Whilst it is said in some of the cases that proceedings may be brought on indictment, there is no requirement to proceed in that manner, and there is ample authority, as Your Honour is no doubt aware, that at common law there is power to summarily punish as criminal contempts, including contempts which scandalise the court.

If I can refer Your Honour to one authority - helpful because it is very recent, and it is from the High Court - that renews that proposition. It is a case of *Re Colina*, ex parte Torney, 1999, 200 Commonwealth Law Reports 386.

If I can hand Your Honour an agreed folder containing, in effect, an agreed collection of authorities.

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HIS HONOUR: Yes. Thank you.

MR GRAHAM: Now, I am told, Your Honour, that there are three authorities listed in the list at the front of the folder which are not presently in the folder, but that will be rectified at a convenient time.

If I can just ask Your Honour to note at this point without going to *Colina*, which is No 33 in the folder, the passage in the joint judgment of Chief Justice Gleeson and Justice Gummow, and I will give Your Honour paragraph references when they are available. Descriptions of punishment of criminal contempt by summary procedure has been the general practice and the proper procedure in this kind of case. I believe there is not a contest between the applicant and the respondents that summary procedure is appropriate.

Could I then take Your Honour to a few provisions of the rules of this court which govern proceedings of this kind. Could I ask Your Honour to look at order 75. If it helps, Your Honour, it starts at page 6,295.

HIS HONOUR: Yes. Thank you. Yes?

MR GRAHAM: Now, if I could ask Your Honour to look, first, at rule 75.05, where it says in relation to part 3, which is for procedure for contempt this: "This part applies to, (c), contempt of an inferior court"; and for these purposes both the County Court and the Magistrates' Court answer that description. Then I would ask Your Honour to look at rule 75.6, where it says in (1): "The application for punishment for contempt shall be by summons or originating motion in accordance with this rule. (2), Where the contempt is committed by a party in relation to a proceeding in the court, the application

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shall be by summons in the proceeding". So that therefore takes us to (3): "Where sub-paragraph (2) does not apply the application should be made by originating motion which shall be entitled The Queen v. the respondent on the application of the applicant".

And I interpolate, and Your Honour will notice, the applicant in this case is the Attorney-General for the State of Victoria, and sub-paragraph (b) "shall require the respondent to attend before a judge"; sub-rule (4), "the summons or originating shall specify the contempt with which the respondent is charged".

If I could then take Your Honour over to rule 75(11), which deals with punishment for contempt. Sub-rule (1): "Where the respondent is a natural person, the court may punish contempt by committal to prison or fine or both. (2): "Where the respondent is a corporation the court may punish for contempt by sequestration or fine or both". And finally, Your Honour, rule 75(14) relates to costs of an application such as this.

Your Honour would no doubt be aware the offence of contempt of court by publishing matter which scandalises the court has a long history and continues in existence on our submission. I believe that proposition to be in contest. I simply signal that point at this stage - I am sorry, I have misunderstood, Your Honour. From something that my learned friend has said, it is not contested that the defence still exists.

There is a convenient summary of the nature and ingredients of the offence in the passage in the case of, a very well known case of The King and Dunbabin, in 3 Commonwealth Law Reports, 434, and that is under tab 26 in

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the list of authorities. Again, Your Honour needn't go to

it now.

The passage is at page 442 where Sir George said, "Any matter is a contempt which has a tendency to deflect the court from a strict and unhesitating application of the letter of the law, or, in questions of fact, from determining whether exclusively by reference to the evidence. But such interferences may also arise from publications which tend to detract from the and influence of judicial determinations, publications calculated to impair the confidence of the people in the court's judgments because the matter published aims at lowering the authority of the court as a whole or that of its judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of judicial office".

The continued existence of the offence of contempt by scandalising the court was recently affirmed by the High Court in the case of which I just gave you the reference, *Re Colina ex parte Torney*, which is tab 33, and I would ask Your Honour to note what appears in the judgments of Justice Hayne at paragraph 110 and Justice Callinan at paragraphs 127 and 137.

In the joint judgment of Chief Justice Gleeson and Justice Gummow at paragraph 2, the passage which I read from the judgment of Sir George Rich in *Dunbabin* is quoted, and Their Honours described that passage as stating what they described as the essence of the offence of scandalising the court.

The parties to this proceeding agree that the contempt alleged is a criminal contempt, and the standard

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of proof resting upon the applicant is proof beyond reasonable doubt. There is much authority for that proposition, most recently the decision of the High Court in *Witham and Holloway*, 1995, 183 Commonwealth Law Reports at 525. That is under tab 39.

There are two other authorities in point, Your Honour, in that regard: tab 13, *John Fairfax & Sons and McRae* 154, 39 Commonwealth Law Reports 351. Tab 16, *Keeley and Brooking*, 1979, 143 Commonwealth Law Reports, 162, tab 16.

It has been said recently both in *Witham and Holloway* and *Re Colina*, that the distinction between civil and criminal contempts is somewhat illusory in any event. Perhaps nothing more needs to be said about that distinction in this case, given the agreement of the parties.

It is perhaps something that I should note in passing, Your Honour, that a Magistrates' Court has no power to deal with contempts of the kind complained of in the present case. There are very limited powers to deal with contempts in the face of the court, and I think in

the vicinity of the court, and it certainly has no power to deal with attacks upon Magistrates which comprise that court.

In theory, the proceeding in relation to the County Court Judges whose conduct has been impugned could have been brought in the County Court. That would have resulted in a duplication of proceedings, because the Crown would have had to come to this court in relation to the Magistrates' Court in any event. So that we have taken the course which we submit is proper in the

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circumstances, to proceed in this court. Your Honour, could I next deal with a couple of matters which need to be tidied up in the material. Would Your Honour go, first of all, to the originating motion, where Your Honour sees in the heading that the Australian company number of the second respondent, as we all, us at the Bar table know, is correctly given as 007-395-048. For reasons unknown, at least to me, Your Honour, in the summons on the originating motion there is one digit wrong.

HIS HONOUR: Yes.

MR GRAHAM: 394 is given instead of 395. And the same error appears in the affidavit of Mr Lee. I don't know whether this is really a matter for amendment, but unless it is a matter subject to some criticism hereafter, I would seek leave to amend.

HIS HONOUR: Yes. Is there any opposition to that?

MR MAXWELL: No, Your Honour.

HIS HONOUR: I will give you leave.

MR GRAHAM: Your Honour, the second matter to be tidied up arises this way: Your Honour will have seen that the passages complained of are set out in the originating motion, and summons, and by reference to the page numbering of the books, and there is an erroneous page reference given each in the originating motion and summons. Would Your Honour go to page 3 of the originating motion; the very top of the page as it is printed in my copy, there is reference to page 365.

HIS HONOUR: Yes.

MR GRAHAM: That should be 367. And the summons on the originating motion is either at the bottom of page 3 or

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the top of page 4, depending which print you have, there is again a reference to page 365 instead of 367. I would seek leave to amend that.

HIS HONOUR: Actually, in the summons it is on the top of page 5 of the summons. So it should be 367.

MR GRAHAM: 367. I would seek leave to amend the summons in that regard.

HIS HONOUR: Yes. Any objection to that?

MR MAXWELL: No, Your Honour.

HIS HONOUR: I give you leave.

MR GRAHAM: Finally, Your Honour, could I explain something about the format of the originating motion itself. Paragraph 3 of the originating motion deals with the second publication, that is Victoria Police No 2, and describes that as the second publication. It seemed convenient to follow that course because that is where the main substance of the complaints are found. Then over in paragraph 4 are complaints concerning the earlier publication, called the first publication, Exhibit A to Mr Lee's affidavit; it seemed convenient in terms of approach to put that second even though it was the first in point of time. Now, as Your Honour will have seen, the originating motion quotes the terms of the offending passages. I don't propose to go through those by reference to the originating motion, but I intend instead to take Your Honour to the books themselves so that Your Honour will see them in their setting and context. In addition to Mr Lee's affidavit, there are some further affidavits.

HIS HONOUR: I think I have left the affidavit of Mr Lee back

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in my room. You don't have a copy of that, do you?

MR GRAHAM: I think we do, somewhere, Your Honour, apart from my own. That is only a copy, Your Honour, it is not - - -

HIS HONOUR: I have just had one handed to me. Was that from the file, was it? That is all right. It has been located so - - -

MR GRAHAM: Thank you, Your Honour.

HIS HONOUR: This was the 18th of May 2001.

MR GRAHAM: That's right, Your Honour.

HIS HONOUR: Right.

MR GRAHAM: In addition to Mr Lee's affidavit, which is largely formal, it contains some important exhibits. There are affidavits from a group of persons whom I will describe as booksellers and publishers, and those affidavits which I will identify and read later on, are those of Anthony Burns, sworn 22nd of October this year; Jessica Lyons, sworn 19th of October this year, Louise Nestor, sworn 22nd of October 2001, and Nicholas Peasley, sworn 22nd of October 2001 - I am sorry, it is Louise Waters. However, while dealing with the matter of sales and publication: the most important evidence, so far as the applicant's case is concerned, is to be found in an affidavit which is an exhibit to Mr Lee's affidavit, being the affidavit sworn by the first respondent I mentioned to Your Honour at the opening of the proceedings. Your Honour, there was a notice given by the respondents pursuant to section 78B of the Judiciary Act (Commonwealth), and I believe it is filed - I don't know if Your Honour has seen it?

HIS HONOUR: Yes, I have got that.

MR GRAHAM: My learned friend authorised me to say that no

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response has been received by any of the other Attorneys-General. Of course the Attorney-General for Victoria being a party is participating in the proceedings. All other Attorneys have responded and all say they don't wish to participate.

HIS HONOUR: Yes. Very well.

MR GRAHAM: As will appear from the material as I go through it, there is some evidentiary significance to be attached to that notice, and if Your Honour has it to hand I will draw Your Honour's attention to the part which is of significance.

HIS HONOUR: Yes.

MR GRAHAM: Your Honour sees in the middle of page, "In this proceeding the applicant seeks orders that", and sets out the orders. And it goes on. The application relates to certain passages in two books of which the first

respondent is the author and the second respondent is the publisher. These passages contain criticisms of certain Judges of the County Court of Victoria and certain Magistrates. Those criticisms concern the discharge by those judicial officers of duties. The applicant alleges that the material contained scandalises the court. It is dated the 9th of October and signed by the respondent's solicitors.

I should say to Your Honour at this stage there is very little dispute between the parties as to the matters of authorship and publication; but there may be some issue as to the scope of the publication; and accordingly, I wish to take Your Honour, briefly, through the evidentiary material, just to show, to layout the sort of chain of proof, and I shall do so as briefly as possible.

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Could I ask Your Honour now to go to Mr Lee's affidavit sworn the 18th of May of this year. Mr Lee says, paragraph 1: "I am a barrister and solicitor of the Supreme Court of Victoria employed in the office of the Victorian Government Solicitor, solicitor for the applicant. Following receipt of instruction to investigate the publications referred to in the originating motion herein, I have caused to be obtained the publications which are now produced and shown to me at the time of swearing this my affidavit and marked as follows:" and he identifies the two books that I have already referred to. I take it Your Honour has copies of - - -

HIS HONOUR: Yes, I do.

MR GRAHAM: Of those books, with fairly colourful covers. Mr Lee goes on: "As appears from Exhibits A and B to this affidavit, the first respondent is the author of the publication. The second respondent is the publisher of the publications. Since receiving instructions to investigate the publications referred to in the originating motion herein, I have also caused to be obtained a company search of the second respondent. As appears from the company search the first respondent was at all material times a director and shareholder of the second respondent" and produces the company search. I will go through the exhibits after I have read the affidavit Your Honour, it is easier.

"On 26 July 2000 I sent a circular letter to various retailers and book outlets seeking details of the volume and extent of the sales and publication. An example of such a letter is now produced and shown to me at the time of swearing this my affidavit and marked D. I have

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received a number of replies to my letter" and produces a bundle of replies. I don't know whether my learned friend takes issue to those replies on the basis that they are hearsay, but perhaps when I come to them he can make the point if he wishes to.

Paragraph 28 - I am sorry, in paragraph 7 he says:

"On 28 July 2000 Mr Nick Peasley a representative of McGills, phoned him in response to my letter dated 26 July to McGills and informed me that since January 2000 McGills had sold 16 copies of volume 1 and seven copies of volume 2 of Mr Hoser's publications, and had sold 22 copies of volume 1 and 13 copies of volume 2 since 1999. As appears from Exhibit E to this affidavit each respondent has publicly and extensively disseminated or caused to be publicly and extensively disseminated containing the words alleged to constitute contempt of court publications in this proceeding.

In proceeding number 7825 of 1999, issued in the Supreme Court of Victoria, in an affidavit dated 7 April 2000 and sworn by the first respondent in the defamation proceeding" - and that was a defamation proceeding brought by a third person against the first and second respondents in this case, sworn by him "in the defamation proceeding on his own behalf and on behalf of the second respondent, the first respondent made admissions relevant to this proceeding in respect of matters, indeed the authorship of the publications, dissemination of the publications, and that the second respondent was at all material times under the effective control of the first respondent. Now produced and shown to me at the time of swearing this my affidavit marked with the letter F is a copy of the said

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affidavit. 10: In the circumstances the applicant seeks the orders sought in the originating motion filed herein". Now, if I could then ask Your Honour to, if Your Honour can find it, to pass over Exhibits A and B for the moment, and go to Exhibit C to Mr - - -

HIS HONOUR: Have the exhibits been filed?

MR GRAHAM: That quite often doesn't happen, Your Honour.

HIS HONOUR: No.

MR GRAHAM: I will just check.

HIS HONOUR: I haven't seen them, but they may have been.

MR GRAHAM: I think that what I am handing to Your Honour is the

exhibit notes which should be attached to two books which Your Honour has. And then I will hand Your Honour Exhibits C, D, E and F.

I don't know if any problem arises from the fact that the exhibit note is not attached to the court's copy of the exhibit. If needs be, I suppose it could be attended to by Mr Lee in swearing his affidavit.

HIS HONOUR: I will wait and see if there is any objection to that.

MR GRAHAM: See if there is a problem.

HIS HONOUR: And you want me to go to which Exhibit?

MR GRAHAM: Exhibit C, Your Honour.

HIS HONOUR: Exhibit C.

MR GRAHAM: Now, I don't think there is any dispute about these matters, Your Honour. We also have in addition to the extract obtained by Messrs Alf Barnett & Sons, a document which is in identical terms, save for the fact that it has a cover page, and which tells us that the extract is given under section 1247B of the Corporations Act 2001 (Commonwealth); and that is an evidentiary provision

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providing that this sort of extract is prima facie evidence of its contents without further proof. But again I think there is no issue about the factual accuracy of the extract Exhibit C.

Can I just draw Your Honour's attention to a few points? First of all, in relation to Kotabi Pty Ltd, the second respondent, it gives the Australian company number, it gives the name of the company, then company address, registered office 41 Village Avenue, Doncaster, Victoria, 3108. I just ask Your Honour to note that address, because it has a little further significance.

If Your Honour turns over the page, a few lines from the top, "Principal place of business address: 41 Village Avenue, Doncaster, Victoria, 3108", and we have the company's officers; "Director, Hoser, Raymond, 41 Village Avenue, Doncaster, Victoria, 3108". Then all the other directors listed below are listed as former directors. So this is a case where the company only has one director, and as Your Honour is probably aware, that is something that can be done as a result of amendments made back in, I think, 1997 or 1998.

Over the page, the secretary, and that is Mr Hoser again, 41 Village Avenue Doncaster Victoria, 3108. Then follows the share structure, which I have had some difficulty with. It says that there are two classes of

shares, "Ord 1" and "Ord", and there are two of each class on issue. At the bottom of that page we have Mr Hoser holds two shares in the Ord 1 category. His address is again given at the top of the next page. All the other shares are described as being ceased. Until I looked at this extract closely quite recently, I didn't notice that

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peculiarity because I didn't know how a share could cease. But I don't think it is going to be a matter that Your Honour is going to be troubled with in this case. Can I take Your Honour next to Exhibit D, and that is the example of a letter to a book shop proprietor, 26 July 2000. This one is to McGills, and it is - I think I need only ask Your Honour to cast an eye over that letter. It suggests that if there is not a response it is possible that there will be a subpoena.

Then we come to Exhibit E, which are the letters which Mr Lee received in response to his letters; the first in my bundle being a letter dated 8 August 2000, from Collins Booksellers. That refers, over to the book distribution of the company, who are the wholesale distributors of the book, indicating what the distributions and supplies to all Collins branches was, and, Your Honour, close scrutiny can see quite a number of the books were produced through the Collins network from Kirby Book distribution. I don't think I need to take Your Honour to the detail.

The next document in that bundle is a fax from McGills giving dates of publication of the two books, but without giving details of numbers; and the next one from Book City, simply advises that the two books were sold between August 30th 1999 and April 2000, without giving numbers.

Then can I come to Exhibit F. That is an affidavit filed in that other proceeding brought by Mr Zoccoli. Perhaps I should at this stage, Your Honour, ask that the court file in that matter is being produced to the court, which in my copy of the affidavit doesn't have the court

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number on it.

HIS HONOUR: Yes, it has. And what are you looking for?

MR GRAHAM: I don't have the court number of - - -

HIS HONOUR: It appears to be 7825 of 1999.

MR GRAHAM: I just want to be sure of that, Your Honour, because my copy of the affidavit didn't have it. It is the affidavit of the respondent, and we know that Raymond Terrence Hoser who deposed in this affidavit was the first respondent, because he gives his full name, slightly unusually spelt middle name and an address of 41 Village Avenue, Doncaster in Melbourne in the State of Victoria 3108. That is the link between the present first respondent and this deponent. I will just read a few paragraphs from the affidavit.

"The second defendant in this proceeding is a company effectively under my control of which I am a director and shareholder. I have authority to make this affidavit on its behalf. I am an investigative author and zoologist by profession. I have written and published over a hundred scientific articles in papers and journals and magazines from various parts of world including Australia, the United States and Europe".

He then lists a series of books which he has published. I won't read them all out. Paragraph 4: "In 1999 I published Victoria Police Corruption and Victoria Police Corruption 2. It was the first of these books, the Victoria Police Corruption, the book, about which complaint is made in this proceeding. The book was tabled in the New South Wales Parliament on 2 July 1999. It was then released for sale on 2 August 1999".

Paragraph 6 is important: "Approximately 7,500 books

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have been printed and as at today's date approximately 4,500 of these books have been sold to members of the public. Of the remaining 3,000 books which are unsold only a few hundred are under my control". And he goes on to indicate what the position really is. "Most of the remainder of the books are in the control of Desmond Burke pursuant to a distribution agreement entered into between Kotabi Pty Ltd and Desmond Burke on 2 August 1999", and he produces that as an exhibit. "Book sales are continuing at a steady rate and I expect that all books currently printed are likely to be sold by 1999/2000 at the latest. The book retails at \$30 and its trade value is about \$10. This leaves on average a profit of approximately \$20 for each book sold. I would estimate that the net loss to the defendants if the plaintiff's application was successful would be in the region of \$40,000 to \$60,000".

May I interpolate there, Your Honour, to say that the court file indicates that there was within the Supreme Court a proceeding, an application for an interlocutory injunction by the plaintiff to restrain further publication, and the trial Judge, Mr Justice Gillard, acting upon a very long line of authority, refused to grant the injunction because the defence of justification had been filed.

He goes on: "This figure assumes that all of the unsold 3,000 books will be sold and no trade discounts. This figure does not include trade discounts and other incidental costs such as fuel, deliveries, et cetera. The relevant chapter of the book about which the plaintiff complains has been posted on a US web site. It is possibly being mirrored elsewhere and I have no control

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over this. The book was also sold in CD version. CDs has been on sale since July 1999 and about 300 of those have been put in circulation by the author and publisher. The defendants have no effective control over the copying and distribution of the book in its CD version". He goes on to put forward material in support of his defence in that action of justification which I need not read. So, Your Honour, that is the affidavit material of - it is the material exhibited to Mr Lee's affidavit, apart from the books themselves, to which I shall return. May I take Your Honour to the other short affidavits filed this morning. I hand the originals up to Your Honour. I thought they had been provided. They were served on my learned friend's solicitors late yesterday, and I understand there is not a problem arising from their late filing. My learned friend says that's right. The first one I would ask Your Honour to look at is that of Anthony Gerard Burns who gives his occupation as bar reader. He says: "I am currently undertaking the bar reader's course. In March 2000 I was employed as an articled clerk in the office of the Victoria Government Solicitor. I have read the affidavit of Stephen Joseph Lee sworn 18 May 2001, in particular the paragraph 2 where Mr Lee deposes to the obtaining of the books Victoria Police Corruption and Victoria Police Corruption 2. Subsequently deposed to in this affidavit I was the person who obtained the publication referred to. On 24 March 2000 at the request of Mr Lee, a solicitor at the Victorian Government Solicitors office, I attended Angus & Robertson Book World at 35 to 37 Swanston Street, Melbourne, and purchased from them a book entitled

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Victoria Police Corruption 2 written by Raymond Terrence Hoser. I was given a receipt for the purchase of the book. I obtained the receipt" - and he produces that as an exhibit. That is apparently with the affidavit. He then said he completed a diary entry detailing that purchase and produces the diary entry. I might say it is a very thorough diary entry.

This is not part of the evidence, Your Honour, but my learned junior says that Mr Burns was formerly a police officer. If I could ask Your Honour to look at the second page of the diary note, at the time 13:48. Could I ask Your Honour just to read that, noting the shop assistant took him straight to a central shelf to which other books had three copies of Police Corruption 1 and four copies of Police Corruption 2, and he took one copy of Police Corruption 2 back to the sales counter and paid with a \$50 note and was charged \$29.95.

The next affidavit to which I would ask Your Honour to direct attention is that of Jessica Lyons. She says that she is corporate solicitor for AWB Limited. She says that: "I am a corporate solicitor employed by AWB Limited of 528 Lonsdale Street, Melbourne. During April 2000 I was employed as a solicitor with Minter Ellison at 525 Collins Street. On 18 October 2001 I had a telephone conversation with Stephen Joseph Lee from the Victorian Government Solicitors office. Following that conversation Mr Lee forwarded to me by fax Exhibit F to an affidavit sworn by Mr Lee in the above matter. Exhibit F consisted of an affidavit sworn by Raymond Terrence Hoser, 7 April 2000, before Jessica G.B. Lyons. I confirm that I am the person referred to on page 6 as having witnessed the

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signature of Mr Hoser. The signature which appears on page 6 above my name and stamp is my signature. I have no independent recollection of Mr Hoser or his signature. However it is my invariable practice as a solicitor is that, whenever I am asked to witness affidavits, I always ensure that the person swearing them and affirming the affidavit signs the affidavit in my presence.

Next the affidavit of Nicholas Robert Peasley, says:

"I am the Managing Director of McGills, 187 Elizabeth Street, Melbourne. I make this affidavit of my own knowledge. Between 20 August 1999 and 4 April 2000 McGills sold 38 copies of Victoria Police Corruption, a book by Raymond Terrence Hoser. Between 20 September 1999 and 4 July 2000 McGills sold 20 copies of Victoria Police Corruption 2, a book also written by Raymond Terrence Hoser.

Finally, there is the affidavit of Louise Waters.

She says: "I am a director of K.P. & Associates Pty Ltd, 2 Kingshott Close, Williamstown. I make this of my own knowledge. On 11 August 1999 until 24 1999 K.P. & Associates sold to various book retail outlets for sale to the general public 808 copies of Victoria Police Corruption, a book by Raymond Terrence Hoser. From 11 August 1999 until 24 December 1999 K.P. & Associates Pty Ltd sold to various book retail outlets for sale to the general public 631 copies of Victoria Police Corruption 2, a book also written by Raymond Terrence Hoser".

Now, Your Honour, it is time to go to the books themselves. What I would suggest Your Honour do is to go to the originating motion, as it were, on the one hand, and take the book in the other hand.

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HIS HONOUR: You are starting with the first book, are you?

MR GRAHAM: We are starting with the second book, Your Honour, because that is the way the notice of motion proceeds. Before I do that, and I am reminded by my learned friend Mr Langmead, there is two parts of this book which are not referred to specifically in the affidavit material, but I would invite Your Honour to look at them. Right at the beginning of the book, just after the first titled page, there is a list of books by the same author. It is just worth noticing that all those publications are the ones that were referred to by Mr Hoser in his affidavit filed in the other proceeding. If Your Honour turns over to page (iv), that page begins by saying it is published by Kotabi Publishing and states that the copyright is claimed by Mr Raymond Hoser.

Could I also ask Your Honour to look at the passage on page 182. This concerns an appearance by Mr Hoser before Mr Colin McLeod, a Magistrate, a former member of the Victorian Bar. He says - this is about point 3 on page 182. The book says: "Keating and his mates" - and earlier material indicates that Keating was a police officer - "decided to use the bail factor as a means to extract maximum punishment and inconvenience on me. They sought from the presiding Magistrate, a Mr Colin McLeod, a whole host of conditions which were granted without question by him. They were: Reside at 41 Village Avenue Doncaster". .

If I can then move back and ask Your Honour to note that we have grouped the comments complained of under a number of headings. And Your Honour sees paragraph 3(a), after reference to Victoria Police Corruption 2, a heading

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in bold, "Comments re Judge Neesham". A couple of pages over, there is another such heading, "Comments re Chief Judge Waldron". The next page there is another heading "Comments re Judge Balmford", as she then was. A further heading "Comments re Magistrate Heffey". Over the page another heading "Comments re Magistrate H.F. Adams". And just while I am on that: if Your Honour goes to paragraph 4, dealing with the first publication, Your Honour will see in the particulars that the paragraph complained of

also refers to Magistrate H.F. Adams.
In order to put these matters together, Your Honour,
one has to jump around the book a bit. In the end, I
respectfully suggest this will prove to be the slightly
long way round, but it is better than taking a short-cut
which might be confusing.

Thus, could I ask Your Honour to go to page 245 of
Victoria Police 2. Your Honour will see at page 245 a
statement starting at point 3, "Once Neesham had made it
clear the matter wasn't being taped". Now, in order to
understand what this is all about, it is necessary to go
back a little. If Your Honour sees - perhaps it is
necessary to go back to page 244. There is a heading "A
taste of what was to come". If Your Honour just peruses
that, it appears that the - - -

HIS HONOUR: What was the proceeding before Judge Neesham?

MR GRAHAM: It was a trial of one charge of perjury. And it
took place before Judge Neesham.

HIS HONOUR: And this is 1993, is it?

MR GRAHAM: Yes, Your Honour.

MR GRAHAM: I will read the passage from that page, which
appears in the originating motion at paragraph 3,

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paragraph (a)(i). "Once Neesham had made it clear that
the matter wasn't being taped, my being declared guilty
became a mere formality. Perhaps most upsetting about the
whole case wasn't Neesham declaring me guilty at the end
of the fiasco, but rather the continued wanton disregard
for truth by Malliaras, Olsen and, in turn, the Judge".
If Your Honour moves to the next page, we have a
picture I think Your Honour would recognise, as most of us
would, which is of Judge Neesham. This is what was said
about him: It was a kangaroo court. "That's perhaps the
best way to describe how Thomas Neesham runs his circus
and the County court where he is a judge. Nobbled juries,
bashing up of independent observers by police, actively
sanctioned perjury by bent police, strip searches,
unlawful arrests, false statements to another court by
himself...It's all apparently routine stuff in and out of
his court (the details of which are later in this book)".

HIS HONOUR: The expression "kangaroo court" there is not in
the originating motion.

MR GRAHAM: No, it is not, Your Honour, and it probably should
be, because otherwise the particular to sub-paragraph (ii)
doesn't make sense. I would ask that that paragraph be

amended by inserting the heading immediately preceding the quoted passage.

HIS HONOUR: Yes. Any objection to that course?

MR MAXWELL: Yes, Your Honour that is objected to. Simply on the basis that the Crown has had ample time to specify those aspects of the publication which are said to offend. The objection is not put on the basis of any prejudice. Naturally we have looked at the passages in their entirety. But no leniency should be allowed to the

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Crown if it can't get its case right; a fortiori when Your Honour had to draw attention to the matter this is opportunistic and the application should be rejected.

HIS HONOUR: That is not explained unless the words that immediately precede it are there, isn't that so?

MR MAXWELL: Well, that may be so, Your Honour, but with respect, we would rely on that. This is not a case where the Crown is entitled to the court's assistance in getting its pleading right. If without those words it wouldn't be possible to say that the words in the originating motion have any of the requisite tendency, then my client is entitled to the benefit of that omission, in my respectful submission.

HIS HONOUR: Yes.

MR GRAHAM: Your Honour, in the light of my learned friend's concession that there would be no prejudice, I would submit that that would provide a strong reason for Your Honour to allow the amendment. And further, in order to understand the passage which is in the particulars, it is appropriate to complete the picture by putting in the heading that precedes them.

HIS HONOUR: Yes. In criminal proceedings amendments of what would seem to me to be of minor order would generally be allowed. The particulars words that are used and which are omitted, though, might be thought to be more than mere formality. I think in the circumstances I will not grant leave.

MR GRAHAM: If Your Honour pleases. Could I take Your Honour to page 260, at the top of the page. In order to understand this passage one needs to go back to page 259, where it is indicated that "the judge appointed to hear the case was

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none other than Thomas Neesham".

HIS HONOUR: Where does this appear? I see, yes.

MR GRAHAM: The bottom of page 259. And then the top of page 260 it is said: "Perhaps most tellingly, he was one of those judges who had refused to allow me to have the case tape recorded, thereby effectively stamping him as a crook judge who wanted his activities never to be opened up to scrutiny. My initial judgments of Neesham as corrupt and dishonest were further proven during the course of the trial and its aftermath, much of which would be explained in the material that follows".

And then page 274, which is particular sub-paragraph (iv), His Honour can see from the passage before what the context is, "As soon as the trial proper commenced Neesham's bias against me commenced in earnest and his desired result was clearly known. His whole modus operandi was to guide the jury towards a guilty verdict. Furthermore, these actions were separate to others which also appeared to have been taken to ensure the jury's verdict was predetermined".

If Your Honour then would go to page 280; still speaking as is apparent about the same court proceedings, page 280, the following appears, starting at about point 2: "Throughout the case he" - it is apparent from the context that that is Judge Neesham - "gave prosecution witnesses an advantage by asking me in their presence what evidence I sought to get from them and what questions I sought to ask. From Neesham's and the prosecution's point of view this was designed to allow these witnesses time to think of the best answers they could give knowing in advance the answers I sought. When doing this, Neesham

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made sure that the jury was hurriedly shifted from the courtroom so they's never know how he was actively aiding and abetting the prosecution witnesses.

Then if Your Honour would go to page 304, paragraph 6 the bottom of the page there is a heading "Judge Thomas Neesham - No concern for truth". "Neesham's attitude to the truth, or perhaps more directly his desire to ignore it came out throughout Keating's evidence and later in the trial through various uncalled for outbursts". And then some examples are given which are not in the particulars. That was page 304.

Would Your Honour then go to page 329 of the particular sub-paragraph 7. Talking about the evidence that was being given during the course of the trial, the book says: "Of course Connell had been doing effectively

what Neesham had told him. It was a classic case - - -"

HIS HONOUR: Where does this appear?

MR GRAHAM: About five, it starts five lines from the top.

HIS HONOUR: Yes, I see.

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

HIS HONOUR: Who is Connell?

MR GRAHAM: He is a prosecution witness as indicated by the context. Perhaps Your Honour can find more from what precedes the passage at the bottom of page 328.

HIS HONOUR: Yes.

MR GRAHAM: Then, page 3 - the particulars say 350 - this appears, Your Honour, starting at about point 7 on 350. It reads: "The prosecution team led by Perry had spent

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most of the day apparently chatting to jurors. I hadn't been aware of the extent of this until it was brought to my attention. What it probably meant was that while I was systematically destroying the credibility of the police side and various aspects of their case, the jury was being deliberately sidetracked by the prosecution side, so none of it really mattered. Of course the Judge, Neesham, should have stopped this carrying on by Perry's side, but, no, he'd been green lighting the whole lot".

Then at page 353, starting at about point 3 or point 4 there is a paragraph: "I directed" - this is in the course of - it is apparent from the context, the evidence of two of the prosecution witnesses. The passage reads: "I directed them both to the previous day's transcript where Brown had confirmed the Broadmeadows strip search. Neesham had attempted to write it off saying 'That is another matter altogether'. That Neesham had got it wrong didn't matter to him. However, it would be hard to believe that both he and Perry would be that stupid. Neesham then improperly made sure that the matter was now effectively closed".

Can I take Your Honour to page 367 which is the subject of the amended sub-paragraph 10. About point 8 this appears: "Neesham had probably made a deliberate mistake here because the date 1993 would indicate that I had premeditated and planned the alleged perjury in early 1994. It was part of his not so subtle and deliberate

campaign to sow the seeds of doubt in the minds of the jurors".
Then, Your Honour, to page 435, at point 6, after quoting some evidence, it would appear to be arising in

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the context of the final address of Mr Perry to the jury. The passage begins: "Neesham again should have stepped in and stopped Perry's lies. The fact that they had themselves prevented the letter from going to the jury was significant. Furthermore, both knew that the letter was addressed to Martin Smith, my then lawyer, not myself. Both knew it never went to the Crown and thus both knew that Perry was lying to the jury. Significant again was that Perry was flagrantly lying and violating all his rules of conduct in order to gain an improper conviction. Neesham's so-called management of his court was similarly tainted. The mis-trial was to continue. (Oh, and by the way when I raised the letter in my reply address, Neesham jumped in at once and said I couldn't talk about it or introduce the letter - yet more double standards). This was deliberate as Neesham and Perry were evidently trying to ensure that the jury's imagination ran wild as to what the contents of this now mysterious letter were. Furthermore, the Dowd letter didn't contain my 'prior history' as Perry had falsely asserted. But like he said, he can't - - -

HIS HONOUR: "Like he said himself".

MR GRAHAM: Yes. "Like he said himself he wasn't interested in the truth". That concludes the passages about Judge Neesham.
Can I go to the passages concerning the Chief Judge. This is in a new series of sub-paragraphs under the heading "Comments by Chief Judge Waldron". If Your Honour would go to page 240. This context indicates that this would appear to be a mention hearing before the Chief Judge.

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At the top of page 240 the following appears. "As the case reopened at 2:15 Waldron displayed further anger and hostility towards me. I could see there would be no fair hearing here". And then over to page 241, at point 8 it appears, "Meanwhile I was about to go to trial for a perjury that no-one could produce a transcript for, because the police side didn't want to. And like I have already said, if the Chief County Court Judge doesn't seem

too concerned with the truth, then what faith can Victorians have in their legal system? Not only that, but myself and any other concerned citizen has absolutely no power to do anything about the recklessness of judges like Waldron, even when the proof is there for perpetuity in the government's own transcripts".

Page 243, the third line down, in the heading "Waldron's form": "While Waldron was hostile on a known corruption whistleblower like myself, and has been seriously harsh on...."

HIS HONOUR: "Similarly".

MR GRAHAM: "Has been similarly harsh on others like me by ensuring we don't get a fair trial, he has simultaneously got a reputation for apparently looking after hardened criminals".

Then, Your Honour, if we can move on to the comments concerning Her Honour Judge Balmford, as she then was. That takes us back to page 140.

The context makes this appear, Your Honour, that this was, I think, an appeal to the County Court against the Magistrates' Court decision which came before Judge Balmford. At page 140, four lines from the top: "After Balmford" - perhaps I should read it. "No taping -

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Judge's mind already made up". "After Balmford had stated that she would not allow the case to be tape recorded, it was obvious that I was losing this one. Like the case in front of Blashki, the only question was the penalty".

On page 142 a short passage about point 9 on the page: "Like I have noted, Balmford wanted to convict me and get the whole thing over with as soon as possible. After all, she had obviously made up her mind before the case even started. Recall she had refused to allow the matter to be tape recorded".

Finally, concerning Her Honour, at page 144, at point 9, "Balmford's bias in favour of police and the DPP isn't just something I have noted. In fact three Supreme Court judges have noted it as well".

HIS HONOUR: I am sorry, where are you reading from?

MR GRAHAM: Page 144, at about point 8, under the heading - - -

HIS HONOUR: Yes.

MR GRAHAM: The heading "Another balls-up". "Balmford's bias in favour of police and the DPP isn't just something I have noted. In fact three Supreme Court judges have noted it as well". He goes on to - as part of charge he goes on to indicate that there was an appeal in some other case to

the Court of Appeal; which I suppose comprised the three judges to whom the author refers.

Returning to the statements concerning Magistrate Heffey, starting, the nub of the sequence, again with sub-paragraph (i). Page 205, if Your Honour picks up, His Honour will see the page, it is headed "A Policeman's Magistrate". It is all about Magistrate Jacinta Heffey. At about point 8 or 9, the paragraph starts: "Although at the time the committal started, I didn't know Heffey. I

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was quickly told by Ben Piper and the others that she has a long-standing reputation as", in bold, "a strongly pro-police Magistrate. In hearings in front of her it can come out that the police have committed the most serious of crimes and it seems she would still not do anything about it. Readers may also seek to refer to the police shootings section in Victoria Police Corruption for details of her past form. Complaints about Heffey's running of courts and the decisions have also appeared in the mainstream media. These usually follow her routine sidings with police after shootings, or death in custody matters".

If Your Honour then turns to paragraph 207, page 207, there is a photograph of, what one might infer from the sub-title is a photograph of Magistrate Heffey. The passage complained of consists of this: "Jacinta Heffey, a Policeman's Magistrate. Sometimes she seemed so confused and scatter-brained that one couldn't help but question the selection criterion for Magistrates in Victoria". If Your Honour would then go over to page 208 - this is a particular sub-paragraph (iii), 208, five lines from the bottom: "in siding with the police, Heffey made her 'ruling' where she goes through the motions of stating the alleged 'facts' and 'reasons' for her decision. She said she was going ahead because I had failed to notify the other side of my intention to seek an adjournment pending legal aid. That her statement was an obvious lie was demonstrated by the multiple letters in Hampel's file and Heffey's own court records. Then again, I suppose it was a case of not letting the truth get in the way of a predetermined outcome".

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Finally, in relation to Magistrate Heffey, if Your Honour goes to page 212, at about point 7, the paragraph begins: "Oh, and just in case you haven't yet worked it out, my committal to stand trial had clearly been well determined before a word of evidence was

given".

One can infer from the context that this was concerning the committal proceedings which led to the perjury trial.

Then we go to the matters concerning Magistrate Adams. If Your Honour goes to the rear cover, there is a photograph which one might infer was a photograph of Magistrate Hugh Francis Patrick Adams. Underneath that appears the following: "The Magistrate that the cops said he paid off", which must refer to the photograph.

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

Now, that concludes the matters complained of in Police Corruption 2.

The main paragraph numbered 4 in the originating motion takes us to Exhibit A of Mr Lee's affidavit, and the passage complained of in that book concerned the same Magistrate. I invite Your Honour's attention to the words at the top of the page. There is the photograph, and then the words "Magistrate Hugh Francis Adams". "In a controversial decision he let corrupt policeman Paul John

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Strang walk free from court after he pled guilty to a charge related to the planting explosives on an innocent man. He then put a suppression order on the penalty. In a separate matter a policeman admitted paying a bribe to Adams to have an innocent man sentenced to gaol". Your Honour, that is the material which we wish to place before the court in support of the Crown's application, and we close our case.

HIS HONOUR: Yes. Thank you.

MR MAXWELL: Your Honour, before my learned friend does that: I would ask that Mr Lee be called to verify his affidavit. We have given notice that I have some matters to ask him, and in my respectful submission that should appropriately take place now.

MR GRAHAM: I accept that, Your Honour, and I also realise that I failed to inform Your Honour of something of some importance, and that is that my learned friends have indicated they admit that the first respondent is the author of the two books, and they admit that the second respondent was the printer and publisher of the books. However, our case goes further than that, in that we say - and we say there is evidence to support the

proposition - that the first respondent is in effective control of the second respondent, and the irresistible inference is that he authorised the printing and publication by the second respondent of both books. And we also say, perhaps now or later, that the further irresistible inference from all the material is that the first respondent and the second respondent, together, are responsible for the extensive publication and dissemination of both books.

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I gather - I am open to correction on this - it is admitted that the first respondent is indeed the deponent of the affidavit filed in the other proceeding, which I read parts of to Your Honour.
I will call Mr Lee.

HIS HONOUR: Well, just before you do that, I might take a five-minute break and we will hear Mr Lee give evidence. (Short adjournment).

MR GRAHAM: Would you call Stephen Joseph Lee, please.

<STEPHEN JOSEPH LEE, sworn and examined:

MR GRAHAM: Mr Lee, is your full name Stephen Joseph Lee? --- Yes.

Is your address, Level 2, 55 St Andrews Place, East Melbourne?
--- Yes, it is.

Did you swear an affidavit which is filed in these proceedings?
--- Yes, I did.

May the witness see the original affidavit to identify his signature, please, Your Honour? Would you look at the last page of the affidavit yourself, and does your signature appear on that page? --- Yes, it does.

Your Honour, I don't think I am required to ask him to identify the exhibits unless - - -

HIS HONOUR: No, I wouldn't have thought so.

MR GRAHAM: If Your Honour pleases.

HIS HONOUR: Yes. If I could have that back, please.

<CROSS-EXAMINED BY MR MAXWELL:

Mr Lee, how long have you been employed in the office of the Victorian Government Solicitor? --- For about 12 years.

And I take it, though I don't think you say it in your

affidavit, that you have the care and conduct of this proceeding on behalf of the applicant Attorney-General. Is that right? --- Yes, it is.

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And you have taken responsibility, subject to counsel's advice, for the preparation and filing of evidence in support of the case? --- Yes, I have; but also subject to my superiors.

Within the department? --- Within the VG - the Government Solicitors Office.

Thank you. Has your advice - I withdraw that. And you procured the copy of Mr Hoser's affidavit sworn in the defamation proceeding; is that correct? You arranged for it to be obtained? --- Yes, I have a recollection that I arranged for a company, sorry, a court search to be undertaken, that disclosed that affidavit.

And when you swore your affidavit on the 18th of May and exhibited Mr Hoser's affidavit, you did so, I take it, for the purpose of proving to this court the dissemination, or amongst other things the dissemination of the publications complained of? --- Yes, I believe so.

And you considered - I withdraw that. You exhibited that affidavit on the basis that what - assuming that the connection could be made between the Hoser who swore the affidavit and the Hoser who is the defendant, the first respondent - assuming that connection could be made - you saw that as being relevant because what Mr Hoser had said on oath, in this court, should be accepted as a true statement by him? --- Well, I considered that he made obvious admissions in his affidavit that appeared to be signed by him, so it seemed fairly straight-forward to me that he admitted elements in the case, yes.

I am not sure whether you understood the question, so I will put it again. You exhibited that affidavit because you considered that the court could properly rely, as evidence of the facts stated, on statements made by Mr Hoser in an

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affidavit sworn by him? Yes or no? --- Well, I hoped that the court would rely upon it, yes.

Because it was at least possible that Mr Hoser himself would say nothing about dissemination, wasn't it? --- I suppose so, yes.

And you wanted the court to conclude, on the basis of what he had said in that affidavit, that the book or books had been published and sold to the extent referred to in that affidavit? --- Sorry, could you repeat that question?

You were intending, through your counsel, to ask the court, in the absence of any evidence from the defendants, to conclude as a matter of fact that the books had been sold to the extent referred to by him in that affidavit? --- Yes, I think that is fair.

And indeed, you, it was important for your client, the Attorney-General, to make clear that the Mr Hoser who wrote the books referred to here was the same Mr Hoser as was referred to in that that affidavit; correct? --- That is a part of the case, yes.

I beg your pardon - made the affidavit? --- Yes, that's correct.

You needed for that evidentiary purpose to establish that identity of persons. And I take it that you did some - before relying on the affidavit, something similar to what Mr Graham, the learned Solicitor-General, referred to in opening, the preface to the police corruption book, that is to say, looked to see whether the books which he claimed to have written, other than these books, he had in fact written? Did you make that investigation? --- I am not sure I understand the question.

Well, if you have got your Exhibit F, I would like to take you to paragraph 3? --- I haven't got Exhibit F.

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I wonder if the witness could have his exhibits, or a copy of them?

HIS HONOUR: Is there a copy of that - that is the only one I have got in front of me.

MR MAXWELL: We want Your Honour to have it, certainly. (Handed to witness). Now, let's go back a stage. Clearly enough, you read this affidavit from beginning to end before deciding that it was proper to put it in as evidence in this proceeding? --- I read the affidavit, yes.

Yes. And you would have noticed that in paragraph 3, Mr Hoser swore that he had various books published on various dates there referred to. Do you see that? --- Yes, I do.

You have got no reason to doubt the truth of those statements, have you? --- No reason, no.

And indeed, my question was: Did you check for yourself whether, as he swore in that proceeding, he had published those books or any of them? --- No, I didn't make any independent checks of paragraph 3 that I can recall.

I would like you to look at three books which I am going to give you. The first two are Smuggled and Smuggled 2. And you will see both of those referred to in that paragraph 3, and I think I am right in saying they were referred to in the introduction to the second volume in issue here. You accept, don't you - take as much time as you need - that the books I have now given you, which purport to be authored by him, and I think published by Kotabi, are the books he refers to in paragraph 3, or some of them? --- That appears to be correct, Your Honour, yes.

I tender those.

MR GRAHAM: Your Honour, this may be a matter for final address, but at the moment I can't see the relevance of it.

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HIS HONOUR: Nor can I. How is it relevant that I have the books? Are you wanting to establish that what is recorded in that paragraph refers to these books. Why do I need to have these books?

MR MAXWELL: Your Honour, might I defer dealing with that until I have asked a couple more questions.

HIS HONOUR: Yes. All right.

MR MAXWELL: I would now like you to look at this book, please. This is a book entitled "the Hoser Files" sub-titled "The fight against entrenched official corruption". And again, I am sorry I don't have an extra for Your Honour, but you will see that it, in the introductory parts, refers, as the later books do, to the Smuggled books that I have just shown you, and identifies the book as being written by Mr Hoser and published by Kotabi. You can see that?
--- Yes.

And you accept, I take it, for the purpose of this proceeding, that that appears to be what he describes as the fourth book in paragraph 3 of his affidavit? --- That appears to be so, Your Honour, yes.

Now you are aware, aren't you, that the question of liability for scandalising the court depends, amongst other things, upon the character and purpose of the publication in question; correct?

MR GRAHAM: Your Honour, even though the witness is a qualified

solicitor, surely that is a question of law.

MR MAXWELL: Well, Your Honour, this is the solicitor who has prepared the evidence for the case. We are about to draw attention to the manifest inadequacy of the material led by the prosecution, and it will be relevant to show - I withdraw that. And it is to that that my question goes.

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This witness has made decisions about what should and should not be before the court.

HIS HONOUR: I will allow you to put the question. As to whatever the answer is the witness gives, as to whether he is right as to whether that is the test in law, is a matter for me.

MR MAXWELL: Indeed Your Honour.

HIS HONOUR: And I will adjudge that if he adopts your proposition, be it right or wrong. If it has got a purpose, I will allow the question.

MR MAXWELL: If Your Honour pleases. I certainly won't be calling in aid any opinion I get in support of my substantive submissions.

HIS HONOUR: I am happy to receive any points that are offered to me.

MR MAXWELL: Yes, Your Honour. And if you have got the volume complained of, or one of them, Victoria Police Corruption No 2 - and you haven't - I would ask that you be handed them? --- I haven't got them, Your Honour.

HIS HONOUR: Are there spares of that? The only ones I have got here I have now marked.

MR MAXWELL: I wonder if my learned friend could have his copies - - -

MR GRAHAM: Mine are marked and - - -

MR MAXWELL: I don't mind, I just want to draw attention to - - -

WITNESS: Your Honour, I still have this book, the Hoser Files.

HIS HONOUR: Yes. Hold on to that book.

MR MAXWELL: If I might ask the witness be given the 1 and 2. For present purposes it is convenient to look at number 2, and the page Roman (ix), about the author, and do you see next to the top of his photograph - - -? --- This is page 8,

is it?

Yes. It hasn't actually got a number at the bottom but it is next to page 9 in the forward. Do you have that page with his photograph on it? --- Yes, I do, Your Honour.

And you, I take it, in the course of preparing this case for prosecution, you have read some or most of this volume 2? --- I wouldn't say I have read most of it. I have read bits and pieces of it. I haven't read it extensively at all.

Have you read this preface about Mr Hoser? --- Not that I can recall, no.

Well, I don't think there will be any issue about this, but tell me if this question is not capable of answer. You will see, even by a quick glance at it, that Mr Hoser describes himself as someone who has for many years been concerned with official corruption. You can see that? --- Yes, I accept that.

And you can see that he describes there, that Smuggled and Smuggled 2 were books in which he pursued those concerns. You can see he says that, can't you? --- He says "It is a search for the truth in the area of wildlife trafficking and associated crime in Australia".

And in the first sentence, "Smuggled became widely accepted as the new benchmark in terms of investigative books about corruption"? --- Yes.

HIS HONOUR: I am sorry, where are you reading from?

MR MAXWELL: The beginning of the fifth paragraph which has the word "Smuggled", Your Honour, about the author.

HIS HONOUR: Yes.

MR MAXWELL: Smuggled was Raymond's first corruption book.

HIS HONOUR: Yes, right.

MR MAXWELL: And then in the next paragraph he describes the book, the Hoser Files, the one that I have more recently asked you to look at, in which he says his book "followed

this trend", that is to say, pursuing issues of official corruption, "and is widely regarded as the precursor of a notably increased media attention to the problem of police corruption in Victoria".

And then he goes on to say in the next paragraph "Victoria Police Corruption and Police Corruption 2 expose further corruption" and like his three previous corruption books will probably be unlawfully banned shortly after release. Were you aware, until I had taken you to that now, that Mr Hoser characterises these books as but the next step in a continuing series of exposes by him of what he perceives to be official corruption? --- I am aware in general terms that is his modus operandi.

You are aware that is how he perceives himself? --- Yes. Yes, I am.

And you accept, to go back to my question of law before, that the character of the publication and the purpose of the author is relevant to the question whether there is any breach of the criminal law of contempt? --- Well, I am not sure I can really recall an authority specifically stating that. But - so I can't categorically agree with you on that.

So wouldn't you agree that - I withdraw that. Were you aware that the Hoser Files, published in 1995, foreshadowed in its introduction, Hoser Files 2 and Hoser Files 3? --- No, I wasn't.

Just turn, please, to inside the title page? --- Of the Hoser Files?

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Yes. And there is an introductory page, the same as the one in the police corruption books, referring to the Smuggled books, and then over the page, there is a reference to Hoser Files 2 and 3. I simply wanted to put this to you: if I said that in the event Hoser Files 2 and 3 did not come out under that title but, rather, came out as Victoria Police Corruption and Police Corruption 2, I imagine you wouldn't be able to dispute that? --- I am not sure I understand the question. Your Honour, I haven't seen this book at all, until today. I can't recall seeing it ever before.

I won't press the question. Now, going back to - but I do tender that volume through this witness; and the basis of relevance is this, Your Honour: that in my respectful submission, it behoves the prosecution to present to the court material which is plainly made relevant by what this writer says in the introduction to these books. That is to say, he says, "I am a writer about corruption. I am

very concerned about matters of official corruption, and I have, over years, written first about that kind of activity within the wildlife administration, and since 1995, see the Hoser Files - - -

HIS HONOUR: Well, you are putting, irrespective of whether you say it is a duty on the - - -

MR MAXWELL: Prosecution.

HIS HONOUR: Prosecution, to put that forward, you say it is relevant to be considered by me in determining whether a contempt has been committed in those circumstances. In those circumstances, if that is correct, then it would be admissible irrespective of the purpose, would it not?

MR MAXWELL: Indeed, Your Honour, and it may be unnecessary to

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add this. But where, as here, an affidavit of Mr Hoser is tendered as evidence of the matters stated in it, and it refers to these books, then in my respectful submission the further tender of books referred to, which my learned friend the Solicitor expressly relied on to link that Hoser with this Hoser, should follow as a matter of course.

HIS HONOUR: Well, it may or may not. But it doesn't require me to resolve that, does it; if you say that it is irrelevant material and should be tendered in any event?

MR MAXWELL: If Your Honour pleases, I do put it on that basis.

HIS HONOUR: Yes. What do you say?

MR GRAHAM: Your Honour, I don't want to foreclose my learned friend from an argument which I see him wanting to put; however, there is a problem in putting admissible evidence before Your Honour in order to establish what Mr Hoser's motives may have been, or to establish that Mr Hoser had been engaged in some sort of campaign to publicise corruption, won't be achieved by the process that he is going through at the moment.

Whereas the affidavit that Mr Lee filed, that Mr Lee obtained, which I will call the Hoser affidavit, is relied on as containing admissions which we now put as admissions against interest, which can be clearly sheeted home to the first respondent and the second respondent; the material that appears in these books as to motive and purpose and campaign is pure hearsay. If that is to come forward before Your Honour, it comes forward through Mr Hoser. It doesn't come forward through what he or his publisher, whatever, may have chosen to write in the book, not on

oath and uncontested. It is straight hearsay.

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HIS HONOUR: I accept - I put this to Mr Maxwell: plainly a document which is relied on for the purpose of admissions against interest, it doesn't follow that what otherwise is not relied upon as being self-serving itself becomes evidence of the truth of what is contained in the document.

But it seems to me that if you are putting it that this material is relevant - and I indicate making no indication of what the law is about that, I will leave that for arguments in due course - if it is a relevant question, and I so find it to be a relevant question as to what is the motive and the background to the publication of this particular material, if that, I am satisfied, is a relevant matter, then it seems to me the evidentiary point which is taken against you is one which I can address at that time.

At the moment, there is, as I apprehend it, a what could be said to be a tactical - not a tactical, a technical objection being taken, that it is not formally proved through this witness, merely because it is attached to the affidavit. That may mean that, in due course, you might have to formally prove it, whether through your client or in some other way. But I am prepared to receive this material on the basis that it has been put; namely, that if I, in due course, rule that this material is not relevant to the issues of contempt, and plainly the exhibits which have just been received couldn't be relevant to the decision which I will have to take, but I don't know what the answer is going to be to that, so I will receive it on that basis, and on that understanding at the moment.

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MR MAXWELL: If Your Honour please. Well now I tender the three books, Smuggled, Smuggled 2, and the Hoser Files, as a single exhibit.

HIS HONOUR: Very well. Three books, being Smuggled, Smuggled 2 and the Hoser Files will together be Exhibit D.1.

#EXHIBIT D.1 - Three books (Smuggled, Smuggled 2 and the Hoser Files).

MR MAXWELL: Now, Mr Lee, did you go to the trouble of finding out what His Honour Mr Justice Gillard decided in that matter in which Mr Hoser swore that affidavit? --- Yes, I

did.

So you would know that His Honour dismissed the application against Hoser and Kotabi for an injunction? --- Yes, I know that.

And you would know that in paragraph 40 of his reasons His Honour said this: "I am of the view, primarily because of what the author has sworn in his affidavit, that this is an inappropriate case for the granting of an interlocutory injunction". Do you recall that? --- I can vaguely recall that that was the conclusion he reached, yes.

And it was important to you, wasn't it, in putting forward the affidavit as an admission, that Mr Hoser's affidavit should be taken at face value, or put it differently, you couldn't - - -

MR GRAHAM: Surely, I must object. Surely, the - - -

MR MAXWELL: I withdraw the question.

HIS HONOUR: Yes. I mean it is plainly being put only for the purposes of proving those admissions against interest.

MR MAXWELL: That is so. But let be there no doubt about it, we will be inviting Your Honour to have regard to it for all purposes.

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HIS HONOUR: You may well be; but it doesn't follow that because it is tendered for the purpose of an admission that it is accepted that it is true as to all paragraphs within it.

MR MAXWELL: I accept that. Now, if I might go to paragraph 9 of your affidavit. And you there say that, "The first respondent made admissions in respect of matters including authorship of the publications". If you could have open, please, Mr Hoser's affidavit on this point, and I take it that you were referring to paragraph 4, indeed the first sentence of it, in saying that they were relevant admissions about authorship? --- (No answer).

If there is somewhere else in the affidavit when he says he wrote both books please take me to it? --- No, I believe it is paragraph 4.

Yes. And you presumably read the second sentence of paragraph 4. If you didn't, would you mind just reading it again slowly, now? --- "It is the first of these books, Victoria Police Corruption (the book) about which complaint is made in this proceeding".

And it is right, isn't it, that everything that he says after that, the tabling of the book, how many books had been printed, and sold, relates to the book in issue in the proceeding? --- Well, I would have to read that to be certain, but I accept that if you say that.

Yes. And on that basis this affidavit says nothing about the extent of dissemination of book number 2, does it? --- It doesn't appear to, Your Honour.

Now, I would like to take you, please, to the book, the Hoser Files, if - would Your Honour excuse me a moment? I will arrange for a copy to be given to Your Honour. Now, the first question about this book, before we go to it, it was

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published in 1995, it would appear. It is right, to your knowledge, isn't it, that no proceeding was taken against Mr Hoser or Kotabi in respect of the publication of that book? --- I am not aware of any such proceeding, Your Honour.

And you weren't aware, until seeing it now, that it is a book which makes criticisms about police procedures and conduct of particular judicial officers? --- No, that is not exactly correct. I haven't read the book or looked at the book until today. But I, I was aware in general terms of a book called the Hoser Files which makes those sorts of allegations. But I hadn't gone much beyond that.

Would your awareness extend to agreeing with me that it is a book of the same type as the two books the subject of this proceeding? --- Well, without looking through it in detail, it is a book about corruption, so in that sense it is similar, yes.

Now, I would like you to turn, please, to page 160 of the Hoser Files. Now, I don't want you to ask you about the detail of this, but you can see the reference in the third paragraph of 160 to a Magistrate, Mr Barry Meagher. Do you see that? --- Yes, I can.

And you can take it that in the pages 160 to 164, there is criticism of biased conduct of the court by that Magistrate. Just have a quick look to - I am not going to get you to confirm that or otherwise, but I am just drawing to your attention that it does deal with proceedings before Mr Meagher, and makes comments such as just next to the photograph on 161, "Other than Meagher's agreement to clear the court of witnesses for the rest of the case - something the RTA people didn't want - Meagher's siding with Ashton was blatant". Now, having

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drawn your attention to those matters, are you aware that the Court of Appeal of this court, in a proceeding concluded in October 2000, took the highly exceptional step of ordering costs against that Magistrate for serious misconduct? --- Yes, I am aware of that. Well, I am not sure I would say it was for serious misconduct; it was costs followed the event in that proceedings so - - -

No, Justice Brooking said "I have no doubt that the..."

MR GRAHAM: Your Honour, I think I should rise to at least enquire what is the relevance of what happened in the Court of Appeal in another case, of an entirely different kind not involving contempt.

HIS HONOUR: If they are relevant matters and it is material which is being tendered by you, why does it need to be put through the mouth of the witness? If they are relevant matters, you are referring to matters which are on the public record and which can be referred to in submissions if they are relevant.

MR MAXWELL: Yes, Your Honour. But in our respectful submission, it is significant to Your Honour's understanding of the nature of this proceeding, to know, from the person who has had the care and conduct of this proceeding on behalf of the applicant, that he knew that one of the criticisms made of a particular Magistrate, in an earlier book of the same character, was vindicated - not in the particular case, but as to the behaviour of that Magistrate - by a unanimous Full Court of this Court and that - - -

HIS HONOUR: But he has not said that he did know that. You have just pointed him to the passage of the book, which he said he hadn't read.

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MR MAXWELL: That is so.

HIS HONOUR: And told him that is what it says. Now how on earth does it help me to have from him that the book said something that you could have read to me yourself. If there is a point to be made that something that is published in that book and followed by Court of Appeal proceedings bears upon whether there is a contempt here, then the issue of whether it is a contempt or not, and the issue of whether those prior matters are relevant to my determination, stand absolutely irrespective of this

witness being used as a vehicle to speculate on a book he hasn't read.

MR MAXWELL: I accept that, Your Honour. Our point, however, is that he ought to have read it, and that this prosecution ought not to have been brought, when matters of vindication like that are on the public record.

HIS HONOUR: Well, I don't think that is a matters which is relevant to the proceedings before me. You can make the submissions in due course as to what does or doesn't constitute contempt.

MR MAXWELL: If Your Honour please. Would you go, please, to page 245 of the number 2, the book that is before the court at present. At the top of 260, if I might take you there, where reference is made to Judge Neesham having refused to allow Mr Hoser to have his case tape recorded. You know, I take it, that in the relevant proceeding Mr Hoser was unrepresented? --- No, I am not sure I knew that.

You know, I take it, that he did make application for permission to tape record, and that was refused? --- I think that's right, yes.

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MR GRAHAM: Your Honour, I don't wish to constantly interrupt the cross-examination; but the witness's only source of information, quite apparently, is what is in the book. Unless he was at the trial and in some way involved - - -

HIS HONOUR: Well, there might be other sources of the information.

MR GRAHAM: I would have thought the first respondent would be the perfect person to tell us what he did. But the fact is we put these passages forward, in the book, not to rely upon their truth; quite the contrary. What my learned friend is trying to do through the text is to establish a fact, and it is hearsay when it comes out of the book that way.

MR MAXWELL: With respect, no, Your Honour. This is an important point. If the prosecutor, through his witness, admits that a statement in the book is true, that is evidence against the prosecutor.

HIS HONOUR: Yes, I would agree with that.

MR MAXWELL: It must be right, with respect. Secondly, this is the Crown - but the witness has just admitted it.

HIS HONOUR: If the witness admits there is a matter in the book which has been tendered, which particular material he says is true, then it becomes evidence of the truth, and not merely material which is put in for the purposes on which the Crown seeks to rely upon it.

MR MAXWELL: Exactly so. And it is important, in our respectful submission, for Your Honour to know that that is true. I shouldn't have to cross-examine it out of their witness.

HIS HONOUR: I am sorry, I don't grasp your point.

MR MAXWELL: This is put forward as a scandalising of the court, but Your Honour hasn't been told that there was an

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application for tape recording and it was refused.

HIS HONOUR: Well, it is apparent from the document, isn't it?

MR MAXWELL: Well, if it is accepted that the statements of fact are true, I won't need to pursue any of these questions with this witness.

HIS HONOUR: But you are wanting to establish that there was an attempt to tape record and that was refused. Well, I don't understand that there is an objection to it.

MR MAXWELL: No, Your Honour; I accept that. And I, importantly, am wanting to establish that it was known to the person having conduct of this proceeding, at the time the proceeding was commenced. And that's right, isn't it: your belief that it was true, that tape recording had been denied him, you had that belief at the time this proceeding commenced? --- Well, I am not sure that's right. I am not sure that is right.

Now, I would like you to go to 305 in this book. At the bottom of 304 and 305 there are set out what purport to be extracts from the transcript of the trial before Judge Neesham. Have you checked whether they are accurate?
--- No.

You don't - you are not suggesting to the court that these are not accurate extracts from the transcript, are you? --- They may be may not be. I really can't say. I don't assume for one second that what Mr Hoser says in his book is the truth.

But you thought it sufficient, in discharge of your duty, to charge him with contempt than to seek information from him checking whether what is in his book was true? --- Firstly, I didn't charge him with contempt, Your Honour. That is a

matter for the Attorney. The books stands alone as a

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publication. It is not my role to check its truth.

Now, would you go to 350, please. And there is the passage about two-thirds of the way down the page, about Mr Perry apparently chatting to jurors. You would know, I take it, from your reading of the book, that Mr Perry was the prosecutor in the perjury trial? --- No, I didn't know that.

And there is the reference to his criticism of the judge for not having prevented Perry's side, the prosecution, from talking to the jury. You can see that? --- I am sorry, which passage are you referring to?

Just above the heading "Not quietened of the 11th day". "Of course the Judge Neesham should have stopped this carrying on by Perry's side, but, no, he had been green lighting the whole lot"? --- Yes.

Now, if you would turn, please, to page 404 the book reprints what purports to be a facsimile of a statement by someone described as university Professor Kim Sawyer, in which, according to the book, Mr Sawyer says, refers - let me start that again. You can see that this is a comment about a case involving Mr Hoser, and I think the timing shows that it was the case in question. This statement, what is set out here as a statement of Mr Sawyer, expresses concern by two matters; and then in this context I want to draw your attention to number 2: apparent communications between the prosecutor Mr Perry and the jury. Mr Sawyer questions whether the settings of this court are in accordance with the principle that justice must be done and seen to be done.

Now, on my instructions, that statement was forwarded by Mr Sawyer to the then Attorney-General. Have you, in preparing this case for trial, seen a copy of a document

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in those terms? --- No, I haven't. I wasn't even aware of this statement until you referred it to me a moment ago.

So you hadn't - - -? --- I don't recall seeing it ever before. I don't recall reading it, in other words, Your Honour, in preparation for the case.

Now, you will see that, according to the author, Professor Sawyer lodged what is described as "a complaint, without

this author's knowledge at the time". So, taking that at face value - this is just underneath the, next to the photo - taking that as face value it is a statement by a person independent of Mr Hoser? --- I am sorry, can you repeat the question?. I am not quite following you.

Yes. It is in the small type, after the reference to "kangaroo court", Professor or Dr Sawyer is described as "another independent observer" and it is asserted that "he was one of over a dozen people who lodged formal written complaints without this author's knowledge at the time about the conduct of Judge Thomas Neesham in running his court in September 1995? --- Yes, that is what is said there, yes.

Now, if that was right - accepting that that is accurate, and that a dozen people, independent of the defendant, Mr Hoser, made written complaints about the conduct of a particular Judge, that would be a matter which your Minister and your department would want to investigate, wouldn't it? --- That is a matter for the Attorney. It is not for me to say.

I understand it is a political decision. But you accept in principle that if members of the public, a number of them, sitting in the public gallery of a court, are moved by what they see, to object to what they think is inadequate,

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unsatisfactory conduct in the courtroom, and if those complaints or some of them reached your department or the Minister, you, yourself, would regard that as a matter warranting some investigation.

MR GRAHAM: Your Honour, the question is based upon, as far as I can count, five assumptions or hypotheses; and we know it is not matters within the knowledge of the witness anyway. I submit the question is objectionable.

HIS HONOUR: How on earth is it relevant if the witness has said he wasn't aware of the proposition until you took him to a page in the book? You are now asking him to speculate on what he would have done had he been aware of it, and had he had it drawn to his attention - - -

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: As part of the Attorney-General's investigation? Well, it has got absolutely no relevance that I can see.

MR MAXWELL: If Your Honour please. I call on our learned friends to produce any document in the possession of the Attorney-General as applicant, being in the form of the

statement of Mr Sawyer, Dr Sawyer, there set out.

MR GRAHAM: I do not produce it, Your Honour. It may be possible to trace it, if it ever went to where my learned friend asserts it went. It is very interesting that the document is headed "Statement by K.R.Sawyer" but it doesn't have an addressee nominated.

HIS HONOUR: Well, you don't produce it?

MR GRAHAM: We don't produce it, Your Honour.

MR MAXWELL: Now, please go to 435.

HIS HONOUR: Lest there be any misunderstanding, the gallery, as appears to be the case - you well appreciate that if there is relevant material to be brought before the court,

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you are perfectly entitled to do so, and there are procedures whereby it can be done without having to be a call on the Crown.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: Yes. All right. You can subpoena it, in other words.

MR MAXWELL: Your Honour, we are well aware of that, and we, with respect, need to deal with these matters progressively.

HIS HONOUR: I understand; I am just simply - - -

MR MAXWELL: We had no idea until Mr Lee was in the box what the position was. The fact that this matter has not even been read is a matter about which submission will subsequently be made.

435 is where - I hope I have got this right - yes, at the foot of 435 is one of the sentences complained of in the originating motion. "It wasn't like he" - that is His Honour the Judge, "said himself he wasn't interested in the truth". Now, if you would go, please, to 304 to 5.

HIS HONOUR: 304.

MR MAXWELL: The bottom of 304. You can see there, can't you, that Mr Hoser sets out what purport to be extracts from the transcript in which His Honour says certain things about not enquiring into the truth of certain allegations. You can see that? --- Yes, I can.

And you would understand - I withdraw that. And would you then

go to 445, point 3, and in bold type is a statement attributed to His Honour, "A criminal trial is not a search for the truth". Now, assuming that to be an accurate extract from the transcript, you would regard that as a surprising statement for a County Court Judge to

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make, wouldn't you?

MR GRAHAM: Well, Your Honour, that is pure speculation whether the statement was made, and it would be seeking the opinion of the witness as to judicial conduct. And I hope that Your Honour doesn't allow - - -

MR MAXWELL: I won't press the question.

MR GRAHAM: Allow questions of that kind.

HIS HONOUR: It has gone one o'clock.

MR MAXWELL: Your Honour - - -

HIS HONOUR: Mr Maxwell, we will adjourn until 2:15.

MR MAXWELL: If Your Honour please.

<(THE WITNESS WITHDREW)

LUNCHEON ADJOURNMENT

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UPON RESUMING AT 2.15:

<STEPHEN JOSEPH LEE, recalled:

MR MAXWELL: Mr Lee, are you aware of press publicity on the 5th of October about a decision of this court with respect to the conduct of a County Court Judge? That is a rather bad question. Are you aware that on the 5th of October there was a report in The Age newspaper of a judgment of His Honour Justice Nathan criticising a Judge Pilgrim of the County Court?

HIS HONOUR: Is this relevant?

MR MAXWELL: Your Honour, I just want to tender the news clipping. This is relevant to a submission I want to make about the - - -

HIS HONOUR: Well, how could you tender the news clipping?

MR MAXWELL: If he read it, it would be again - - -

HIS HONOUR: But how is it relevant whether this witness has read that or hasn't read that from last week? What relevance has it got to the case?

MR MAXWELL: Well, Your Honour, it is a - - -

HIS HONOUR: If it is a relevant matter and there is a judgment, you can tender the judgment as part of your submissions; you can hand it up to me as part of your submissions.

MR MAXWELL: That is so, Your Honour, but, with respect, we will seek to make a separate point the publicity which attends critical judgment. That is why the newspaper report has a separate relevance apart from what His Honour, the judge says. But I accept if Your Honour won't permit the tender through this witness, I won't pursue that matter. Mr Lee, you will recall that amongst the matters complained of are some comments made about Magistrate

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Heffey, and in particular, at page 208 of the Victoria Police Corruption 2, there is a passage beginning "In siding with the police"? --- Yes.

You will recall, because my learned friend the Solicitor read the paragraph, that it was asserted by the author that what the Magistrate had said was an obvious lie, and that this was demonstrated by the multiple letters in Hampel's files - Hampel being, I think, the book reveals the prosecutor, Ms Hampel of Senior Counsel, and Heffey's own court records. Do I take it, from answers you have previously given, that you have not sought to investigate whether such letters exist, and if they do, whether they justify or otherwise the assertion made about the Magistrate's statement? You haven't sought to investigate those matters? --- No, not at all.

And to your knowledge, no-one in your department has said to investigate whether the matters on which the comments and criticisms are based are true or not? --- The comments at page 208?

Yes? --- To my knowledge, no.

And likewise, for the other matters which are put forward as the basis for the comments? --- To my knowledge, no.

Lastly, if you turn to the back cover, which is the picture of

Mr Adams, the Magistrate, as far as you are aware, Mr Adams has taken no defamation action in respect of having the allegation that he had been paid to fix a case? --- I have no knowledge of such a defamation case, Your Honour.

And I take it that not having read the Hoser Files, you would be unaware of the fact that the confession by Policeman Bingley is set out in the book, the Hoser Files? --- I have

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got no knowledge of that at all, Your Honour.

If Your Honour pleases, I have no further questions.

HIS HONOUR: Yes. Any re-examination?

MR GRAHAM: No, Your Honour.

HIS HONOUR: Thank you, Mr Lee. You may stand down? --- Your Honour, the books are - - -

Yes, I think they got back to counsel, thank you.

ASSOCIATE: These are tendered.

HIS HONOUR: All right.

MR GRAHAM: Your Honour it may not be necessary, but I would ask that Mr Lee be excused, if he wishes to absent himself from the court.

HIS HONOUR: Yes, he may be excused.

<(THE WITNESS WITHDREW)

MR MAXWELL: Your Honour, my learned friend having closed his case, I wish to make a no-case submission on behalf of the respondents.

HIS HONOUR: Yes.

MR MAXWELL: And Your Honour, as the first step in so doing, I will hand up to Your Honour and to our learned friends a copy of an outline and, to save time, an extract from the Australian Concise Oxford Dictionary to which reference is made in the outline.

HIS HONOUR: Thank you.

MR MAXWELL: I am in Your Honour's hands. I don't propose to read it in any literal way. I do propose to develop it by reference to the book of authorities which Your Honour

has. But if Your Honour wished time to read it, perhaps I could resume my seat and then - - -

HIS HONOUR: Well, you deal with it whichever way is convenient to you.

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MR MAXWELL: If Your Honour please. Well, Your Honour will see that in paragraphs 1 and 2 we seek to depict the essence of the case, the proposition that there is no case to answer, and it is put in two different ways. The first is that on the evidence which has been led, and on a proper understanding of the limits of the offence of scandalising the court, the publication of the books did not constitute that offence.

And to leap forward a little: the essential submission there is that the offence is and should be narrowly confined, and in particular that the common law courts have recognised the necessity for and the legitimacy of public criticism of courts. So that the definition of the offence itself accommodates that recognition of the importance, necessity, indeed public benefit, in public criticism of the system of justice. Paragraph 2, alternatively, if we fail to persuade Your Honour that the law of contempt did not, properly understood, apply to this conduct, then we would seek to call in aid the implied constitutional freedom of communication, that being the point raised in the section 78B notice, which is to say - and it is important how the question is asked - not that the existence of an offence of scandalising the court can't be justified consistently with the existence of the implied freedom. That, with respect, is not the question. The question is whether the common law offence of scandalising the court validly extends to these respondents in respect of these publications.

And it is not in our list of authorities, Your Honour, but that is the way the High Court recently

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formulated a different constitutional question, in asking whether provisions of the Migration Act validly applied to a Mr Taylor, who, it turned out, was a British subject and therefore wasn't an alien. So the question is, in its application to these persons or conduct of this kind, is it a valid law? And we say the answer to that question is no.

If I might then deal, Your Honour, with the offence of scandalising the court.

HIS HONOUR: You speak of it as the offence of scandalising the court. You mean contempt, which has in turn been described in the judgment as scandalising.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: Yes.

MR MAXWELL: We draw attention to the fact that, and it is consistent with what Your Honour has put to me, that in the originating motion it is said that each of my clients should be adjudged guilty of contempt of court, particular (a), the second publication scandalises the court.

HIS HONOUR: Sorry, you are looking at what, at the moment?

MR MAXWELL: Paragraph 3, sub-paragraph (a) of the originating motion, Your Honour. Paragraph 3 makes an allegation that my clients have committed contempt of court and, with respect, as Your Honour put to me, that is the generic offence. But the subspecies of contempt which is alleged against my clients is that which is referred to in the particulars in sub-paragraph (a). The second - - -

HIS HONOUR: I am with you. I see, yes.

MR MAXWELL: The second publication scandalises the court. So the applicant has invoked what is a recognised sub-category of contempt, and we take no issue with that.

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The submissions are directed to the ambit of that category, or its definition. It has not been made clear, but what is, the allegation we have to meet in sub-paragraph (a) is that the second publication, that is, this volume, scandalises the court. True it is, it goes on to say in which places and in relation to which judicial officers. But as we understand it, this is put in a global way. The like allegation in relation to the first publication is put somewhat differently. If Your Honour would go to the bottom of page 5 of the originating motion particulars of contempt, the second sentence: "The first publication contains material which scandalises the court", and there is reference to the only passage from that book which is complained of. Your Honour, before I go to the cases at footnote 1 about the narrowness of the offence, it might, since I have given Your Honour the extract from the Australian Concise Oxford Dictionary, be appropriate simply to mention that in passing, and we have set out in paragraph 4 the relevant part of the definition which Your Honour can see. It is a transitive verb, meaning "offend moral

feelings, sense of propriety, or ideas of etiquette". Now, it is important that I say to Your Honour that I have also looked at the Shorter Oxford English Dictionary, which is an older publication with an English setting, and it has other definitions of "scandalise". We deliberately put before Your Honour a volume from the same reputable stable, but one which is the Australian Concise Oxford, because in our respectful submission - and I haven't looked at the Macquarie Dictionary, Your Honour; I should have done that because that would provide the same

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relevant locational connection with this. And according to this - now, this is the 1987 edition - at least as at 1987 it was given one meaning only, and in my respectful submission Your Honour would, if it arose, find that that meaning accords with what the use of the phrase in ordinary parlance means. Someone would say "I am scandalised by this". You have "scandalised the members of polite society", or some phrase along those lines. You have generated a sense of outraged feelings.

HIS HONOUR: You don't see that as a term which derives from the statements of Judges at common law, so that the issue is, not you are treating the word as a dictionary definition, whereas it is a word which has arisen by, and been developed by, the common law by judges applying the term, is it not?

MR MAXWELL: Your Honour, I accept that unreservedly, and we will be coming to what the common law courts have said about it. But in our respectful submission, reference to the word in ordinary parlance highlights what a curious concept it is, which the common law is still utilising - that is not to say that the dictionary would enable Your Honour to disregard what the High Court has said, but rather, that when scandalising was identified, and there is a reference to its origin in one of the decisions I will take Your Honour to - but I think I am right in saying 18th Century - there is a very different view about the proprieties and the dignity of the members of the Bench.

We make the point in paragraph 5 that the law of contempt is not concerned with feelings at all. It is concerned that it is the province of the law of

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defamation, that is to say, any Judge or Magistrate who considered that his or her reputation had been traduced by

a publication can, like any other citizen, take proceedings for damages for that tort. Contempt is concerned with the protection of the administration of justice, and, Your Honour, it might be convenient at that point if I can take you to the decision of the High Court in Gallagher and Attorney-General, No 9, which was a proceeding and a conviction related to conduct in this sub-category.

Your Honour, did I say that is tab 9 in the folder?

HIS HONOUR: Yes.

MR MAXWELL: If Your Honour would go to 242.

HIS HONOUR: Excuse me one second. 242?

MR MAXWELL: 242, Your Honour. And Their Honours in the joint judgment set out what it was that Mr Gallagher had said, and Your Honour will see from the second part of the quote, that Mr Gallagher, the defendant, was asked about the decision of the Full Federal Court which had reversed an earlier decision, and Mr Gallagher says words to the effect, "I believe that by their actions in demonstrating walking off the job I believe that is the main reason for the court changing its mind".

Now, a wholly different case, and we take nothing from it as regards the facts or the circumstances. But the long paragraph on the right hand page is, in our respectful submission, an important passage. It describes, it refers to the category of imputations on courts or Judges which are calculated to bring the court into contempt or lower its authority, and references to Bell and Stewart, Fletcher ex parte Kische and Dunbabin,

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and each of those is in the volume Your Honour; some of them I will take Your Honour to, but as Your Honour will see there are several cases which discuss most of the main authorities, and that is perhaps a more convenient way to deal with them.

Your Honour will see at about point 3 of the page the judgment says: "The law endeavours to reconcile two principles, each of which is of cardinal importance but which in some circumstances appear to come into conflict. For example, one principle is that speech should be free so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed". And that addendum echoes similar remarks in earlier cases, that is to say, the "even if" addendum. "The other principle is that it is necessary for the purpose of maintaining public confidence in the administration of law, that there shall be some certain

and immediate method of repressing imputations upon courts of justice, which, if continued, are likely to impair their authority". Your Honour, I pause there to draw attention to the phrase "some certain and immediate method", and the phrase "which, if continued, are likely to impair their authority".

As Your Honour will see from the outline, we respectfully submit - and this is paragraph 15 at the bottom of page 3 of the outline - that the delay in the bringing of these proceedings bears eloquent testimony to the lack of any relevant impact on the administration of justice; and we will seek to make good the point in paragraph 9, at the top of that page, that the entire

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rationale for the availability and utilisation of the summary procedure is that the publication is such as to create an urgent need to protect the administration of justice; hence, the phrase "certain and immediate method of repressing imputations", because, if they continue, they will be likely to impair justice. Your Honour is entitled to assume that if these publications on any reasonable view had such a tendency to cause damage, then action would have been taken much earlier than this. And we rely, in relation to that, on the fact that no proceedings were ever taken in relation to the Hoser Files, being, as Mr Lee fairly agreed, a book of like character. And that is my words. That is the substance of what - I accept that. We will submit to Your Honour that it is a book of like character. I withdraw any reliance on Mr Lee's concession. It is true that he hadn't read it, and we will make other submissions about that.

Then, to read on in Gallagher, there is another - there is a further very important passage beginning after the reference to Dunbabin, Your Honour: "The authority of the law rests on public confidence, and it is important for the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges". Just pausing there, Your Honour, the vice is that the authority of the law will be undermined. Public confidence is not an end in itself, so Their Honours are saying, but a means to the end of maintaining the authority of the court. And Their Honours go on: "However, in many cases the good sense of the community will be a sufficient safeguard

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against the scandalous disparagement of a court or judge" -

and we draw attention to the strength of that statement, "scandalous disparagement of a court or judge" - "and the summary remedy of fine or imprisonment is applied only where the court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable". And we would draw attention again, Your Honour, to the notion of the "ordered and fearless administration of justice". If this branch of the law of contempt has a legitimate concern, it is confined to preventing conduct which will - and we say this towards the end of our submissions, in paragraph 25 - it is to protect the administration of justice against actual damage, that is to say, against conduct calculated to inhibit the ability of Judges and Magistrate's to decide cases fairly and free of external pressure; or (b), reduce the level of community obedience to orders of the court, which is a long-winded way of saying reduce the authority of the court.

And we submit, as we have put it in paragraph 10, page 3, the test of impairing or undermining public confidence in the administration of justice is unacceptably imprecise, subjective and uncertain. That is to say, it is objectionable as a matter of law for persons to be subject to a law of such imprecise definition, but we say, from the point of view of the court, it is a standard which is almost impossible of application, because we ask rhetorically: How does a judge, absent exceptional cases which could be imagined, determine whether there is any likelihood of "public confidence"

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being affected?

In any event, perhaps the more important point is that that is only a step along the way to the ultimate question: Is there danger of damage to the administration of justice such that the publication should be punishable? And we do draw Your Honour's attention to the fact that in the originating motion the Attorney-General seeks that Mr Hoser be imprisoned.

HIS HONOUR: Where are you referring to?

MR MAXWELL: Your Honour, it is in the, it is towards the end. Paragraph 5, Your Honour.

HIS HONOUR: So that says imprisonment or fine or both.

MR MAXWELL: That is so. And the first alternative is imprisonment. But it is apparently the view of the applicant that this is such a serious contempt that imprisonment and fine would be appropriate. That, from an applicant who has allowed the case to be brought forward

without, on the evidence, any investigation of whether the matters on which, in every instance these comments are based in the book, whether those matters are true or not. And without any investigation of prior publications by the same person, and in particular any consideration of whether any of the complaints made in those earlier publications have been shown by other events to be vindicated, we have already made reference to the Magistrate Meagher, and we will come to the Full Court decision in that regard.

If Your Honour would now go to paragraph 6 of the outline, because we are endeavouring to deal, still, with the scope of the offence. Indeed, it might be appropriate if I go back. I have not taken Your Honour to the House

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of Lords decision in Gilbert Ahnee, and that is to be found in tab 10 of the folder, Your Honour. Your Honour can see from the headnote that this was an article published in a newspaper in Mauritius alleging that the Chief Justice had manipulated the court process and had chosen the Judges who would hear it. The Director of Public Prosecutions, in Mauritius, had alleged that the article scandalised the Supreme Court and had therefore been a contempt. The matter came to the Privy Council, and the advice of the Privy Council was contained in the judgment of Lord Steyne, and, Your Honour, I think we can pass over much of the early discussion which concerns the existence of the power to punish for contempt in the law of Mauritius. Then, there is reference to a constitutional guarantee of freedom of expression. Your Honour will see at letter H on 1313 His Lordship says, and this is a reference to - - -

HIS HONOUR: Sorry, letter - - -

MR MAXWELL: H, on the right-hand side of the photocopy.

HIS HONOUR: At what page, did you say?

MR MAXWELL: 1313, Your Honour.

HIS HONOUR: 1313.

MR MAXWELL: 1313; I hope Your Honour has got the Appeal Cases.

HIS HONOUR: I have got the Appeal Cases - pages 300, they start from 294.

MR MAXWELL: Yes, Your Honour. I beg Your Honour's pardon. It is entirely my fault. I was working off our old Weekly Law Reports photocopy. Your Honour, it is 305.

HIS HONOUR: Yes. All right.

MR MAXWELL: The constitutional provision naturally is

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irrelevant, or the terms of it. But it is to be noted under letter G that the constitutional guarantee of freedom of expression is subject to qualification in respect of provision under any law for the purpose of maintaining the authority and independence of the court and shown to be reasonably justifiable in democratic society. As Your Honour will see in due course, that is, bears a close resemblance to what the High Court has said in Lange, about the limits on freedom. His Lordship goes on: "Their Lordships have concluded the offence of scandalising the court exists in ... (reads)... that leaves the question whether the offence is reasonably justifiable in a democratic society. In England such proceedings are rare, and none has been successfully brought for more than 60 years. But it is permissible to take into account that on a small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom. The need for the offence of scandalising the court on a small island is greater". Relevantly, of course, Your Honour, Australia, or Victoria for this purpose, would be regarded as on the United Kingdom side of the comparison, that is to say, this is not a tiny community. "Moreover, it must be borne in mind" - and we rely on this - "that the offence is narrowly defined. It does not extend to conduct of a judge unrelated to his performance on the Bench. It exists solely to protect the administration of justice rather than the feelings of judges", and that is a formulation which Your Honour will see in the Australian cases, the reference to a 'real risk'. "The field of application of the offence" - and this

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is to make good our earlier point, Your Honour - "is also narrowed by need in a democratic society ... (reads)... would be in the public interest". On this point, Their Lordships prefer the view of the Australian courts that such conduct is not necessarily an offence. "Given the narrow scope of the offence of scandalising the court, Their Lordships are satisfied that the constitutional criterion that must be necessary in a democratic society is, in principle, made out".
And Your Honour, I needn't dwell on that, save to say

that applying that analysis to this case, Their Lordships have said, well the field of the offence itself is narrowed by the necessity for public discussion of these matters. That means they have concluded that is a narrowly defined offence, so "narrowly defined" does not offend the constitutional freedom which the constitution of Mauritius there guaranteed. In the present case, if Your Honour reached that view it would be unnecessary to go to the Lange point.

If Your Honour would then go to Bell and Stewart, which is at tab 5. Your Honour, the relevant part of the discussion, there had been convictions of a printer and publisher of a newspaper. There is a discussion in the joint judgment of Mr Justice Isaacs and Mr Justice Rich at 428 at the bottom of the page. And starting at about point 8, there is reference to McLeod and St Alban, which was a decision of the Privy Council which declared, as at 1899, that the offence was obsolete.

Then Their Honours go on to talk about the only justification for the summary process being to protect the public by guarding the administration of justice from any

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obstruction or interference which might affect its impurity, its impartiality or its effectiveness - again, focusing on the point that we wish to focus on, which is: will this prevent the legal system operating in the way in which it is meant to operate; that is with Judges and Magistrates deciding cases according to law.

In our respectful submission publications of this kind, which draw attention to what the author alleges are aspects of impartiality, is not calculated to produce the result that Judges won't try cases in accordance with law. It is calculated to produce precisely the opposite result. This is, to use a word in common parlance, accountability of the justice system in the public domain. The fact that it is trenchantly expressed, or a particular point might be said to be wrong headed, doesn't weaken that point at all, in our respectful submission. What would be the vice would be if those in these important positions of public responsibility were immune from this kind of criticism, because that, in our respectful submission, would conduce to the kind of - I withdraw that. We simply make the positive point that the existence of such criticism, including by those who have been the subject of court processes, is conducive to courts and Magistrates continuing to do the job on which the community depends. And we will draw attention in due course to what Mr Hoser says in these books about the objective being not to bring down the system of justice, but to improve it.

We have footnoted that at number 11. It might actually be convenient to take Your Honour to it now since

I have mentioned it. Footnote 11, it is actually a

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footnote to paragraph 17(f) of the outline.

HIS HONOUR: Yes, I have got it.

MR MAXWELL: The reference is to page 18 of the book.

HIS HONOUR: This is which one?

MR MAXWELL: Number 2, Your Honour.

HIS HONOUR: Yes. Whereabouts?

MR MAXWELL: In the paragraph beginning "But if there are any apologies to be made", "I will make a form of one here, that is to all the honest police and government officials whose reputations have been sullied by their corrupt colleagues". And then, leaving out some sentences, "In other words, this book is not an attack on police or the establishment per se. In fact I am the greatest supporter of both you will ever find. I seek to highlight the corruption and the wrongs as the first step towards rectifying them and to ultimately strengthen public faith and trust in the very organisations and institutions detailed in this and previous books". He then refers to the previous books that Your Honour has now in evidence.

HIS HONOUR: Now, that is a passage in a document which has been tendered as evidence in the case. But how does it establish the truth of that assertion, that is, the truth that that is what he believes?

MR MAXWELL: Well, in our respectful submission, the tendency of the publication, as we say later in the submission, must be read in its entirety, and if the author declares that he is well intentioned towards the system of justice and the criminal justice system involving the police, then that is, in our submission, of enormous significance in the judgment the court would make about the tendency of

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the book.

HIS HONOUR: But do I have evidence before me that your client expressly adopts that statement as the truth?

MR MAXWELL: You don't, Your Honour, no. But Your Honour, we invite Your Honour to infer that it is, as a matter of overwhelming inference, in our respectful submission, from the history of writing books on these subjects, which is now in evidence.

It is accepted that he wrote those books, from the fact that this is done in the form of a book rather than a pamphlet, that is to say, the inference is that what is said by the author - let me put that differently: his conduct is consistent with what he says about himself, that is, the conduct alleged against him, that he has sought to have this book, he has had this book published and printed and distributed because he is serious-minded with respect to the dissemination of these matters which he says are of concern to him. I can't put it any higher than that.

HIS HONOUR: Yes. Well, you have made this as a no-case submission, which means that you have not called evidence.

MR MAXWELL: That is so.

HIS HONOUR: So you are dependent on the state of the evidence as it is before you which, as a no-case submission, has to be taken at its highest against you.

MR MAXWELL: Yes, Your Honour. I accept that. But we put the proposition which is in paragraph 20, that the law of contempt will only be attracted where it is shown beyond reasonable doubt that the criticisms were made otherwise than in good faith. We say that it is for the prosecution to prove a want of good faith, not for the defence

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positively to prove the presence of it.

HIS HONOUR: Well, isn't the test, given that it is a no-case submission, not that? The test which you have to deal with for the no-case submission is whether, on the evidence which has been produced in the case, it is open to conclude that the criticisms were made otherwise than in good faith. Or it is open to conclude that they constitute contempt? I mean, that is the height of the bar, isn't it, for a no-case submission?

MR MAXWELL: Yes, Your Honour, I accept that. And in our respectful submission it is not open to Your Honour to conclude, on the material before you, that these criticisms were made otherwise than in good faith and honestly; that is to say, the views expressed were held by the author at the time he expressed them. And that is why we have been at pains to establish the place that these books have in the sequence of writings by this person.

It is also important in our respectful submission, that the prosecution have relied on my client as a witness of truth in support of their own case. They have put in his affidavit, and they rely on his oath. Indeed, they are put in an affidavit referring to the fact that - "Although I can't remember it", says the solicitor, "I always ask them to sign it in my presence". They want to make the point that this was a serious document; Your Honour should infer that it was sworn by him, as the piece of paper suggests.

HIS HONOUR: But Mr Maxwell, that is precisely the same basis on which in every prosecution in the country, every day of the week, prosecutors tender documents as admissions against interest which contain a whole range of material,

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where the prosecution doesn't accept that they are statements of truth but seek to pick and choose those on which they do rely as being true, simply because it can be used against the interests of the person who made it.

MR MAXWELL: I accept that, with respect. But we, nevertheless, submit that when the reliance on the reliability of Mr Hoser's evidence in the other proceeding is part of the prosecution's case, and when the books speak for themselves, as these do, about why is he doing what he is doing and has been doing it for a number of years, then it is for the prosecution to show that these books aren't what they appear to be, in our respectful submission.

HIS HONOUR: In what sense?

MR MAXWELL: Well, his good faith, in our respectful submission, is manifest on the face of the books. The books are in evidence. They are authored by him, as has been admitted.

HIS HONOUR: But can one not commit a contempt of court in good faith - - -

MR MAXWELL: Your Honour - - -

HIS HONOUR: Believing the truth of what you are saying but, nonetheless, it constituting scandalising a court?

MR MAXWELL: Well, Your Honour, that will require some reference to authority.

HIS HONOUR: That is why I am putting it.

MR MAXWELL: The point is that if you are in the field of robust criticism of the courts, then good faith is the characteristic which attends the description of that

freedom to express, as a matter of the law of contempt.
And - - -

HIS HONOUR: But if someone was to make a statement that Judge so-and-so is in the take of criminals and receives \$10,000

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a week, and absolutely believes that to be so, then are you saying that that absolute belief on his part that it is so would mean that it could not constitute scandalising the court?

MR MAXWELL: No, Your Honour, I don't go that far. In my respectful submission I don't need to go that far, because in the case in question, as I am submitting to Your Honour, we have what is ex facie behaviour in good faith. And given all the other characteristics of this publication that we refer to in paragraph 17, we respectfully submit that it is exactly the kind of criticism which the courts have time and again said is permissible and in the public interest, and if Your Honour accepts that it is on its face in good faith, it is an expression of sincerely held opinions by the author - and we rely, as I say, on the sequence of publications to show his consistency and seriousness of purpose - then Your Honour would accept that it is comfortably within, or comfortably outside the boundary of the offence; that it was exactly the kind of criticism, albeit that it is making serious imputations against judicial officers. But as we have seen from Ahnee, that is no longer per se an offence. The question remains whether - and, Your Honour, we will take you to a Family Court decision which makes that point very well - the question is whether there is, whether it is criticism of the kind which the system of justice itself depends on.
Your Honour, in Bell and Stewart - - -

HIS HONOUR: In, sorry, who?

MR MAXWELL: Bell and Stewart, which I hope Your Honour has at tab 5.

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HIS HONOUR: Yes.

MR MAXWELL: I was just referring to the bottom of 428, and to the phrase "purity, its impartiality or effectiveness of the administration of justice". "It is not the personal feelings of the Judge that are to be regarded, nor is it

even the dignity of the court that is a proper subject of solicitude; it is the public welfare only, and that is to be sought in maintaining the proper administration of justice. Modern conditions have - as the Privy Council stated in the case referred to" - that is McLeod - "rendered obsolete in England the summary procedure of the court for that species of contempt which consists in 'scandalising' it. We do not say that occasions may not occur where even in that case the jurisdiction may properly be exercised, because, as the same tribunal said in the Indian case" there mentioned, "it is essential to the proper administration of justice that unwarrantable attacks should not be made with impugntiy upon Judges in their public capacity". "But", Their Honours said, "the occasions would be exceptional". And we respectfully submit that is how this subspecies should be recognised - as exceptional. "And that is so", Their Honours say, "because usually that species of contempt - for it is a contempt" - as Your Honour pointed out to me - "is primarily abuse only from which the good sense of the community is ordinarily a sufficient safeguard, and, such contempt not touching any pending proceeding, its effect on the administration of justice must generally be remote".

And I didn't dwell on the point earlier, but do now, Your Honour, that Your Honour is entitled to take the

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view, in our respectful submission, that the good sense of the community is a sufficient safeguard to the extent that this publication, these books, would otherwise be regarded as unwarrantable attacks on Judges or Magistrates: and in that sense, the presentation and character of the book is itself important.

This is a campaigning book. It is plainly an amateur job. The reader only has to open it to see that it is self-published. This is not written by an esteemed academic of national or international standing. This is written by somebody who is, by profession, what I think is called a herpetologist, that is someone who is expert in reptiles, but who is, as an examination of the Hoser Files and these two books shows, someone who has had his own encounters with the criminal justice system and has serious concerns about the way in which those proceedings, and proceedings in which others to his knowledge were concerned.

So that when the sensible member of the public, to whom Their Honours are referring here, picks up this book and reads this person as saying, "Well, in my case the Judge was backing the prosecution", the reader is going, as a matter of good sense say, "Well, after all, he was the defendant. You would expect him to say that, wouldn't you? And if it is right that he was unrepresented, well,

you can understand him feeling a bit aggrieved about the way things went. And if the Judge did say, 'We are not concerned with the true truth here', then that is something that is worth commenting on. But am I going to not obey the next court order that is imposed on me?" Why would it be thought that this book would have that effect

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on the reader? Or if that would have that effect, then why would it not have the same effect when The Age on the 5th of October reports "Rebuke for Judge over Conduct"?

MR GRAHAM: I object to my learned friend's address on that. That article is not in evidence, Your Honour. Your Honour already ruled so.

MR MAXWELL: Your Honour, that is a very technical point.

HIS HONOUR: Well, it is hardly technical. It is not in evidence, is it?

MR MAXWELL: Well, it is not in evidence. That is so, but - I will take Your Honour to the judgment of Justice Nathan, but Your Honour will know, without my needing to put in what is a matter of public record, that there are, and we cite a number of them, instances of stringent criticism of Judges by appellate courts; and Your Honour would also know that those judgments quite often receive publicity. The fact that in the recent decision of Gilfillan, which is in Your Honour's book, Justice Nathan was trenchantly critical of Judge Pilgrim - - -

HIS HONOUR: I am not sure what the relevance of that is, though. What is the point you are seeking to make by virtue of the fact that an appellate judge is being critical of another judge?

MR MAXWELL: Your Honour we make the point in paragraphs 11 and 12 of the outline. And Your Honour will see in footnote 9 Gilfillan is one of the cases we cite. And of course, the point of the submission is in 13: There is nothing to suggest that criticism of this kind damages the administration of justice, in the sense of impairing the ability of Judges and Magistrates to carry out their duties in accordance with law.

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HIS HONOUR: Well, that is the administration of justice, isn't it? That is the point.

MR MAXWELL: Yes, Your Honour, it is. We sought only to put in what, as Your Honour puts to me, is merely redundant to make the point again, that we are not concerned with confidence. We are concerned with whether in fact it will prevent Judges and Magistrates or is calculated to prevent them carrying out their duties such that the law will not operate as this community expects it to; that is, impartially and on the merits of a particular case. At all events, to the extent necessary, I will come back to those authorities, Your Honour. In our respectful submission, as set out in paragraph 7, the offence is or should be confined to those or this sub-category of scandalising, confined to those cases where the publication has a clear tendency to damage the administration of justice in the way described, and where, as a result, immediate protection is concerned, is required. Would Your Honour kindly go to the Fairfax decision, which is in tab 13. Your Honour, the passage in question is at 370. And we draw attention to the very long paragraph beginning "We have expressed our opinion ...".

HIS HONOUR: Yes.

MR MAXWELL: And Their Honours are referring to the scope of the summary jurisdiction to punish for contempt, and the opinion that it has a wide scope. "Its practical justification", Their Honours go on, "lies in the fact that in general the undoubted possible resource to indictment or criminal information is too dilatory and too inconvenient to afford any satisfactory remedy. Because

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it is founded on the elementary necessities of justice, there must be no hesitation to exercise it, even to the point of great severity, whenever any act is done which is really calculated to embarrass the normal administration of justice".

Again, so as not to come back to it, Your Honour will note that the summary jurisdiction which is invoked in this case is justified because any other means would be too slow. The damage would be done if you did it on, by the time you got round to trying on indictment.

Then there is reference to the trial by newspaper. Then exactly in the middle of the page, the sentence beginning towards the right-hand side: "On the other hand because of its exceptional nature" - the same phrase Your Honour saw in Bell and Stewart - "this summary jurisdiction has always been regarded as one which is to be exercised with great caution, and we rely on that, and this particular class of case to be exercised only if it is made quite clear to the court that the matter published

has, as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case".

HIS HONOUR: But you have missed the sentence prior to that which was "that there should be no hesitation to exercise it, even to the point of great severity". That - -

MR MAXWELL: Your Honour, I did read that.

HIS HONOUR: That appears to conflict with the proposition that you were putting before, that the High Court was suggesting that this was, or I think it was the Privy Council, was suggesting that this was a remedy which should be exercised very rarely. That would tend to

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suggest, at that stage - this is a pretty early case - that would tend to suggest at that stage they weren't adopting that approach in the High Court.

MR MAXWELL: Well, with respect, no. If I might say, sir, I did read that, because - - -

HIS HONOUR: I am sorry,, I didn't hear you, if you did so.

MR MAXWELL: I certainly accept that it is important, and it is a strong statement. "No hesitation to exercise it even to the point of great severity whenever any act is done which is really calculated to embarrass the normal administration of justice". But we balance against that, the "on the other hand" section, which does, even in 1953, 55, Your Honour, identify this as an exceptional jurisdiction, the summary jurisdiction, as one to be exercised with great caution, and only if it is made clear that the matter published has, as a matter practical reality, a tendency to interfere with the due course of justice it says in a particular case - though that is a comment - or those words apply to a particular species where there are pending proceedings, and we don't suggest that that is a necessary element of the sub-category we are concerned with here. But in our respectful submission there is a clear thread from Bell and Stewart, through Fairfax, that this is an exceptional step to take, and the court would take it when the nature and tendency of the publication is such that something has got to be done quickly to prevent the damage which will otherwise flow to the system of justice.

Now, Brett's case, which is in the folder at tab 24, is one where, I think I am right in saying, the publication - there was a very short time between the date

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of the publication and the date of trial. And Your Honour will see that at the start of Mr Justice O'Bryan's judgment there is a reference to a matter published in the Guardian newspaper of the 27th of January 1950. And this matter was on on the 3rd of March, so just a little over a month later. And we build on that, in paragraph 8, by seeking to do what Mr Gallagher's counsel failed to do in that case, - I withdraw that.

What we seek to do in paragraph 8 is to call in aid as a way of capturing the vice to which this subspecies of contempt is properly directed, to call in aid what the United States Supreme Court has defined as being the test for a contemptuous publication, that is, whether it creates a clear and present danger of high imminence. And we have given Your Honour reference to Pennekamp. That, we were told last evening, wasn't able to be copied. We will make a copy available to Your Honour as soon as it is available.

It is important to point out that Mr Gallagher, in Gallagher and the Attorney-General, sought to have the High Court apply a clear and present danger test, and that was rejected; and that is at the foot of the page that I had taken Your Honour to in the Gallagher judgment. Your Honour, we move then to paragraph 9, and I have made the point and drawn attention to a couple of references already which refer to the need for a timely application because of the need to protect the administration of justice. If I might take Your Honour to Attorney-General and Mundy, which is in tab 3. Your Honour, this is a decision of Mr Justice Hope. The particular passage relied on in relation to urgency of the

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matter is at 912 where His Honour says at - does Your Honour have that?

HIS HONOUR: Yes.

MR MAXWELL: His Honour says at letter A: "The reported decisions show that such a charge should be dealt with summarily, only where it is established clearly and beyond reasonable doubt and where the case can be described as exceptional. The justification for the summary disposition of contempt charges has been said to be the need to remove at once the immediate obstruction to the administration of justice". While Your Honour has that open, if I might draw Your Honour's attention to the very helpful discussion which His Honour begins at 906; and I won't take the time by reading this at any great length,

Your Honour. One of its virtues is that it sets out a number of important passages from a number of the key decisions.

Your Honour will see that at 906 D His Honour begins with the reference to McLeod and the need to balance against the interests of the administration of justice the right of free speech and what His Honour says is the right to criticise and indeed the desirability of criticism of public institutions.

And Your Honour, I just draw Your Honour's attention to the extracts from the various cases on 906 and 7. Then at the top of 908, His Honour says - and we have quoted this in paragraphs 18 and 19 - - -

HIS HONOUR: Yes.

MR MAXWELL: I am sorry, Your Honour. The top of 908, at letter A, His Honour says: "The slightest reflection shows how essential it is in the public interest, and particularly

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in the interests of administration of justice, that members of the public should have the right publicly to criticise the public acts of judges and courts". This is particularly so where a judge has made some improper or unjustified statement, as was pointed out in Nicholls, and that is a case in Your Honour's volume. "But criticism does not become contempt because it is wrong-headed, or based on the mistaken view of the facts or of the law. Nor, in my opinion, need it be respectfully courteous or coolly unemotional. There is no more reason why the acts of courts should not be trenchantly criticised than the action of other public institutions, including Parliaments. The truth is of course that public institutions in a free society must stand upon their own merits; they cannot be propped up if their conduct does not command respect of confidence; If their conduct justifies the respect and confidence of the community, they do not need the protection of special rules to shield them from criticism. Indeed informed criticism, whether from a legal or social or any other relevant point of view, would be of the greatest assistance to them in the performance of their functions".

But His Honour goes on to point out, and we accept, that the law has imposed qualifications on the right of criticism, and they are qualifications that relate to the effective performance by courts and Judges of their role in the administration of justice. "Unfortunately, these qualifications are ones the boundaries of which are difficult to define with precision, and indeed in respect of which courts have, from time to time, had different attitudes". Then there are references to other relevant

authorities through 908 and 909.

Your Honour, we then go to letter F on 910. There is a reference just above that to the passage from Nicholls, which the Privy Council referred to with approval in Ahnee about it being in the public benefit if a judge made a public utterance of such a character as to be likely to impair the confidence of the public.

Now, the book quotes what it says is a statement of Judge Neesham, that the criminal law is not concerned with establishing truth. That is a statement of such a character as, on one view, to be likely to impair the confidence of the public.

HIS HONOUR: That statement is one made in criminal cases, in my experience, throughout the country, almost universally, for the purpose of explaining to a jury, in favour of the accused person, that they should not avoid finding a person not guilty on the basis that they have a reasonable doubt, because they feel that will leave us without a solution as to who did commit the crime if we decided on the basis of a reasonable doubt. I mean, that is the basis on which that comment has been made in court cases for decades.

MR MAXWELL: Your Honour, I accept the force of that. But what is important about Your Honour's response is that that is, with respect, an appreciation of that remark based on Your Honour's experience and expertise.

HIS HONOUR: Yes. I am not saying a person hearing that. I might say, I don't use it myself; not because it is inappropriate, but because it is precisely right - - -

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: In terms of what the criminal law is. The only

reason I don't use it is for fear that someone might misunderstand what it was I was saying.

MR MAXWELL: Well, Your Honour, that is the point I sought to make.

HIS HONOUR: There is a very large gap between that and what you are putting, and you have emphasised that statement several times as being a critical illustration of the correctness or the openness for a comment to be made about

corruption. I mean, that is - it is a pretty strong leap to go from a statement which is made in just about every criminal trial for the purposes which I have described and which may be capable of being misunderstood, to then use it as a linchpin for an argument that that particular statement somehow provides a basis for an assertion that there was valid criticism on grounds of corruption?

MR MAXWELL: Well, Your Honour - - -

HIS HONOUR: There is a big difference between misunderstanding in those circumstances and demonstration of corruption.

MR MAXWELL: Well, yes, Your Honour. But I will be careful to relate that statement only to the comment complained of, which goes to the author's perception of the Judge not being concerned about finding the truth. That is a - that statement is much more closely connected with the kind of misunderstanding to which Your Honour has referred.

HIS HONOUR: I mean, that might be a demonstration of what is a totally muddled or wrong-headed interpretation of something which is said in the court - - -

MR MAXWELL: Yes, Your Honour. Just so - - -

HIS HONOUR: Which may therefore flow, have absolutely no consequence, be entirely understandable how it might arise. The issue, it seems to me, is whether that, as an

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illustration of a point which is being made, leads to a statement which does scandalise the court; namely, that here is a person who is corrupt. And so the task, it seems to me, that you have got to address, if you are using that as the illustration, is that it is not merely a case of a misconception or a misunderstanding which someone might have made from hearing a remark which, to lawyers, has that particular context, and it has for decades if not a lot longer than that - - -

MR MAXWELL: Yes.

HIS HONOUR: To that potential for misunderstanding; therefore, converting what might otherwise be a statement which is, on its face, scandalising under any of these authorities, into no longer scandalising because it is a misunderstanding.

MR MAXWELL: Well, I accept, with respect, of course the force of that. But the passage which is complained of, which just for reference is Roman numeral xi, page 435, there appear to be two criticisms, and the word "corruption" is

not mentioned anywhere. The first is the failure of the judge to step in to stop what are said to be the prosecutor's lies. And then there is reference to the judge preventing the defendant from introducing a particular letter, and the passage concludes "but like he said himself, he wasn't interested in the truth". Now, that is said to be a comment which scandalises. In our respectful submission, we put no more store on that sentence than that it is - it typifies the fact that when comments are made in this book they are not made in thin air. On the contrary: each of them is made on a basis which is set out in the book, and that is why, in

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our respectful submission, it behoves a prosecutor seeking to say this is a scandal to make, to ascertain whether there was a proper foundation or not. But in any event - - -

HIS HONOUR: Well, the particular passage you referred to earlier was at 445.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: The statement "Criminal trials are not a search for truth", I understand the basis on which you are putting it. I am just pointing out that you placed a lot of emphasis on that particular sentence which seems to me to be an odd one to pick.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: Because it is so patently open - - -

MR MAXWELL: For the judge to say - - -

HIS HONOUR: Of the explanation, that it is a misunderstanding of what is being said.

MR MAXWELL: Yes, Your Honour. Let me clarify my client's position. We don't regard that as anything more than an example of a comment which, on the face of the book, was made by the judge, in respect of which an unrepresented defendant non-lawyer could draw the erroneous conclusion, the wrong-headed conclusion, that the judge wasn't concerned with finding the truth in that proceeding. Now, that would, in our respectful submission - so we don't say that gives the key to understanding the whole book, or all of the passages. But rather, that - in fact I alluded to it simply in order to ascertain whether there had been any checking as to whether this was what was said; and there wasn't. It is, however, a good example of the kind of thing which is, in our submission, well

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outside the category of contempt, which is wrong-headed criticism of a judge based on something which was said. And Your Honour has pointed out the way in which, or the risk of a phrase like that, which has a meaning to those who understand the language and procedure of the courts. There is a risk of that being misunderstood by lay people. That is why this is just the kind of thing which we say falls into that area which is accepted as being permissible. Someone says "I was in court and being tried, and a judge said the criminal law is not concerned with the truth". Your Honour has explained what that meant, so it was wrong as a matter of law to conclude that that meant what it literally sounded like meaning, but well within the permission which the courts have granted for criticism of that kind; and in that sense it is a useful example, but only one, of how these writings are to be characterised and understood by Your Honour. Back to Mundy, if Your Honour please. At letter F, on 910. "Furthermore", His Honour says, "it does not necessarily amount to a contempt of court to claim that a court or judge had been influenced or too much influenced, whether consciously or unconsciously, by some particular consideration in respect of a matter which has been determined. Such criticism is frequently made in academic journals and books, and the right cannot not be limited to academics; and although the use of particular language may reduce what might otherwise be criticism to mere scurrility, the use of strong language will not convert permissible criticism into contempt, unless perhaps it is so wild and violent or outrageous as to be liable in a real sense to affect the administration of justice".

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To take Your Honour's example, in our respectful submission, those comments made by this author in that book would not, in a real sense, affect the admission of justice; that is to say, have any tendency to the result that a Judge or Magistrate don't try cases in accordance with law.

HIS HONOUR: It is not being alleged that they are. They are not the statements which are alleged against you.

MR MAXWELL: With respect - - -

HIS HONOUR: "A criminal trial is not a search for the truth"; is that one of the passages?

MR MAXWELL: No, Your Honour, it is not. But the comment which I have sought to connect with that, that is the assertion that His Honour was not concerned with the truth, is in our respectful submission, based on that, as well as on the reference, the other page I took Your Honour to.

HIS HONOUR: Well, is that one of the ones - I mean, I am not as familiar with them as you are, but is that one of the passages that is relied on by the Crown?

MR MAXWELL: Yes, Your Honour. Your Honour has the originating motion.

HIS HONOUR: Yes, which one is it?

MR MAXWELL: It is (xi), page 3 page.

HIS HONOUR: Yes, the bottom of Roman (xi).

MR MAXWELL: (xi), Your Honour, yes. That is said to be - that is a discrete section, the previous one being 367, where there are two distinct points about what the defendant thought was the misbehaviour of the prosecutor not stopped by the judge; and then secondly, a comment about him being, that is Mr Hoser, being prevented from putting in a letter, and he says, like he said himself, "that is the

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Judge. He wasn't interested in the truth". Now, that is said to be calculated to damage the administration of justice.

HIS HONOUR: Well, one of the four paragraphs, presumably. They have got four paragraphs cited there.

MR MAXWELL: I accept that, Your Honour, yes. And the references in the book elsewhere to the attitude to truth, one was at 445, as Your Honour has put to me, and the other is at 304 to 5, which is an exchange apparently early in the proceeding. Then at the foot of 910, in Mundy, Your Honour, His Honour goes on: "On the other hand, it may and generally will constitute contempt to make unjustified allegations that a judge has been affected by some personal bias against a party, or has acted mala fide, or has failed to act with the impartiality required of the judicial office. However, the point at which other forms of criticism pass into the area of contempt is a matter in respect of which the opinions can differ, and differ quite strongly". Your Honour, in footnote 7, there is a reference to Maslen. I won't take Your Honour to it, but the relevant

passage is at 610 to 611 in the joint judgment. That is under tab 21.

HIS HONOUR: Right. Thank you.

MR MAXWELL: Now, Your Honour, if I might go to paragraph 12 of the outline, and if I could take Your Honour to Gilfillan, which is at tab 11, Your Honour. Your Honour, unfortunately, the print which Your Honour has is not of the final judgment, which was September, October 2001, but of a prior appearance where His Honour apparently thought

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it necessary, for obvious reasons, to have the allegations of bias drawn to the attention of the judge in question.

HIS HONOUR: I see, yes. So it went off from there to another hearing.

MR MAXWELL: And it came back, Your Honour, and we have the unreported decision - I am not sure whether we have got a spare copy for Your Honour - but it came back before His Honour on the 10th of September. Its number is 2001 VSC 360.

HIS HONOUR: Is it that one, or is that - I see. This was 569; right?

MR MAXWELL: 569.

HIS HONOUR: I am with you. 360.

MR MAXWELL: 360 of 2001, Your Honour. At paragraph 21 His Honour said this about the judge: "The facts reveal that the Judge displayed bias. He became an investigator and a prosecutor for the Crown. As a result of his own researches and enquiries he made good the defect which he had indicated existed in the evidence. He therefore deprived the defendant of the acquittal to which he might have been entitled". And His Honour went on to say at paragraph 26, "This is a matter of prejudgment which is not merely procedurally unfair but is grossly offensive to the rules requiring a fair and unbiased adjudication. The matter of whether the case should be re-opened or otherwise had simply been prejudged. It follows from all that that the judge displayed both ostensible and actual bias against the interests of the defendant". Your Honour, we will copy that and provide that to Your Honour, or Your Honour's Associate, later this afternoon.

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Now, Your Honour, what is said by Mr Hoser is naturally of a different character from what is said by an appellate judge in the course of his functions. But as Your Honour has heard from what I have read, and as Your Honour will see from reading the judgment in full, it is very severe criticism of a judge of the County Court for failing to perform his judicial duty.

The functioning of our system, in our respectful submission, depends on that kind of criticism, because it is calculated to improve, in the future, the administration of justice. Now, Your Honour will assume, rightly, that the Court of Appeal or a judge on judicial review is more likely to apprehend correctly whether what might have been thought to be bias was in truth that when the circumstances are properly analysed and the legal context in which the judge or Magistrate was functioning is properly understood.

But as was mentioned in Mundy and elsewhere, criticism of that trenchant kind can't be just the province of the well-informed external commentator or appeal judge. There is a proper place, in our respectful submission, for comment by someone who has been a participant in the system, who feels aggrieved about the way he was treated, and goes to the trouble of publishing a detailed critique, not consisting of a series of bald assertions, but consisting of a detailed recounting of the events from his perspective and the making of the kinds of criticisms to which reference has already been had.

HIS HONOUR: Well, he was going beyond saying he was biased, wasn't he? He expressly said he was corrupt and dishonest.

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MR MAXWELL: If Your Honour will just excuse me?

HIS HONOUR: I am looking at (iii) - - -

MR MAXWELL: Yes, Your Honour. Yes. Your Honour.

HIS HONOUR: And the classic case of a better judge improperly helping the prosecution witness. That sort of matter. It is going well beyond the sort of criticism of bias, isn't it? It is going definitely to a corrupt purpose.

MR MAXWELL: Well, in our respectful submission, Your Honour, it is not - it is only a difference in degree, from the criticisms made of the County Court Judge in Gilfillan; because it is extravagant or extreme language; but what is said is there is an alliance between judge and

prosecution. That is exactly what, or effectively the same, as what has been said in the Gilfillan case. The County Court Judge assumed the role of prosecutor and investigator; and that is corrupt in the sense in which Mr Hoser uses the word - and I want to take Your Honour to that now. That is corrupt in the sense that it is contrary to the judicial oath for any judicial officer to assume the role of prosecutor. That is not what they are there for. They are sworn to uphold the law without fear or favour.

Your Honour, the definition of "corruption" is to be found at page 3 - no, perhaps, in the second one which we have been referring to, at page 17. It is a very broad definition.

HIS HONOUR: Sorry, where are you referring to?

MR MAXWELL: Page 17, under the heading "Hiding the Truth". Does Your Honour see in the box there, Mr Hoser says "An act is corrupt if it includes any of the following - an illegal, immoral, inconsistent, unethical or dishonest

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action".

At the other end of the definitional spectrum by way of example, Your Honour, "corruption" might be defined as narrowly as someone who is being paid to act otherwise than in accordance with his or her duty. It is plain that that is not what Mr Hoser is using the word to mean, and that inconsistency would fall within his expanded definition of it.

HIS HONOUR: Well, the test, at least for purposes of a no-case submission, would be whether viewed from the perspective of the public reading the words, it had the capability of imparting what is regarded on the authorities as being the impermissible contempt so far as a court is concerned. You would agree with that?

MR MAXWELL: Yes, I would.

HIS HONOUR: Yes.

MR MAXWELL: Your Honour, before I move on to paragraphs 16 and 17, I want to draw Your Honour's attention to a case of which Your Honour is no doubt aware, that of Lewis and Ogden in the High Court, which in our submission stands for the proposition that imputing a want of partiality to a judge, even in that judges's court and in front of the jury, doesn't amount to the offence. Your Honour, that is in tab 19.

HIS HONOUR: Do you put it that highly, that it cannot be? Or

do you put it that - - -

MR MAXWELL: No, Your Honour.

HIS HONOUR: That in the circumstances dealt with in that case, Their Honours held - - -

MR MAXWELL: What I should have said was, "does not necessarily".

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HIS HONOUR: Yes.

MR MAXWELL: Yes, Your Honour. I don't mean "cannot". But it is an important case because on one view of it, it was quite an extreme imputation of want of impartiality as the High Court noted; and yet on balance, and maybe only by a whisker, Their Honours said, no, it doesn't insult. Your Honour, this is in tab 19. Your Honour, the - - -

HIS HONOUR: Whereabouts on your outline, are you? I might have just lost my place, I think.

MR MAXWELL: No, Your Honour hasn't. This is an addition to it.

HIS HONOUR: Okay.

MR MAXWELL: I am in the 13, 14 and 15 section of the outline.

HIS HONOUR: Yes.

MR MAXWELL: Your Honour, the headnote or that which follows it, the description of the case, helpfully sets out on 682 and 3, what counsel for the accused said in the course of his address to the jury, and having referred to the three very clearly defined roles, he went on, as Your Honour will recall: "You normally think of a judge as being a sort of umpire, ladies and gentlemen, and you expect an umpire to be unbiased. You would be pretty annoyed, if, in the middle of a Grand Final, one of the umpires suddenly started giving decisions one way. That would not be what we think a fair thing in Australian sport. It may surprise you to find out that His Honour's role in the trial is quite different. That His Honour does not have to be unbiased at all except on questions of law. On questions of fact, His Honour is quite entitled to form views and very obviously has done so in this trial". Your Honour, he was convicted of contempt and then fined, and then the Supreme Court quashed it on the

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grounds of breach of natural justice, and the appeal wasn't disturbed, so he appealed by special leave to the High Court, and the High Court did quash the conviction. And Their Honours in the joint judgment say at the foot of 689 that - there is discussion, but I won't go through it, on 688 and 9. The last paragraph: "Mere discourtesy falls well short of insulting conduct let alone wilfully insulting conduct. This, again, we accept in a different context. This is contempt in the face of the court". But Their Honours go on to identify at 690 the remarks which are said to be wilfully insulting. And the relevant passage for present purposes is at 691, referring to what Mr Byrne for the respondent had said: that is what the insult was; the implication was that the Judge was biased, and was entitled to be biased, and Their Honours say: "No doubt in some settings it would be insulting to say of someone, especially a judge, that he was biased, suggesting thereby that he was predetermining a case by reason of interest or other pre-existing commitment". And then Your Honour, without reading it, the conclusion is to be found at the bottom of 692 and the top of 693. The question whether this went beyond the bounds wasn't easy to answer, and the conclusion at 693.2, that it "came close to insulting the judge" - "he came close to insulting the judge", that is what I meant by the reference to a whisker. Now, Your Honour, I want to deal with the - no, I will come to it when I get to paragraph 20, that is the point about good faith and that the publication is not punishable unless it is disqualified by absence of good faith.

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Your Honour, we make what we respectfully submit are uncontentious points in paragraph 16, that is, that all of the features of the publication must be considered in deciding whether or not a publication is calculated to cause damage of the requisite kind, and I have already referred to some of those. As to B, the status of the author in relation to the subject matter, that is relevant in our submission to how the good sense of the reader will react to it.

HIS HONOUR: Is there any authority that directly bears out those propositions as relevant considerations?

MR MAXWELL: Your Honour, that is my summary based on a reading of the cases. Overnight I will look and see if there is any - - -

HIS HONOUR: I mean it may well be that they do. I ask the

question in ignorance, whether they are propositions that are expressly dealt with?

MR MAXWELL: No, not in - as I say, that is my own formulation, paragraph 16, based on what I apprehend to be the approach that the courts have taken, case by case, that is to look as one would do at the - for example, in some of the cases it is relevant that what is said is said on the steps of the court immediately after judgment has been delivered, and certain latitude is allowed for the immediate emotional reaction, for example. That is all I mean by taking into account all the circumstances. But, Your Honour, we will try and see if there is some more general definition of that. Paragraph 17, then we draw attention to what we say are the relevant circumstances. If I might just go back to 16A, my learned friend said, the Solicitor said, "Well,

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we have got to jump around in the book a bit". In our respectful submission, that was necessary in order to show bits relating to particular judges. But in our submission, it is not how these books stand to be judged. They need to be read as a reader would expect to read them, that is, from the start through to the finish, in order to determine what the character and tendency of the publication is.

HIS HONOUR: Just as to that: can you tell me - I have looked at the index and I am not sure to what extent - in volume 2, are the chapters chapters dealing with cases in which your client was personally involved, and to what extent? It is just that a number of the passages at different places I have been taken appear to be relating to the County Court trial.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: Is that generally what the whole of the book is concerned with, or are there some chapters which are discrete and are not concerned with cases he was personally involved in?

MR MAXWELL: Well, Your Honour, the answer, if I might respectfully say so, is "yes" to both; that is to say, there is a substantial amount of the book taken up with proceedings in which he was involved, but there are other matters to which he makes reference in the book. What I will do, tomorrow morning, Your Honour, is try and categorise the bits of the book which fall into the one or the other category.

HIS HONOUR: That could be done in very broad terms. I just

wanted to get some general idea.

MR MAXWELL: Indeed. Yes, Your Honour, but there is a

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substantial concern with matters in which he was involved, and most, if not all, of the passages complained of are from parts of the book dealing with his own proceedings. And we rely on the fact in that regard, that Mr Hoser was an unrepresented defendant in those proceedings, or so it is asserted. We haven't led evidence to that effect, but the book asserts that he was unrepresented. Indeed, there was debate about whether he should be allowed to apply for legal aid or not.

In 17 we draw attention to the work being self published. My learned friend described the covers accurately as fairly colourful, and that goes to the weight or otherwise which would be attributed to the opinions expressed by the ordinary reader of good sense. We say in little (b) of 17 that the circulation is limited. It is not as limited as a statement made to four or five people at a particular moment; but on the evidence, which relates only to the first one, which is the one in respect of which only one complaint is made, there were, as at the date of the affidavit, some four and a half thousand copies sold. There is no - - -

HIS HONOUR: When you say the "first one", you mean book 1?

MR MAXWELL: Book 1.

HIS HONOUR: I thought you put to the witness, and he agreed, that that reference to four and a half thousand was not a reference to that book; it was a reference to other books?

MR MAXWELL: No, Your Honour, I hope the transcript will bear me out, but I think Mr Lee agreed that because the defamation case concerned the Victoria Police Corruption, rather than the one with "-2" after it, what he went on to say

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about - - -

HIS HONOUR: I misunderstood. I thought that proceeding was referring to one of the other books. It was referring to volume 1, was it?

MR MAXWELL: Volume 1 of this - - -

HIS HONOUR: I see.

MR MAXWELL: And that is what Mr Hoser in the affidavit defined as "the book", and it is that to which what followed, as Mr Lee agreed, appeared to relate.

HIS HONOUR: And that was 4,000 sales for that book, was it?

MR MAXWELL: Four and a half thousand for that, beyond the evidence from the distributor and from McGills; but I think the highest it is put is that the distributor shows that the sales of the second one were about, in the hundreds.

HIS HONOUR: Yes; 690 or something like that.

MR MAXWELL: Something like that, Your Honour, yes. 691 copies of Victoria Police Corruption 2. It is simply not right to say, as the learned Solicitor says, that this is extensive dissemination.

HIS HONOUR: But is that relevant to the question of whether the publication has the tendency to damage the administration of justice, or relevant to the question of penalty?

MR MAXWELL: Your Honour, it is relevant to the first, and I will take Your Honour in the last few minutes to the Family Court decision I have just referred to. In our respectful submission, there is the question whether the words have a tendency, and there is another question which goes to liability, which is: is there a real risk of interference with the administration of

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justice? And in the case I am about to take Your Honour to, His Honour decided, "yes" to each. "Yes" to the first question, I think, in respect of each of the publications complained of, and "no" to the second, and accordingly dismissed the contempt charges.

And so the extent of publication is a matter going to the existence or otherwise of a real risk of damage to the administration of justice.

Your Honour, the case I am referring to is Colina and Torney. It is in tab 6. We have copies for Your Honour and our learned friends.

And Your Honour will recall my learned friend mentioned Re Colina ex parte - sorry, Your Honour.

HIS HONOUR: Yes.

MR MAXWELL: Re Colina ex parte Torney in the High Court. That

was a proceeding concerning the same matters, and concerning the procedure by which those charges of contempt should be or could be maintained. This is the report of the trial itself. And Your Honour, given the time, I will - - -

HIS HONOUR: I don't think you are going to get very far into it.

MR MAXWELL: Indeed. I just want to draw Your Honour's attention to one example. Your Honour will see from paragraph 1 that the applicant sought to have the respondent dealt with for contempt of court, and on certain dates the respondent had handed out material making various statements about Judges of the Family Court. And Your Honour can see they were all in strong terms. And we respectfully draw His Honour's attention to the helpful discussion beginning at paragraph 5 of the

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applicable principles, and Your Honour will see, without my going to them now, the references to a number of the cases of which mention has already been made. That goes through to the third paragraph, 13, for example; the reference to the setting out of the full passage from Ahnee. And then paragraph 17 refers to the need for a real risk of prejudice, and quoting from Borrie and Lowe's well-known textbook on contempt. And in a reference in the course of that quote at the top of page 8 to the passage I took Your Honour to before, from John Fairfax, the third line, there is a quote within the quote, whether the matter published has, as a matter of practical reality, a tendency to interfere with the due course of justice.

HIS HONOUR: Yes.

MR MAXWELL: And then - - -

HIS HONOUR: I think I will read this overnight. So rather than take me through it now, I will have a look at it and you can take me to it tomorrow.

MR MAXWELL: Would Your Honour permit me - - -

HIS HONOUR: It is fairly lengthy.

MR MAXWELL: One reference, which is simply to go to page 18.

HIS HONOUR: Yes.

MR MAXWELL: His Honour concludes at the top of 18: "The publication clearly implies that Judges of the Family

Court do not act according to law" and so on, and are biased against men in favour of women. His Honour then goes on in 48 to consider the test of practical reality, tendency to interfere. 49, "I am not satisfied beyond reasonable doubt that the publication had the requisite tendency" - but no doubt that the words cast the necessary

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aspersion on the Judges, and that there was no foundation for them; but looking at it, taking the matter as a whole, as a matter of practical reality, no tendency to damage the administration of justice. We will be submitting to Your Honour that even if Your Honour accepted that these were words of the requisite kind, as a matter of practical reality they would not have that tendency.

HIS HONOUR: Yes.

MR MAXWELL: If Your Honour please.

HIS HONOUR: All right we will stop there until tomorrow morning. 10:30 tomorrow morning.

ADJOURNED UNTIL 10:30 A.M. WEDNESDAY, 24 OCTOBER 2001.

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