HIS HONOUR: Yes, Mr Maxwell.
MR MAXWELL: Your Honour, I have finished, but with Your Honour's leave, I want to mention two matters that occurred to me overnight I hadn't mentioned - they are quite short.
HIS HONOUR: Yes, go on.
MR MAXWELL: Your Honour, the first is that Your Honour raised in the discussion about the implied freedom the question whether discussion of the courts would be regarded as a, within the genus of communication regarding political and government matter.
HIS HONOUR: Sorry, discussion of the courts - - -
MR MAXWELL: That is to say, this kind of communication, whether it, as I understood was saying, well, it is a question to be considered whether, if the implied freedom would otherwise be relevant, whether - and Lange was about a politician; here, this is about the administration of justice plainly enough - we simply want to make it plain that it is, in our respectful submission, a discussion about the judicial branch of government, and that reason, that is to say as a matter of definition, a discussion about a government matter.

Secondly, Your Honour, I asked Mr Lee in cross-examination if he was aware of the decision which His Honour Mr Justice Gillard gave in the Zoccoli matter in which Mr Hoser was a defendant, and for the purposes of which the affidavit, which the prosecution in part relies on, was filed. What I want to hand up to Your Honour is a copy of His Honour's decision given on 18 April 2000. It is relevant to make good the proposition I put to Mr Lee, which is that His Honour says at the conclusion, "I am of

the view primarily because of what the author has sworn in his affidavit, that the case is not made out for an interlocutory injunction".

Now, it is accepted, naturally, that that was not a hearing at which final decisions had to be made about the matters referred to in the affidavit. But it is significant, in our respectful submission, that the affidavit was accepted, was not challenged apparently as to the truth of its contents, and indeed, one of the passages from the affidavit which the prosecution doesn't rely on but which we rely on, and which His Honour quoted in paragraph 17 of his reasons, was paragraph 11, where Mr Hoser says: "When undertaking the research for any of my books I take all reasonable steps to ensure the accuracy and truth of statements made in my book books and any material relied upon". That is but a part of what we rely on in support of the proposition that not only has there been no demonstration of absence of good faith, but the material on which the prosecution relies finds its place in an affidavit in which that sworn statement is made and which was expressly relied on by a judge of this court in dismissing an application against this very man.
HIS HONOUR: Yes. Thank you.
MR MAXWELL: I will hand up that judgment. I don't have a copy for our learned friends. I will rectify that deficiency, but I wanted my learned friend to be aware of the point before he began. If Your Honour please.
HIS HONOUR: Yes. Yes, Mr Graham?
MR GRAHAM: Your Honour, although my learned friend's last remarks probably relate to the matter with which I should deal with last, I propose to deal with them first, whilst

they are fresh in Your Honour's mind.

I will be having a deal to say about whether the principles in Lange have any application at the State level as distinct from the federal level, since the implied limitations and implied freedoms dealt with in Lange were those arising at the federal level in sections 17 and 24 of the Commonwealth Constitution. I will come back to that.

I wish also to come back to the question of whether those limitations apply in relation to the judicial branch of government. I should say, however, my learned friend's last minute reliance upon what was said by Mr Justice Gillard and paragraph 11 of Mr Hoser's affidavit call for immediate response.

As I understand it, there is nothing before Your Honour to indicate one way or the other whether Mr Hoser's affidavit was challenged in the application for an interlocutory injunction seeking to restrain publication of Exhibit A. However, as Your Honour, I expect, would be aware, in the kind of proceeding that was before His Honour, where the person who publishes the alleged defamation swears an affidavit in support of a plea or intended plea of justification, then the court will not grant an interlocutory injunction restraining publication.

The authorities are collected in His Honour's judgment. They are very familiar, and such applications may fairly be said to be doomed to failure. I do not think there is a single example in the books where one has succeeded. But it doesn't supply any support for my learned friend's suggestion.

As to the contents of paragraph 11 of Mr Hoser's affidavit, as it was provided to Mr Justice Gillard, I simply make the comment that we have had no opportunity of cross-examining Mr Hoser, as to the truth or otherwise of that statement. In an application of the kind before Mr Justice Gillard - and I must say I have had experience of some of them - cross-examination of the defendant is not only usually discouraged but disallowed simply because of the presence of the affidavit verifying the intent to plead justification.

But as to the truth of paragraph 11 or not, Your Honour, that is something that Your Honour simply has to leave to one side, in our submission.

Your Honour, if I can set about replying to Mr Maxwell's submissions, I don't intend to follow closely the course which Mr Maxwell followed. That would present some difficulty because, without meaning to criticise him, he did not closely follow his own outline. Furthermore, Your Honour, I am bound to make the comment that many times it sounded more like a final address than a submission of no case to answer. And further - and I will come to this in more detail later - he did not confine himself to matters which were presently in evidence or established by evidence before Your Honour.

There is a preliminary matter, two preliminary matters which I wish to refer to before going to the substance of the matter. My learned friend complained about the fact that the originating motion claimed as forms of relief as against the first respondent, imprisonment or fine, and as against the second respondent sequestration or fine.

That was not done for any reason that was open to criticism. Rule 5.022 of the rules requires an originating motion to be in one of the scheduled forms, 5(b), (c), (d) or (e). Each of those forms requires the applicant to set out the relief or remedy sought. Rule 75.11(1) and 2 then requires the originating motion to take the form which was adopted here. The final relief, if any, to be granted in a case such as this may take many forms, and lies largely in the discretion of the court, and we have established many courses are open to Your Honour besides those in the originating motion, and I say no more than about that because it would be entirely premature.

My learned friend complained on many occasions that the applicant should have included further passages from the books in the originating motion in order to provide the context in which the passages complained of appear. We accept that we could have included many other passages in the book by way of particulars of the offences and context. However, the allegation in paragraph 3 and paragraph 4 is that the contempt was committed by the publication of each of the two books in order to keep the case in manageable proportions, particulars were supplied, and the passages which we contend represent the most clear transgressions, that is to say, the clearest occasions when the line was being crossed, were relied upon. To have included the context would have made the particulars misleading and no doubt would have attracted criticism of a different kind.

This is the second preliminary point: my learned friend made a comment early on - I haven't checked the

page in the transcript - that in questioning Mr Lee he made the point that no steps had been taken to prevent or terminate the publication of the two books. However, as I have noted it, this point was not put to Mr Lee at all; that is to say, he was asked about, for example, encouraging or discouraging booksellers to sell the books by means of letters or anything of that kind. So Your Honour is left up in the air on that point.

My learned friend says it is certainly not his contention that no steps were taken to prevent termination. That is important. The fact that - my learned friend goes so far as to say he accepts that steps were taken, and that is - - -

MR MAXWELL: If my learned friend would permit me to interrupt: I should make it perfectly clear Your Honour, if anything I said suggested that we said there had been no action of any kind, then that is absolutely withdrawn. We accept that there was contact with publishers and distributors warning them about continuing to distribute. The only point we have sought to make is about the commencement of these proceedings, and I hoped I had confined my comments to that particular aspect.

MR GRAHAM: I am obliged to my learned friend, because that point does bear upon the point my learned friend made about delay and commencement.

My learned friend, when he came to deal with the expression "scandalising the court" made the comment - and this is in paragraph 4 of his outline - he said that the very notion of scandalising is archaic, and then quoted from the Australian Concise Oxford Dictionary. However, this is a misleading proposition for two reasons.

Firstly, the word "to scandalise" and the expression "scandalising the court" have a long, respectable and reasonably precise meaning in this branch of the law of contempt, and therefore the court must have regard to the legal meaning of that word and those expressions.

As was pointed out in Borrie and Lowe, the Law of Contempt, Third Edition, page 335 - which I regret to say I failed to bring to court this morning; I will have it copied and provided to Your Honour - the learned authors say that the standard definition of contempt by way of scandalising the court is to be found in the famous case of the Queen and Gray, 1900, 2 Queen's Bench, page 36. Your Honour will find - I think it is The Queen and Gray; it might have been Quinn and Gray. Tab 28, if Your Honour pleases. The relevant passage is at page 40.

I might just pause to say, and I will probably say this more than once, that this was a case where the proceeding was brought for scandalising the court as a result of one publication against a publisher who had published a particular article highly critical and full of obloquy against a particular judge, Mr Justice Darling. It has been pointed out in the past that the authorised reports in a slightly coy way don't contain a report of what was actually said. One can find that in the Times Law Reports and Law Times reports. The relevant passage is halfway down page 40, where His Lordship said, "That description, the former class belongs to the category which Lord Hardwicke Lord Chancellor characterised as 'scandalising a Court or a judge'".
HIS HONOUR: About what point are you reading from?
MR GRAHAM: Halfway down the page, Your Honour.

HIS HONOUR: Yes, I have got it.
MR GRAHAM: That description of that class of contempt is to be taken subject to one and an important - I am sorry I should have started a little earlier, about point 4. "Any act done or writing published calculated" - and "calculated" is an important word - "calculated to bring a Court or a judge of the court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or lawful process of the courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke Lord Chancellor characterised as 'scandalising a Court or Judge'. That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every other subject of the Queen".

So that, of course, is the precursor of what was said by Lord Atkin in Ambard's case, but it is a demonstration of this that this expression scandalising the court goes back a very long way, and it can hardly be said to be archaic.
HIS HONOUR: It is an interesting case to be the starting point

though, isn't it, for scandalising the court, because what was published in 1900 and scandalised the court would now be written by historians of the court and of Justice Darling in terms to which, were he around, take every bit as much offence against it as probably anything said in the article. It does nicely highlight the question of the balance between a legitimate entitlement to be critical of the performance of the judiciary and the necessity to protect the administration of justice from undermining which falls into a category that should be worthy of punishment.
MR GRAHAM: Yes. Your Honour may not fully recall what was said, but if the historian was to say that Mr Justice Darling owed his appointment to either political connections or his parentage and described him as being difficult and pompous on circuit, that would be one thing. To couch it in the terms that were adopted, "pompous little figure bedecked in scarlet and ermine" was something else altogether.

We would refer Your Honour, in this connection, to the definition of the word "scandalising" firstly in the Oxford English Dictionary. I can take Your Honour to "scandalise" which is spelt with a "z" here. Meaning number 2 is described as "rare" - I am sorry. Meaning number 3 which is said to be "somewhat rare to utter false or malicious reports of a person's conduct; to slander or to charge slanderously". Then meaning number 4, the next meaning, "to bring shame or discredit upon, to disgrace", and 5, "to horrify or shock by some supposed violation of morality or propriety".

Each of those would come close to describing what

lawyers would take to mean by "scandalising". If we are going to use more modern dictionaries, my instructing solicitor has provided me with the CCH Macquarie Concise Dictionary of Modern Law, which shows a publication date - it says it was first printed in 1988, reprinted in 1990. On the last page of the bundle: "Scandalising the court: Particular type of contempt of court involving the making of derogatory remarks about judges or of court so as to undermine a court's authority".

It is a very convenient short summary, quite suitable for law students, for whom I think the book is primarily designed.

The last point which should be made in here is that one cannot argue by looking at a modern dictionary which contains a narrow definition of "scandalise" as in the 1990s, in order to narrow the scope of the word which had a wide meaning earlier, and has a precise meaning so far as the law is concerned.

Now, I want to turn at this point, Your Honour, to the nature and scope of a submission of no case to answer; and at this point I will endeavour to indicate what the nature and scope comprises, and to try to find some assistance for Your Honour from the authorities.

As Your Honour would be well aware, and certainly better aware than me long gone from criminal practice, the usual basis for a submission that there is no case to answer is that there is either no evidence, or no admissible evidence, or no acceptable evidence - to use an omnibus word - which sustains the offence alleged. Occasionally it may be said that there is no case to answer because there is no charge alleged which is known

to the law; but I think that point is more likely to be taken at the outset, or that the particulars which have been provided by the prosecution do not support the commission of the offence as developed by the introduction of evidence.
HIS HONOUR: Can I just, whilst I think of it - it is probably a statement of the obvious, but I just want to be absolutely sure about it - do I take it, there are two counts that are brought here of contempt: in one instance with one particular being identified; in the other instance with whatever number of particulars that are there, and it is put that insofar as any of those particulars are made out they would, individually, be capable of constituting a single contempt, or collectively presumably they constitute a contempt; but the way it is put by the Crown is that some of those particulars might be deemed to be not capable of, themselves, supporting a conviction for contempt, but the balance, or if it came to one, one would be sufficient to constitute the contempt? Is that - - -
MR GRAHAM: That's right, Your Honour. Perhaps if I could just develop that in a couple of sentences. We say that contempt by the first respondent was the writing of the book and causing it to be published, and particulars are given as to why that is so. And likewise in the case of the second book, contempt; and in the case of the second respondent, contempt consists of printing and publishing each of the two books.

As Your Honour said to my learned friend - and we respectfully adopt this - when a submission of no case to answer is made at the close of the prosecution case, the

prosecution evidence must be accepted as its highest. It is probably not a matter of very great importance so far as our submissions are concerned, but it is important in relation to my learned friend's submissions when, time and again, I would respectfully submit, my learned friend endeavoured to use the contents of the book, not verified by anybody, as being proof of the matters stated.

Our case, as Your Honour appreciates, is simply particular passages appear in the book, true or false. We don't need to go into that. My learned friend develops the submission by relying on material which is not in evidence before the court. It is quite simple for him to make it evidence before the court, but it is not evidence as yet.

Your Honour, we looked at authorities in Victoria relating to submissions of no case to answer in criminal cases, and as Your Honour probably is aware, they all seemed to be directed to the case where there is more than one accused and one or more of them wants to make a submission.
HIS HONOUR: Yes, there is very little in Victoria.
MR GRAHAM: Yes. And I didn't go further than that, because, apart from looking at New South Wales, not much help is to be gained.
HIS HONOUR: There is the 83 reference of the Full Court which adopted May and O'Sullivan.
MR GRAHAM: Yes.
HIS HONOUR: And apart from that, as you say, they are primarily concerned with multiple party cases and the complications that arise as to what is evidence and what is not.
MR GRAHAM: Yes. It gets worse, Your Honour, if one makes a

submission and another accused makes - used to make an unsworn statement - - -
HIS HONOUR: Yes.
MR GRAHAM: Most of the authorities around Australia in relation to submissions to no case seem to come from the civil side. There is a useful decision of the Appeal Division of this court - I will distribute some copies of this. The case, Your Honour, is Protean Holdings Limited and American Home Insurance, 1985, Victorian Reports. There is a short passage in the judgment - Your Honour has been handed both the report of the trial at first instance - - -
HIS HONOUR: Yes.
MR GRAHAM: And the Appeal Division, because they come together in the reports. There is some discussion - I needn't perhaps take Your Honour to the facts of this case except it was one of those difficult insurance claim cases.
HIS HONOUR: Yes, I can remember the case.
MR GRAHAM: Yes. I can too, Your Honour. If I could just give Your Honour some references to the judgment of Mr Justice Tadgell, which are perhaps of most assistance.
HIS HONOUR: Yes. At the back page he refers to the no case, at 240.
MR GRAHAM: Yes. There is an earlier, two earlier references that I am looking for. One is at page 236, where Mr Justice Fullagar at line 8 said: "The present case was in my view one for the application of the following observation of Mr Justice Fullagar in Puddy's case. 'Where, as in the case before me, fraud is alleged, it may often be wrong to suggest that a party should submit himself to cross-examination before it is seen that there is really some evidence against him'. It is important of

course, to observe that there was no jury in the present case. Of such cases Mr Justice Windeyer said in Jones and Dunkell: 'When there is no jury, the proposition of no case to answer may obviously mean far more than is there evidence upon which a jury could find for the plaintiff?' It may mean, 'Would you, the judge, on the evidence given, decide for the plaintiff?' It is important to observe that Mr Justice Windeyer twice used the expression 'may mean', and not 'means' or 'must mean'. The circumstances of the present case were such that in my view the propositions really did mean the latter question posed by Mr Justice Windeyer".

Over on page 238 starting at line 45: "That is what Mr Justice Fullagar did in Union Bank of Australasia and Puddy. When that course is followed the judge will know, before he commits himself to rule, whether the no-case submission is (a) that there is no evidence at all in support of the respondent party's case, that is, accepting all the evidence at face value, no case has been established: Hannah and Stott. And as was submitted, (unsuccessfully as it turned out) in - and the plaintiff in my copy has disappeared through the punch hole, Your Honour - "Laurie and Raglan Building Company Limited; or (b), that, although there is some evidence in support of the respondent party's case, the judge should not act on it because, for example, it was so unsatisfactory or inherently unreliable or equivocal that he should find that the burden of proof resting on the respondent party has not been discharged".

There is a further passage at line 25, where His Honour said: "It has been said that when there is no jury

the 'proposition of no case to answer' may obviously mean far more than, 'Is there evidence on which a judge could find for the plaintiff?' It may mean, 'Would you, the judge, on the evidence, find for the plaintiff?'" - he again refers to Jones and Dunkell. Then there is the passage, two passages at page 240. The first at line 8. "In order to raise a case deserving of an answer, the appellant of course had no need to demonstrate that it would ultimately have succeeded on one of its defences had the evidence remained unaltered". And further at line 22, His Honour said, "The appellant was certainly entitled to expect that the Judge, when ruling on the submission, would draw or leave room for the drawing of all reasonable inferences in its favour".

And that last point is of some importance. There may be inferences in the present case. I am not sure that there are, but if there are, then those inferences are to be drawn in their favour.

I won't read the passages from the next, the other case to which I wish to refer. The High Court, in hearing an appeal from the Victorian Court of Appeal in Naxakis and Western General Hospital, 1998, 197 Commonwealth Law Reports, dealt with submissions which had been made at the trial, to the trial Judge. I simply refer Your Honour to passages in the judgments of Mr Justice McHugh at page 282, and Justice Gaudron at page 274.
HIS HONOUR: Those basic principles that were set out in May and O'Sullivan and Zanetti and Hill, et cetera. I take it to having been confirmed by the Full Court here over the years, and as I would take it, without really having to have recourse to the civil cases, which have got -

although it was a fraud case in the Home Insurance matter - in criminal cases, strictly speaking, as I take this to be, it is, unless I am told to the contrary, it seems to me the principles in those two cases in particular, and as adopted by the Full Court here in 1983, I take it to be unaltered, and that they really do constitute the sort of propositions which I put and I think which counsel accepted - - -

MR GRAHAM: Yes.

HIS HONOUR: Is the statement of the test required for a no case.

MR GRAHAM: If Your Honour pleases. We don't contend otherwise. As I have indicated, there are some difficulties in approaching and responding to my learned friend's submissions. As I have already indicated, my learned friend took the court to the three books in evidence, including that of the Hoser Files; and as I have said in substance he invited the court to treat some of the assertions of fact contained in them as being evidence before the court - at least evidence of events which had occurred concerning Mr Hoser, and events which would have affected Mr Hoser's approach to judicial proceedings.

One troublesome aspect of the case as it has been developed, Your Honour, is that it has begun to take on the appearance of a collateral challenge to the decisions of Judge Neesham, the proceedings before him, and the conviction which ultimately resulted. Now, clearly, that is not the function of this court in the present proceedings. It is certainly not its function if dealing with a submission of no case to answer.

In this connection, Your Honour, we consider that

Your Honour should have regard to what happened in the Court of Appeal following this trial, and it is to be found in a reported case, therefore it is in the records of this court, and Your Honour can have regard to it. The case is The Queen and Hoser. It is reported in 1998, 2 Victorian Reports, 535. And it is very interesting to notice no member of the court - I will start that sentence again; that the grounds of appeal to the Court of Appeal barely touch upon the matters of complaint, which are being raised in the proceedings before Your Honour. The case is mainly concerned with the technicalities of an indictment for perjury and the question of amendment to the presentment in a case where perjury is charged.

There are, however, grounds relating to the manner in which His Honour conducted the trial, most of which were adopted as correct by the Court of Appeal having regard to the fact that the judge was under particular duties in dealing with a trial where the accused was unrepresented.

If I can deal just a little further with the approach of the court to a submission of no case. As I have said, inferences may readily be drawn in favour of the prosecution from uncontradicted evidence at this stage. This is particularly true in the case of claims by the defence that it is apparent that the allegations which have been made were made in good faith. I will have to come back to the question whether good faith does provide a defence to such a charge, but at this present stage the question of inferences which may be drawn as to good faith are important when one considers the context where the claims are expressed in terms which we would characterise as unreasonable and which would indicate an obsessive

attitude on the part of the first respondent towards certain judicial officers.

The second further point we wish to make is that no issue arises at this stage that the case of the applicant has or has not been proved beyond reasonable doubt; and further, discretionary considerations which might tend to affect the final resolution of the proceedings don't arise at this stage.

At this point, Your Honour, I should mention that Your Honour, in finding the case proved, has a discretion whether or not to impose a conviction or record a conviction; although there is perhaps some doubt about that proposition. That is a matter for much further on, Your Honour. Your Honour certainly has a discretion whether or not to impose a penalty at all, and also what kind of penalty. In those areas Your Honour would be concerned with the extent of the publication of the books in question, as well as their contents; the likelihood or otherwise that there will be further similar publications, the alleged delay, and any other factors which might be regarded as mitigating the offence if one is proved to have been made out.

But all those are matters which don't arise at this stage.

Further, Your Honour, we submit that at this stage alternative approaches to the publications need not be considered unless Your Honour takes the view that they are the only approaches which are available on the material. If Your Honour were of the view, for example, that the publications were merely wrong-headed and misinformed, that would not mean that there was no case to answer

because we say that if there is the tendency to affect the administration of justice, the publications were calculated to do so. The fact that they were wrong-headed or misinformed would be beside the point, at least at this stage.

Further, if the publications were explicable by some set of circumstances not presently in evidence, then that would not preclude Your Honour ruling that there was a case to answer.

Now, we found some difficulty in understanding precisely the position that Mr Maxwell was adopting in relation to the position of the first respondent in particular. Your Honour put a question to my learned friend to the effect of whether he was saying that the first respondent was misguided, wrong-headed, and his publications could not be treated seriously by anybody. My learned friend demurred to that suggestion, and indicated that whilst the publications may be taken to have been colourful, or exaggerated, even misinformed, they were to be treated seriously.

He appeared, as I understood him, to go so far to say that one should read the whole of the book or at least peruse the whole of the books, in order to underpin the impression that he said emerged, that the books were written by a person, particularly Exhibit B, who had been convicted of perjury and who says that he is wrongly convicted and writes from a partial, aggrieved and distorted perspective. But as I have already said, the applicant doesn't rely upon the truth or falsity of the passages complained of or upon the truth or falsity of anything else that is in the books. It relies on the

contents of the book and, in particular, the passages in the particulars in the originating motion.
HIS HONOUR: Just on that proposition, I know that in a prosecution for criminal libel there is no obligation on the Crown to prove the falsity of what had been said. Is that the same position, so far as a charge of contempt?
MR GRAHAM: Yes, Your Honour.
HIS HONOUR: Is there authority directly on that? I didn't find any.
MR GRAHAM: I believe it emerges from the authorities rather than by reason of a direct statement.
HIS HONOUR: I mean, it would make some logical sense that, just as in criminal libel, that if a defendant sought to answer it by proving the truth of what was said because it is a libel action, that plea of justification in defence would plainly be relevant for the defence to take. But this is not a libel action, although elements of libel plainly come into the question of contempt, or can come into the question of contempt.
MR GRAHAM: Yes. Your Honour. I may want to come back to that proposition. If somebody published, as I say a newspaper, published a statement that Judge X received bribes, and those bribes were delivered to him in brown envelopes which regularly arrived on his desk in chambers, and that was true, then I don't believe I could possibly suggest that that would be a contempt of court.
HIS HONOUR: Yes.
MR GRAHAM: If it was false, I certainly could. But there may be many grey areas in between and the grey areas may be made slightly greyer by reason of the particular language chosen; and it may be important to know what the facts

were, and whether the inferences which the writer drew were fairly to be drawn from the known facts. So it is not as black and white as Your Honour's example in the first instance perhaps would suggest.

Now, what I will endeavour to do next, Your Honour, is to follow my learned friend Mr Maxwell's outline of argument as closely as I can in order to respond to it, and then go on to deal with the case of Colina and Torney upon which my learned friend placed considerable reliance. I want to go also to some of the comments which my learned friend made about, I think all of the particulars to paragraphs 3 and 4 of the originating motion, and finally to what he said in relation to Lange's case.

I might say at this stage, I am reluctant as matters stand to go very far into the last proposition, because it would occupy me quite happily for a day, as it did in the High Court.

HIS HONOUR: Can I raise the question, which is, it seems to me, to be an important threshold question, and that is the status of the balance of the book. And you have touched on it in what you have already said, and indeed, I think I said in the course of argument to Mr Maxwell that I did not have before me evidence of the truth of that which is in it; but the documents, however, or the books being the documents in which the Crown alleges the contempts appear, are tendered by the Crown for the purpose of identifying those contempts.

The Crown does not dispute, as I understand it, that the context in which those matters appear must be, therefore, a matter on which the court is entitled to have

regard for the purpose of the no-case submission - leave aside the question of proof beyond reasonable doubt. But without having regard to whether the Crown regards that which is said as the truth, it is the Crown's case that all that is said was said by Mr Hoser. So therefore, if what is alleged on page 400 to be at line 10, a particular of contempt is relied on as something said by Mr Hoser, then the Crown must be relying on everything in the other 399 pages as having been said by Mr Hoser. So that without it being evidence of the truth, it is nonetheless, is it not, evidence before me that that is what he said?
MR GRAHAM: That is what he wrote.
HIS HONOUR: That is what he wrote, and that insofar as, for the purpose of a no case, the Crown's case is to be taken at its highest, which is plainly the test, that would not mean, however, that there was no evidence constituted by the balance of the book, because there is evidence. And insofar as - for example, to take the illustration that you dealt with: if an assertion is made that what appears on page 354 is a matter which is written in good faith; then if, on page 353 there is a passage which says "This is written in good faith", the Crown, it seems to me, can't say there is no evidence that it is written in good faith by virtue of its self-assertion that that is so.

The question of whether it is written in good faith might be something which is capable of being inferred simply by a reader, the arbiter of fact or law, reading the publication and forming the view as to whether it is reasonably open from that material that it was written in good faith, and might take into account that the author, himself, has asserted that it is written in good faith.

The issue it would seem to me, would come down to this: whether it would be taking the Crown case at its highest for the purpose of the no-case submission that what appeared, to use my example, in a phrase, "The following passage is written in good faith", whether it is taking the Crown case at its highest to accept that there is some evidence therefore that it is written in good faith, or whether the Crown case as its highest should be, in some respect, that that should be ignored as a statement at all.

MR GRAHAM: Well, Your Honour, all that can be taken to be is evidence of the fact that Mr Hoser so asserts that it is written in good faith. It can't be evidence of the fact, objectively established by evidence, for example, from the witness box, that it was written in good faith. It is only evidence that that was what he said.

HIS HONOUR: Well, let's assume a jury: if a jury was to have the books tendered in the way that they have been tendered here, would there not be - and the judge making an assessment of whether there is no case to answer or not - if the question was: was it written in good faith, would there not be some evidence before the jury that it was, albeit not supported on oath, and albeit self-serving as a statement, but nonetheless, some evidence on which a reasonable jury might conclude that the assertion of good faith is made out?

MR GRAHAM: Your Honour, we wouldn't go so far as Your Honour has put it. But I think I am repeating myself: certainly there would be evidence that Mr Hoser so stated and wrote that. It would be for a reader looking at the whole publication to make a judgment whether that assertion was

indeed true. But it wouldn't stand alone as evidence of the fact that the book was written in good faith. It shows that Mr Hoser so states. The reader reading the whole book might come to the conclusion: "Yes", "No", or "I doubt it".
HIS HONOUR: Put another way, possibly from the Crown's point of view with the evidence at the highest it might be said that the answer would be, well, was it reasonably open to a person who head read it, including reading that sentence, to conclude that it wasn't written in good faith?
MR GRAHAM: Yes.
HIS HONOUR: That would be taking the Crown case at its highest, I suppose.
MR GRAHAM: Yes, and that is how we would put it. That reminds me of something which - I can deal with it later on, Your Honour. There is some internal indications that the text of the book is simply not to be relied upon as true anyway.

Could I take Your Honour to paragraph 6 of my learned friend's outline. He there draws attention in a footnote to the case, McLeod and St Alban in 1899, and reference to the speech - I think it may have been of Lord Morris, at page 561, one only of a House of Lords comprising five put forward that proposition. It is interesting to note the sequence of events between The Queen and Gray, followed a year later, showing that the statement in McLeod and St Alban was plainly wrong and the offence of contempt by scandalising the court was alive and well, and Mr Gray was fined a hundred pounds, an enormous sum of money in those days, and he would pay the costs. As my learned friend

has, I think, already conceded, the offence is not obsolete. It can still be charged, and his references to the case of Ahnee, which is under tab 10, 1999, 2 Appeal Cases, 294, showed that the Judicial Committee considered the offence was alive and well, although apparently in better health in Mauritius than in the United Kingdom. One does not know what the population of Mauritius is by comparison with the United Kingdom. It might be nearer the population comprising Mr Hoser's readership than the entire population of the United Kingdom.

Then, if I go to paragraphs 9 and 10, my learned friend says the entire 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. He refers to Mundey's case and Maslen and the Official Receiver. He goes on in paragraph 10: "The test of impairing or undermining public confidence in the administration of justice is unacceptably imprecise, objective and uncertain". He cites no authority for that proposition.

Your Honour, it is necessary, at this point, to emphasise a distinction which is no doubt present in Your Honour's mind, that there are at least two kinds of contempt involved in interfering with the due administration of justice. The one most commonly encountered and most commonly prosecuted is a contempt arising from the publication of prejudicial material in relation to a particular pending case; and Your Honour has had recent experience of that in the Percy case.

The other class of case is where there is a general attack upon the integrity of a judicial officer or a

number of judicial officers scandalising the court. My learned friend's comment concerning an urgent need to protect the courts, really relates more readily to the first category. Cases falling within that category are numerous, and it is only necessary to remind Your Honour of the case of John Fairfax and McRae, which is tab 13, 1954, 93 Commonwealth Law Reports 351, which is the locus classicus in Australia of this branch of the law, particularly in relation to the contempt by interference with the course of justice by publication.

Cases falling within the latter category of undermining the authority of the court by actions or publications are to be found in many cases. Again two recent ones, or relatively recent ones in the folders are Attorney-General of New South Wales and Mundey, to which reference is made. It is in tab 3, 1972, 2 New South Wales Law Reports 887.

When I say examples, Your Honour, that, I think, was in fact an example of contempt of the first character, but it contains a useful statement in the judgment of Mr Justice Hope who was sitting at first instance, at pages 910 to 911. I think my learned friend may have read that case.

HIS HONOUR: Yes he did, yes.

MR GRAHAM: I will simply refer to it and rely upon it. It goes over to the end of the first paragraph on page 11, to 911. The other recent case was Gallagher and Durack under tab 9, 1983, 152 Commonwealth Law Reports 238.
Your Honour will recall the facts of that case, where Mr Gallagher was moved to say publicly that the actions of himself and the members of his union had in fact brought

about the outcome in the court in favour of the Attorney; in other words, asserting that Judges were capable of being intimidated or moved to take wrong action by reason of activities of Mr Gallagher and his colleagues.

Now, my learned friend says that, in paragraph 11, "Robust criticism of in particular courts, Judges and magistrates is commonplace" and he goes on: "Some of the most trenchant criticism comes from within the justice system". Frankly, Your Honour, we don't understand that proposition. The ability of a court exercising appellate jurisdiction, a jurisdiction by way of judicial review to overturn the decisions of other judicial officers, is accompanied by an obligation, in all cases to give reasons,; and those reasons may, in some cases be trenchant. That will all depend upon the nature of the conduct under scrutiny in the appeal, judicial review proceedings; and that is unfortunately what happened in the case of Gilfillan and the County Court.

My learned friend referred to the case of Lewis and Ogden, which is tab 19, 1984, 153 Commonwealth Law Reports, 682; but it is ultimately, Your Honour, a case which turned upon its own facts. I may say, tentatively, it was a finely run thing, and the matter was concerned with the statutory offence under section 54A(1) of the County Court Act of wilfully insulting a judge. Whether that is the exact equivalent of scandalising a court is an open question, and we submit this case really shouldn't be called upon in the present discourse.

In paragraph 15 my learned friend makes the point that the books were published in August 1999, more than two years ago. He draws a conclusion that "delay in

bringing these proceedings bears eloquent testimony to the lack of any relevant impact on the administration of justice".

Now, one can say two things in response to that. The first is to say it is less replete with objectionable material than the second. The second book came out after the first, we are led to assume. I am not certain there is evidence of the actual dates or date in 1999 when they came out. A copyright claim is made in Exhibit B for 1999, and one would - and the same in the case of Exhibit A. But - - -

HIS HONOUR: It has got to be later than July. I notice that at Roman (xii) it publishes an extract from the Legislative Council, New South Wales Hansard of July 1999.

MR GRAHAM: Is that Exhibit A or Exhibit B, Your Honour?

HIS HONOUR: That is B.

MR GRAHAM: Yes. Well, Your Honour, one might understand why the Crown would not be troubled to prosecute in relation to Exhibit A alone, and Your Honour might at least take account of the fact that crucial evidence became available to link a particular Raymond Terrence Hoser with the publication of the books by reason of the affidavit filed in the proceedings before Mr Justice Gillard.

This is not, I may say, Your Honour, quite like the usual case against a newspaper, where one finds an imprint in the last page saying: "This newspaper was published by The Herald and Weekly Times" or whoever, "John Fairfax & Sons", being people required to register themselves under particular legislation and have particular registered addresses.

If I can turn to paragraph 16. My learned friend

said at paragraph 16 that he understood the statements there made were uncontentious - I heard my learned friend say that he didn't perhaps say that. Well, in any event, for our present purposes, sub-paragraph (c) is undoubtedly contentious. If he is saying "the purpose of the publication is to give rise to an inquiry as to the intent of the author in causing the publication to be made" then we say that on the authorities it is not necessary to prove an intent on the part of the author or publisher in causing the work to be published to scandalise the court.

We say what must be established is the tendency of the published material to scandalise the court; the question being whether the writing was calculated, having regard to its terms, to bring a court or a judge of the court into contempt or to lower its authority or to prejudice the authority of the court and to render obedience to the orders of the court less likely.

I will come back to that topic again, Your Honour, and give some authority when I come to the notion of good faith in just a moment.

In paragraph 17 a number of statements are made. "In the present case the following circumstances are relevant. The work is self published". That, I would accept, is an inference which can be drawn from the appearance from the book itself that the publisher is Kotabi Pty Ltd. Kotabi Pty Ltd, from the company searches, appears to be simply Mr Hoser under a different front, and certainly one doesn't see the names of Angus & Robertson, or Hodder & Stoughton, and Thames & Hudson or anything like that, printed on the book. So, yes, the work appears to be self-published.

It is said its circulation is limited. I will come to that evidence about that later.

Then it is said the author is writing not as an expert on law or criminal justice but as someone who has been subjected to its processes; and one can only get that out of the book itself. But we wouldn't contest the fact, because it is not in contest at all in these proceedings, that Mr Hoser has been subject to the process of criminal justice. Paragraph (d) - - -

HIS HONOUR: I can understand how that point was put by Mr Maxwell, and I didn't make this point with him when he said it: it seems to me that there is some ambiguity in how the proposition is put, because it seemed to me that it was being put that the reader, picking up the book, should regard the author as being expert in matters of criminal justice; because the claim that is made for it, within its own terms, is in broad terms by the author of the important books on corruption which are then listed, and the author of previous books.

So it seems to me that if it is being put that the author is writing a book as someone who the reader should take it has no special skills or knowledge in the criminal justice system, that would seem to fly in the face of what is elsewhere asserted in the publications.

However, the way it was being put, as I understood it, by Mr Maxwell, was that, put aside that question of the self assertion that might be involved there, the fact of the matter is it is written by a person whose perspective is, and the term is not perjorative, but a disgruntled participant. He has been an unsuccessful party, in particular an unrepresented unsuccessful party,

to criminal litigation, and that is the way I think paragraph (c) was being addressed by Mr Maxwell in the course of his submissions to me.

It raises the question of, in determining whether the court has been scandalised, does one look at it from the point of view of who the readership might be, how discerning the readership might be, what weight might be given to the publication by the readership; and that, in turn, might have some bearing on the question, if it purports to be an expert publication compared with if it is plainly not purporting to be anything other than a personal experience with no special knowledge involved?
MR GRAHAM: Your Honour, one would respectfully agree with what Your Honour first said, as Your Honour had put it to my learned friend Mr Maxwell. But we would go on to say that the contents of the book at least invite the reader to assume or believe that the writer knows a great deal about his topic. In that connection, the fact that he asserts considerable knowledge on another topic, seems to be, that is to say, zoology and a particular branch of it, can well be understood to say: "I am a person who knows what I write about. I inform myself and endeavour to set forth the facts as they are, using the expertise which I have acquired"; and that not merely in the topic in the area of zoology, but also as a result of events which have happened and presumably studies which he has made, he has become reasonably expert on law and criminal justice.

As to paragraph 17(d), "the author has a long-standing demonstrated commitment" et cetera, "as investing and exposing certain things", in a sense, I suppose, one could accept, merely reading the books, or

one would suppose by reading the books, that the author had some sort of commitment; but it is not the case upon reading the books as a whole, as Mr Maxwell said they should be, the conclusion is that there was a demonstrated commitment other than a commitment on the part of a person who was unbalanced and, to a degree, obsessed about the police of this State and the judiciary of this State and what they have done to him.

Now, if I can move on to paragraph 20. It is an important paragraph. My learned friends contend that the law of contempt of court will only be attracted where it is shown beyond reasonable doubt that the criticisms were made otherwise than in good faith. Now, we would say that this runs counter to Australian authority.

Could I take Your Honour back to McRae's case at tab 13. Now, my learned friend has read from page 370, and we, for our part, respectfully adopt all that was said on the judgment; that has been quoted and applied again and again by courts exercising summary jurisdiction in contempt matters.

But I draw Your Honour's attention to what appears at page 371, at about, the second complete paragraph. "The actual intention or purpose lying behind a publication in cases of this kind is never a decisive consideration. The ultimate question is as to the inherent tendency of the matter published. But intention is always regarded by the court as a relevant consideration, its importance varying according to circumstances. In the present case we think that it is of more importance than usual. For here, not only is it clear that nobody in The Herald office had the slightest intention of committing a contempt, or the

slightest intention of doing or saying anything which might affect in any way the conduct or outcome of any legal proceeding. It is also clear that to those responsible for what was published in The Herald the guilt or innocence or Rigby on any charge pending against him was a matter of complete indifference".

I don't think I need to go on. But it is the first general proposition, the first two general propositions in that paragraph which are of particular importance. What is more, Your Honour, it is said, often, that intention is relevant on the question of penalty. But that is a different matter.

Then, can I take Your Honour back in the book of authorities to tab 3. That is Attorney-General of New South Wales and Mundey - again, I go to the passages that I have already quoted, at page 910 to 911 - bear out the proposition that it is the tendency of the publication rather than the intent of the author which matters.

Finally, to a case which I think has been referred to in passing, and that is Hammersley - this is in tab 12 - Hammersley Iron Pty Ltd and Lovell, 1998, 19 Western Australian Reports, page 317.
HIS HONOUR: Tab 12, you say?
MR GRAHAM: Tab 12, Your Honour, yes. This was a case, as I think Your Honour may have heard, of a contempt of court constituted by publishing discovered documents in breach of the implied undertaking involved in the discovery process, and in that case the Full Court of Western Australia, I think unanimously, dismissed - I am sorry, Your Honour, the case was heard at first instance by the Full Court. The Full Court unanimously held that there

was a contempt had been committed.

Could I ask Your Honour to go to page 325. I think it is only necessary to refer to one of the three judgments in this case for my purposes. At page 325 in the judgment of Mr Justice Ipp, between letters D and E, His Honour said: "I turn now to the second form of contempt, the interference with the administration of justice. The relevant legal principles governing this issue were recently set out by this Court in The Queen against Western Australian Newspapers ex parte DPP, where it was said that 'It is well-established that all proceedings for contempt must be seen as criminal in nature and, in consequence, all charges of contempt must be proved beyond reasonable doubt'. And 'The absence of ... an intention (to interfere with the due administration of justice) ... while relevant, is not a prerequisite to a finding of contempt. The ultimate question is as to the inherent tendency of the matter published'". His Honour referred to McRae's case, and also to Hinch's case, and I think I needn't read further.

So, Your Honour, we would say that it is, at least on the present state of the authorities it is very difficult in Australia to say that the prosecution must prove publication in good faith, because even if the author and publisher's good faith were proved, and yet the publication had the requisite tendency, or was objectively calculated to constitute a contempt of court by interfering with the due course of justice, then good faith would not be an answer. It might matter on penalty, but we submit it is not something which the prosecution must prove, just like intention need not be proved.

If Your Honour please, now my learned friend placed much reliance on the decision of Mr Justice Ellis, sitting as a single Judge of the Family Court, in dealing with a very particular case. That is tab 6 in the book of authorities. I am moved to comment, Your Honour, that according to what appears in the heading, this judgment of 30 pages, was delivered extemporae.
HIS HONOUR: Yes, I read that with some amazement.
MR GRAHAM: And may I say with some admiration, Your Honour. Nevertheless it is said that he heard it on the 24th and 25th of February and delivered it on the 2nd of March. But - - -
HIS HONOUR: I think it probably means he read it out, which is probably a very good idea.
MR GRAHAM: A good idea in such a case. If Your Honour looks at paragraph 1 of the judgment, there were originally six counts lettered A to F. The last was not pressed. The relevant principles to be applied by a court hearing such a case to be are to be found in paragraphs 5 to 24 on pages 2 to 10. One aspect of the defence was the implied freedom argument based upon Lange, and His Honour dealt with that at paragraphs 25 to 33.

But it is necessary to go back - because my learned friend placed such reliance on this - to paragraph 1. In respect of the material on the leaflets which were the subjects of the fourth and fifth counts, that is D and E, these alleged judicial bias; and at paragraph 64 it was held that the publications didn't constitute contempt.

Justice Ellis held that the publications contained breaches of assertions. "Those assertions are baseless, unwarranted and unwarrantable. The material so published

had the necessary tendency to interfere with the administration of justice", And he said that in relation to count A in paragraph 48, count B paragraph 56 and 57, and in relation to count D on page 72 and count E in paragraph 83. And His Honour held in respect of those four counts that in each of the passages that were relied on that the publication would only constitute a contempt of court if it satisfied the test of having, as a matter of practical reality, a tendency to interfere with the due course of justice.

Now, before His Honour there was evidence as to very limited publication. His Honour considered the evidence as to the nature and extent of publication in each instance. I just want to read a few passages from - perhaps it is unnecessary. I will give Your Honour the references instead. His Honour was in effect saying that all the evidence showed was that the respondent was handing out leaflets to people outside Marland House, where the Family Court used to sit. Some of the people who received the leaflets comprised the Marshal of the Family Court, and some of his staff had been sent out to do so, and there was evidence that leaflets, the contents of which were not proven, were handed out by the respondent to members of the public. So His Honour said that there was, in effect, insufficient evidence of publication to complete the necessary elements that constitute the offence of contempt of court by publishing matter which scandalises the court, because of the limited nature of the publication. But as to the other elements of the offence of contempt of court, His Honour held that the matters published in the leaflets did fulfil those

elements.

Your Honour has, I think, either read that case or will read that case.
HIS HONOUR: Yes, I have, yes.
MR GRAHAM: Your Honour will discover His Honour's findings in relation to the five counts which remained extant.

Now, as to the evidence of dissemination of the Hoser publications limited distribution founded by Mr Justice Ellis in the case of Mr Torney's leaflets - Your Honour has evidence in relation to Exhibit B and Exhibit A. Exhibit B indicates that - I am sorry. The affidavit of Louise Waters shows that 631 copies were sold in the last five months of 1999 to various book retail outlets for sale to the general public. The affidavit of Nicholas Peasley shows that 20 copies were sold at McGills.

The Exhibit A was evidence of sales according to Mr Hoser in his affidavit, of four and a half thousand books being sold, and he admits to 300 CD copies put in circulation. The affidavit of Louise Waters shows that 808 copies were sold in the last five months of 1999 to various book retail outlets, for sale to the general public, and there is some evidence of further numbers of the same book being on sale and sold in Melbourne retail outlets.

It is worth observing that at least an inference is open with the quite extensive sale of Exhibit A, that Exhibit B would have enjoyed similar popularity, since somebody reading Exhibit A and saw Exhibit B on the book shelf might well be moved to buy a copy, or at least look closely at it, so there is, in our submission, an inference open that far more copies of Exhibit B have been

sold than are the subject of direct evidence before Your Honour.
HIS HONOUR: Or the inference might be that the 4,000 who read the first book weren't attracted to read the second book.
MR GRAHAM: Well, Your Honour, I suppose that is a possible inference. Anyway, I put that forward, Your Honour. There may yet be further evidence as to the extent of publication. But to the extent we have already proved is in sharp contrast to the extraordinarily limited distributions which were - - -
HIS HONOUR: It is a curious matter, but I rather took it that - perhaps I took it wrongly - that the assertion of 4,000 being sold, or four and a half thousand being sold was not an assertion reflecting some embarrassment or modesty so much as an assertion that it was a popular and therefore respected book; that it had a wide readership. Do you say, four and a half thousand should be taken by me as demonstrating a wide circulation or a narrow circulation? What is a substantial impact?
MR GRAHAM: Your Honour, I don't think I need to say more than that - at this stage I am drawing a contrast with the case before Justice Ellis. But we would say that, quite clearly, four and a half thousand represents a significant distribution of the book, and one must assume also, one may assume that many copies of the book may be read by more than one person, as is the case with newspapers, Your Honour has often seen figures showing circulation compared to readership, and readership is usually found to be about four times the number of copies that have been actually sold. So one can't just confine oneself - - -
HIS HONOUR: I don't know how many copies of The Sun would be

sold if it ran to 760 pages.
MR GRAHAM: Your Honour, given the state of the real estate market, that seems to be about the size of it.

What we say, Your Honour, is that - I should add something, Your Honour, to what I said about the books being read by more than one person. Of course, people talk about what they read as well; so that it is not just a case of saying, well, four and a half thousand copies, that is it. One must look further to see how far the dissemination went, and we say it is open to infer that it was quite widely disseminated, intended to be so; and no doubt we would submit Mr Hoser didn't write the second book in any expectation other than it would achieve equal success to Exhibit A.
HIS HONOUR: But you see there is another side to that. I mean, the fact of the publication having been in 1999, the walls haven't fallen down in the meantime; the streets haven't been lined with demonstrators wanting to stone the courts. What should I read into it? Is the assertion - it is all very well to put it in a broad sense of the tendency to scandalise the court and to bring the court into disrepute. If there was evidence that it was achieving that result, it would be capable of being forwarded. I mean, it might be by, because letters to the editor have been packed with people saying, "I have just read the 760-page book of Mr Hoser, and I had no idea the courts were this appalling". Wouldn't it be something which the tendency to scandalise after a couple of years would be capable of being proved by the Crown?
MR GRAHAM: We would say, Your Honour, that that would be an enquiry that the court need not undertake, having regard

to the terms in which the offence is expressed.
HIS HONOUR: Need not, but might I infer from the absence of such evidence that the risk of scandalising the court is not one which has apparently been translated into any discernible action?
MR GRAHAM: Your Honour, we would again say, not; certainly not at this stage, because Your Honour is dealing with a submission of no case, where every proof that is in favour of the Crown should be drawn and the Crown's case should be taken at its highest. If, hereafter, there were evidence that the book had not, Exhibit B had not achieved many sales and had been withdrawn from sale, that might be different. But at the moment Your Honour is left with the position that there is a submission of this kind, and we would need to prove no more than the tendency that the book was calculated to do what we say it did.

Your Honour, I might add that, going back to The Queen and Gray, and going on to - well, firstly there was no suggestion that there need be evidence that the authority of the Queen's Bench Division, of which Mr Justice Darling was a member, had been reduced either generally or in the circuit area where he was sitting, and no comment was made about the absence of such evidence. Perhaps more importantly in Gallagher and Durack, where the conduct of Mr Gallagher, as I understand the report, was widely reported.
HIS HONOUR: That is the difference, isn't it? That is publication of a major player in the industrial field, in the political field, published in mass newspapers, must have got huge circulation - - -
MR GRAHAM: Yes.

HIS HONOUR: Across the country. It is a rather different kettle of fish, isn't it?
MR GRAHAM: I am trying to answer Your Honour's point about civil disturbance and disobedience to the court having improved or having eschewed from the publication.
HIS HONOUR: I am not suggesting it has to be proved as part of the Crown case. Plainly, on the authorities, there could be a tendency to scandalise without the tendency having manifested itself in the court reputation being in fact tarnished. It is indeed a tendency. But if, as a matter of fact there has been no demonstration to that effect, might it not be some relevant evidence as to whether the tendency in fact was ever there?
MR GRAHAM: Your Honour, one determines the tendency by looking at the publication, not by looking at its impact. That is why I mentioned Gallagher and Durack. There was no evidence in that case that other persons, be they union officials, unionists or members of the public were disposed to disobey commands of the Federal Court; and no-one suggested that that need be proved.
HIS HONOUR: You would no doubt, in any event, say, as you have said before, that if that was a relevant proposition it would be relevant to proof beyond reasonable doubt, rather than to the question of whether it was capable of supporting the charge.
MR GRAHAM: We would say that, Your Honour, yes.
HIS HONOUR: Mr Graham, I might take a five-minute break, I think.
MR GRAHAM: If Your Honour pleases.
(Short adjournment).
HIS HONOUR: Yes, Mr Graham?

MR GRAHAM: If Your Honour pleases. When I said earlier about paragraph 16, my learned friend suggested that was the uncontentious points. He said that at page 101.

Secondly, Your Honour, if I can go back to the lack of similarity between this case and the case before Justice Ellis - Colina and Torney.

My learned friend seemed to say in his discussion about it that one of the reasons why this case should be dismissed at this stage was by virtue of a comparison with what the publication said in that case as compared to Exhibit A and Exhibit B. At page 108 he drew Your Honour's attention to how severe the criticisms were in what Mr Torney said. At page 109 he drew attention to the fact that the publication clearly implied that Judges of the Family Court didn't act according to law and didn't make decisions on the evidence and were biased against him. At pages 110 and 111, he drew attention to the test that Judges should have regard to the character and the form, the place and the extent of publication, and His Honour concluded that the publication was generally available in that place, even though the evidence only showed one copy given to the informant.

But, Your Honour, the real problem about all this is every case is going to be different, and Your Honour doesn't gain very much from an examination of the facts of another case which ultimately failed only on the question of publication. The judge held that on useful analysis of the authorities, that all the other elements of the offence of the contempt of court by scandalising the court had been made out.

Your Honour, I am just going to depart for a moment

from what I intended to do next, which was to go to my learned friend's comments about the various particulars, and I want to refer Your Honour to a case which has some similarity to this case, but again, so far as the facts are concerned, they are different. It is the case of Re Borowski. It is under tab 32, and the reference is 1971, 19 Dominion Law Reports, Third Series, at page 537. It is a decision of Judge Nitikman, sitting in the Manitoba Court of Appeal Bench.

We refer to it only because it is a more recent case of an attack on the integrity of the court or a judge, later of course than The Queen and Gray, later than The King and Dunbabin, and The King and Kische; but I think it pre-dates Gallagher and Durack.

If Your Honour goes to the headnote of the case, which I will read so as to get the facts; "An information alleging an offence against the Vocations with Pay Act was sworn before a Magistrate who then issued a summons against the accused who was a Minister of Transport in the Province of Manitoba. After an application to quash the information was heard and dismissed by the same Magistrate, the Minister was interviewed in his office and the news story and a portion of the taped interview were broadcast over a radio station. The Minister criticised the Magistrate, stated that the fact that the Magistrate was a loyal Conservative Party member and had been appointed by the Conservative Party could not be overlooked, and stated that his decision was so judicially improper that one could only conclude that it was based on political considerations. The Minister further stated that, 'If that bastard hears the case I will see to it

that he is defrocked and debarred'. It was held that the Minister was guilty of contempt of court".

There is just one or two passages to which I would draw Your Honour's attention in the judgment of Mr Justice Nitikman. If Your Honour goes to page 539, Your Honour will see at the top of the page that the publications resulted from an interview by a journalist with the Minister in his office, and down the page it appears that portion of the taped interview was broadcast over a radio station. It was in the course of the replaying of that tape over the radio station that the statement made to the journalist which was complained of was published; and at page 540 about point 4, the terms of the proceeding for contempt of court are set out, in the quote that Your Honour sees there.

The case contains a full review of the relevant authorities, and it is of some value for that purpose. It starts on page 541, with a quotation from an article written by the Chief Justice of the High Court of Ontario, which I would commend to Your Honour. It goes through - His Lordship went through all of the cases that we have been hearing in this proceeding before Your Honour. Ultimately, it was held at page 546 that "I have no hesitation in finding it was calculated" - that is the broadcast - "to bring the provincial Magistrate's Court in Dauphin and the learned Magistrate who presides over it into contempt and to lower its authority". And the judge went on to indicate what a bad case this was, having regard to the language used.

I mention the case at this point Your Honour, because although contempt was constituted by a radio broadcast,

there is no evidence apparently before the learned trial Judge, either as to the extent of publication in the sense of how large the radio audience was, or whether the wheels of justice in Manitoba ground to a halt as a result of this broadcast. There is no suggestion that any such evidence was required.

Although it is only a judgment of a single Judge, it is perhaps notable that parties were represented by senior counsel, and the proceeding had been initiated by the Magistrate, as I understand it, with the support of the Attorney-General of the Province of Manitoba.

If I can turn, then, to deal with some of the comments which my learned friend made concerning the particulars, and the particular paragraphs in Exhibit B. I should say I will follow the course of dealing with particular passages that he followed. He started by referring to page 273. Your Honour would recall this, at point 5 on page 273, "He", that is Judge Neesham, "made it clear that this material, tape and transcript would be made available to the jury. In other court case, s this most certainly occurs". And I think Your Honour drew attention to the fact that whilst the author quotes the transcript in many cases to support his contentions, or purports to quote the transcript - and I will demonstrate that there is some inaccuracies in his purported quotation - he doesn't give you a quote for that.

And I think it was ultimately, it came down to what Judge Neesham said at point 6. "Neesham - Every word spoken in this trial is recorded and at the end of the day is reduced to type. The result is that at any time anything that is said can be recalled should it be

required". In any event, Your Honour, it doesn't seem to matter very much, because there is nothing, there is no indication in the book at least that the transcript was ever needed to be read over, or was asked for by the jury, either for them to see it, or asked by, or the jury asked for passages to be read over.
HIS HONOUR: No, but it has been put as an illustration of the perspective of the defendant, how - I think it was put "can't take a trick" - that, in effect, he starts with an assumption as to the odds being stacked by virtue of the prior association with Judge Neesham in the case.
MR GRAHAM: Yes.
HIS HONOUR: From that point on, you start with the assumption that everything that occurs is going to be loaded against you and that you can only protect yourself by having a record because you can't trust the officials. That is the context of it. As Mr Maxwell pointed out, my comment didn't really place sufficient weight on - indeed I am not sure that I really appreciated that - to that quote which is there from Judge Neesham, that "it can be recalled any time should it be required".

It is certainly not beyond belief that a member of the public, hearing that, might read into that the conclusion that it was going to be available for the jury any time they should want it. So that if the statement that is made in the text by the author goes beyond the statement of what is said by the judge, it is not inconceivable that he has drawn that breadth of conclusion from what, as lawyers in the criminal trial would know, was a very different proposition, which is actually being stated by the trial Judge.

MR GRAHAM: Yes. Your Honour, clearly, what Judge Neesham apparently did was to follow the absolutely normal procedure - - -
HIS HONOUR: Yes, precisely.
MR GRAHAM: And the attack which was made on the court was in fact he did. Whereas it was based on a misunderstanding by the writer of what the procedure was, and the attack is mounted, and the "can't take a trick" point is based on a complete misunderstanding.

My learned friend then went to page 239. He made comments about 240, where there was a short passage at the top of the page, which is one of the particulars, and down to 241 he made comments about the passage complained of. I am not going to go into those.

He took Your Honour to page 319, of which specific complaint is made, and I think the only point that he seemed to make from that, was, well, if someone can assemble 20 counts of perjury, then there must be something in what has been said. Again, it doesn't take the case for the respondents any further, in our submission.

He took Your Honour then to page 350, where there is a passage complained of, and the particular passage, so far as we are concerned, is the last bit "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". Now, that word "green lighting" carries a very strong meaning in our submission. It indicates that the learned Judge was aware that Mr Perry had been engaging in improper conduct in talking to jury members. One can hardly think of a worse thing on the part of the

prosecution than that. He was indicating that he was aware that Mr Perry had been talking to jury members, and, instead of stopping it, Judge Neesham, by green lighting it, approved of it and allowed it to continue.

Then my learned friend referred to page 430. I am trying to keep this in the order that my learned friend - - -

HIS HONOUR: As I understand how that was put, and I think I am understanding it correctly from the various passages which were shown to me, it appears that what is being said there is that a member of the gallery, possibly others, commented to Mr Hoser that whilst he was in the court and the case was being conducted, either by him giving evidence or by him cross-examining witnesses, that there was exchanges taking place between the prosecutor and the jurors. It is not, as I apprehend it, being put that either he was aware of that fact, or for that matter that the judge was aware of that fact.

Let's assume it is a factor for the moment. The complaint is being put that, in effect, he should have known that that was occurring, and so it starts with a series of propositions: "firstly, I didn't notice it, but someone else said they did. What someone else said they noticed should be accepted as being what occurred, and if that was so, that he was doing that, that was improper, as obviously it would be, and it should have been stopped". But that, as I understand it, is the sequence. So that the "green lighting" reference there, and it may be that again, coming back to the test for a no case, you would say, "Well, there might be an alternative interpretation open, but the one that is strongest for the Crown which

can be applied is that it is a deliberate exercise, the Judge did know, was giving the nod and the wink to the prosecutor: 'You can go ahead and talk to the jury" et cetera", in which case it would be suggesting by "green lighting", that he was consciously permitting a quite improper interchange between the jury and the prosecutor. But that is an interpretation which the "green lighting", would put the "green lighting" in a rather lesser light, wouldn't it, the alternative interpretation?
MR GRAHAM: Well, Your Honour, yes, but in my submission that is a matter for my learned friend's final address. We say the word is, the sentence containing the word has one obvious meaning. It is borne out by my learned friend's reference that you are entitled to read other parts of the book to explain one part - page 430, where we have a picture of "Mr Keith Potter, former President of the Victorian Branch of Whistle Blowers Australia was outraged when he entered Thomas Neesham's Kangaroo Court in September 1995 and saw DPP barrister Raymond Perry having conversations with the jurors as Raymond Hoser was giving evidence from the witness box. He was even more outraged when he saw that Judge Thomas Neesham was aware of and tacitly approving of Perry's illegal behaviour".
HIS HONOUR: What page was that you are reading?
MR GRAHAM: 430. My learned friend took Your Honour to it. It is one where one was allowed the use the book as internal corroboration or providing aids to meaning. It couldn't be much clearer indication of a suggested meaning of green lighting than that.

My learned friend then took Your Honour to page 353. I think his only suggestion, matter that he put in

relation to that was that the context in the passages before and after the passage complained of should have in some way been made part of the Crown case, presumably by being included in sub-paragraph (ix).

I apologise for these occasional delays but it is sometimes difficult to pick up the particular passages in question.

If Your Honour would now go to page 435, which contains a passage complained of. Your Honour had that passage read to you by me in my opening. I won't read it again.
HIS HONOUR: Sorry, which page are you at?
MR GRAHAM: Page 435. And there was a question about the last sentence raised between Your Honour and my learned friend. "But like he said himself, he wasn't interested in the truth".
HIS HONOUR: Yes.
MR GRAHAM: And that would require us to go back, Your Honour, to two passages to which reference has already been made. At the bottom of page 304 over to page 305, there is a passage, "Neesham - The truth of the allegations I do not propose to have enquired into before this jury!". Firstly there is a heading - this is the passage complained of. "Judge Thomas Neesham - No concern for the truth". And that passage has been read. And the passage following. "Neesham - The truth of the allegations I do not propose to have enquired into", he said. That's not going to be followed and enquired into in this court".

Then there was a passage at page 445, which we looked at several times. "The guiding of the jury", near the top of the page: "The guiding of the jury to the desired

verdict continued as Neesham said the following, 'A criminal trial is not a search for the truth'". It was, I suppose, at that stage - - -
HIS HONOUR: Sorry, 435?
MR GRAHAM: 445, Your Honour.
HIS HONOUR: Yes.
MR GRAHAM: So what His Honour is doing was saying something that Your Honour has probably said, or words similar to that effect, and of course it is a statement which is made, as I understand it, in favour of the accused, in order to ensure that a jury doesn't go about trying to work out whether the Crown's case is right or whether the defendant's case is right, and one is better than the other, and one side is declared the winner.

I just have noted at this stage, I want to draw Your Honour's attention to two passages - first of all to page 209. Would Your Honour, on page 209, note the passage at about point 6 beginning at that paragraph, "While talking transcripts, all the quotes and court comments that follow (MacLennan, Heffey, Waldron and Neesham trials) are taken direct from the 'official' transcripts similarly available from the State Government and/or the internet. (Go to)" - a web site is mentioned which would rather tend to infer is something to do with Mr Hoser; but may I, in the light of that, Your Honour, claim the transcript quotations are accurate.

Would Your Honour go to page 418. Your Honour will see at about point 5 on page 418, firstly there had been an exchange between Mr Hoser and Mr Perry. And it says: "Independent observers in the court laughed at Perry's comment". Then, "Neesham (to people in court) - 'Control

yourselves, please, or I'll have the court cleared'...". One might question very much whether any transcript of this court would contain the words in brackets. If you and I go down to the end of that pretended passage from the transcript, Your Honour sees: "Neesham (again threatening people in the court)" - one would feel confident that a transcript did not contain that, and Your Honour can take judicial notice of that fact.

Whilst on this topic, Your Honour, if Your Honour goes to page 434, Your Honour sees another quotation, "Hoser - 'Excuse me, Your Honour, he's doing it again'". "Perry: "I didn't" question mark. "Neesham - (grudgingly): 'Fair enough Mr Hoser'". I would suggest, Your Honour, that from your own experience as a matter of judicial notice you could assume and infer that that is simply not an accurate quotation. That is exactly what was said the other day. Other than that - - -
HIS HONOUR: Well, I would have thought the reader would also assume that.
MR GRAHAM: Well, Your Honour, a lawyer reading it would. But it throws serious doubt upon the assertion that I took Your Honour to first, that these are accurate.
HIS HONOUR: Well, I think there would be a huge turnover of shorthand staff if they were to insert before comments by the Judge, "grudgingly". There would be a round of applause if it said "brilliantly" or "decisively" or - - -
MR GRAHAM: Now, Your Honour, I think I won't take up the court's time by responding to each and every one of my learned friend's submissions concerning the publications relating to His Honour Judge Neesham. We say that all of them are set out in the particulars under paragraph 3 of

the notice of motion and amount to a publication that scandalises the court. The most one could say in favour of the respondents is that some are worse than others, and I am not going to go through and draw a set of comparisons as to which were worse.

Then my learned friend went on to deal with the allegations relating to Her Honour Judge Balmford, as she then was, referring to pages 140, 142 and 144.
HIS HONOUR: You have passed over the references to the Chief Judge. You are not wanting to deal with those?
MR GRAHAM: No, Your Honour.
HIS HONOUR: That is all right. I just wanted to make sure you hadn't jumped by mistake.
MR GRAHAM: No, Your Honour. I think my only note for the purposes of this address is that I didn't want to say anything about them beyond referring Your Honour to them again without reading them.

It is, if I can turn to page 144, where complaint is made from what appears at point 9. "Balmford's bias in favour of the police and the DPP isn't just something I've noted. In fact three Supreme Court judges have noted it as well". And reference is made to the case of DeMarco. I think, as my learned friend told you, this was a decision of the Court of Appeal, 26 June 1997, unreported. As I understand the position, that was a case of misdirection. It was not a case where the judge's conduct at the trial or in framing her summing up or otherwise was alleged to have involved bias in favour of the police or the Director of Public Prosecutions. It is an entirely different class of case, and it - - -
HIS HONOUR: What was the date of that judgment?

MR GRAHAM: My learned friend gave it as 26th of June 1997. My learned friend, in dealing with that passage, made a submission which I would suggest was unacceptable. He said that, "The allegation of bias on the part of Her Honour Judge Balmford was an allegation of apprehended bias or an appearance of bias". In my submission, Your Honour, no-one could read that sentence as suggesting a case of mere apprehension of bias. Even if that had been what had occurred in DeMarco's case, but it didn't.

When one reads the book, and the other passages in the book, the niceties of distinction between actual bias and apprehension of bias are nowhere to be perceived. The thread of Mr Hoser's complaint is that Judges are actually biased against him.

I don't wish to say anything about what my learned friend said concerning the particulars dealing with Magistrate Heffey. I do want to say something about what was said about Magistrate Adams - Magistrate Hugh Adams, on the back cover.

This was an allegation referring to a 1995 publication of policeman Ross Bingley's confession that he had paid off Adams to fix a case, et cetera.

Now, then I was going to ask myself, "Well, what is the 1995 publication that is being referred to?" And if one goes to the Hoser Files, which is Exhibit - did Your Honour designate it Exhibit D.1?
HIS HONOUR: Yes. I have that.
MR GRAHAM: And looks at the copyright date, it is 1995. If one looks at page 71 one can see, or at least infer, what the 1995 publication was. And so in making an attack against Magistrate Hugh Francis Patrick Adams reliance is placed

upon policeman Ross Bingley. One cannot resist going to the inside of the front cover of Exhibit B. "Ross Alan Bingley gained notoriety for several actions including falsifying charges, perjury and using police protected criminals as witnesses. After one case he confessed to fixing the result by paying off Magistrate Hugh Francis Adams". No need to read the balance of it. So the allegation of serious corruption against Magistrate Adams appears to be based upon statements made by a certain policeman, Ross Bingley, who was accused in the same book of being a crooked cop. So one must wonder about the reliability of anything Mr Bingley said, if one is to follow this trail through to a conclusion.

If I can turn now, very briefly, to Exhibit A - I think I can deal with this before one o'clock - page 57. There is another allegation against Magistrate Hugh Francis Adams. It is there said that "In a separate matter a policeman admitted to paying a bribe to Adams to have an innocent man sentenced to gaol". It refers to the Jennifer Tanner inquest which was the bit that was referred to in the inside of the back cover of the other book. One might ask - I think Your Honour raised this issue - what is meant by "in a separate matter"? It is not identified. It may be the interview between Mr Bingley and Mr Hoser referred to at page 71 of Exhibit D.1, or it might have been the court proceedings. But whatever it is, we say that it doesn't detract from the scandalous nature of the statements made by Mr Hoser concerning Magistrate Adams.

Now, Your Honour, I was next going to turn to Lange and the Australian Broadcasting Corporation, and also to

say something about the companion case of Levy in the State of Victoria; and a later case, copies of which are not before Your Honour - I will try to arrange them over lunchtime.
HIS HONOUR: Well, you can turn to those after the break.
MR GRAHAM: If that is convenient.
HIS HONOUR: 2:15.
LUNCHEON ADJOURNMENT

UPON RESUMING AT 2.15:
HIS HONOUR: Yes. Thank you.
MR GRAHAM: If Your Honour pleases, turning to, what I will call the Lange argument, which my learned friends deal with in paragraphs 22 to 26 of their outline - - -
HIS HONOUR: I must say, although I rejected your contention in this regard earlier on, as to whether the Lange principle can be relevant to the question of whether it is capable of making out a prima facie case, the more I think about it, the more I think that and the balancing exercise between the two considerations, free speech on the one hand and protection of the court on the other, are unlikely to be considerations relevant to whether evidence is capable of constituting contempt of court, rather than to the question of whether evidence is capable of amounting to either proof beyond reasonable doubt or is relevant to the question of penalty. But having heard submissions on it, by all means proceed. I haven't come to any definite view about that, but I - - -
MR GRAHAM: Well, if Your Honour pleases, since it is a subject pretty close to my own heart, which Your Honour will see in a moment when you go to the cases, I don't resist the opportunity to say something about these decisions.

It is useful just to take a moment, Your Honour, to look at the context in which Lange and the Australian Broadcasting Corporation arose. The two famous cases, that of Theophanous and the Herald & Weekly Times and Stephens versus Western Australian Newspaper had been decided in 1994, and they were both reported in 182, Commonwealth Law Reports, respectively, at pages 104 and 211.

In Theophanous, the High Court decided by a four to three majority that certain implied limitations were to be found in the Commonwealth Constitution which inhibited the plaintiff, who was a Federal Member of Parliament, from bringing defamation proceedings against The Herald & Weekly Times for a publication about him, in that capacity as a Federal MP. So the case was there concerned simply with implications to be found in the Federal Constitution about the freedom of speech and communication.

Stephens case, which was heard at the same time as Theophanous, and also decided by a four to three majority, that certainly limitations upon the common law arose out of the Western Australian Constitution, which had an inhibiting effect at state level. The source of the limitations as found by the majority is, with respect, not clear; but part of the reasoning of some members of the majority depended on the proposition that because the legal source of State Constitutions is to be found in the Commonwealth Constitution, specifically sections 106 and 107, it was possible to develop the Theophanous principle to apply it as it were at the State level. This is commonly referred to in this area of discourse as the "flow down" effect.

Now, in Levy and the State of Victoria, 1997, 189 Commonwealth Law Reports, 579, which is tab 18, the plaintiff challenged certain regulations which inhibited his ability to demonstrate his opposition to duck shooting during the duck shooting season, basing his challenge in part upon Theophanous and Stevens saying that the regulations infringed an implied freedom of speech arising at the State level.

If I could ask Your Honour to look at the report at page 583. Your Honour will see that this is in the course of the argument of the late Mr Caston, and picking up in the debate in this argument at about point 4, Your Honour will see counsel reported as saying, "The debate about duck shooting carries across State lines and involves national political parties". Sir Daryl Dawson intervened: "Do you rely on Theophanous and Stephens? It seems that there is now not a majority of the court which would support them." And Mr Caston said: "We do rely on those cases".

Then, if Your Honour would be good enough to go to page 584, where the report of the argument on behalf of the State of Victoria, at about point 9, it is said: "We do not need to attack the correctness of Theophanous or Stephens. They concerned defamation. The court has not said that a right or freedom of communication extending to forms of communication exists". Sir Daryl Dawson intervened to say words to the effect reported.
HIS HONOUR: I am sorry, could you just keep your voice up.
MR GRAHAM: I am sorry. "Those cases" - does Your Honour - - -
HIS HONOUR: Yes, I have got the passage, yes.
MR GRAHAM: "Those cases did not purport to be restricted to defamation. They are relied upon against you. In that case we seek leave to re-open and argue the correctness of Theophanous and Stephens. The court adjourned to give persons claiming to have a sufficient interest in the question of re-opening and reconsidering those decisions".

And some months later a large number of persons turned up in order to support the correctness of

Theophanous and Stevens, and I will just - I will come back to the judgment in this case shortly. That is how the point first arose. But in the meantime the proceedings in Lange had commenced and found their way to the High Court. As Your Honour may be aware, Lange was another defamation case, but it wasn't attended with all the other possible arguments that the State sought to raise in Levy. So that it was a much more straight-forward and simple vehicle for the reconsideration of the Theophanous and Stephens cases.

And that, the court did. And it is fair to say in summary that the court closely confined and reduced the scope of decisions in Theophanous and Stephens.

Now, Your Honour, it is necessary to look at Lange, which is 1997, 189 Commonwealth Law Reports, 520 under tab 17, and it appears at page 521; that the action was brought by the Right Honourable David Russell Lange, a resident of New Zealand in relation to a broadcast in Australia by the Australian Broadcasting Corporation. Now, Your Honour will see at point 7 on page 521, that "By paragraph 10 of its amended defence the Corporation pleaded that the matter complained of was published: '(a) pursuant to a freedom guaranteed by the Commonwealth Constitution to publish material; (i), in the course of discussion of government and political matters".

Now, if one could stop there, because the next two sub-paragraphs were later abandoned, that is (ii) and (iii). And the defence went on. This is at about point (b)(i) "in the course of discussion of government and political matters", and the next two sub-paragraphs, (ii) and (iii) were also abandoned, and so was sub-paragraph (iv).

Then the defence went on in paragraph (c) to allege other more familiar defences in a libel proceeding. So that was how Lange arose, and the resumed argument in Levy took place at the same time as the argument in Lange commenced.

If Your Honour would just bear with me while I re-organise my papers for a moment. It is useful, Your Honour, before undertaking any analysis of the decision in Lange, just to look at the very end of the judgment at page 577; you will see that what the court unanimously decided about those pleas that I have read to Your Honour. It appears at the top of page 577. "1, The case stated should be answered as follows: Is the defence pleaded in paragraph 10 of the defendant's amended defence bad in law?" "Answer: Yes".

Then, may I summarise for Your Honour what we say are some of the fundamental points that emerge from Lange. I will ask Your Honour, first, to go to page 560. Halfway down the page, there is a paragraph which begins: "That being so, sections 7 and 24" - those are the Commonwealth Constitution - "and the relation sections of the Constitution necessarily protect that freedom of communication between people concerning political or government matters, which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather, they preclude the curtailment of the protected freedom by the exercise of legislative or executive power".

And then, could I ask Your Honour to go over to page 561, the last paragraph, where Their Honours said: "However, the freedom of communication which the

Constitution protects is not absolute. It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution".

So that when one is looking at the implied freedom or limitation on executive or legislative power, supported by Lange, one can say from those passages that it doesn't create a personal right. It protects freedom of communication between the people concerning political or government matters which enable the people to exercise a free and informed choice as electors. It precludes the curtailment of the protected freedom by the exercise of legislative or executive power, and because of its implied nature, the freedom is not absolute, but only extends so far as is necessary to give effect to the sections from which the implication derives. It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution.

So if I move on, the question is to be asked: "Does the law" - in this case the law relating to contempt of court being common law - "effectively burden freedom of communication about government or political matters, either in its terms, operation or effect".

The next question which emerges from the judgment at page 567 is, if so, "is the law reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by section 128?"

Now, if Your Honour goes over to 567 of the judgment,

under the heading "The test for determining whether a law infringes the constitutional application". There is a passage which extends over to page 568 which in our submission supports the approach that I have endeavoured to put forward in the questions that I posed.

Now, it is apparent, in our submission, that the protected discussion extends to discussion about members of the legislature and their conduct and decisions, and the Executive and its conduct and its decisions, and the performance of their duties by public officers. But it is limited by its implied nature. It is centred upon the necessity for an informed choice at elections, while, given the nature of responsible government established by the Constitution, it may also extend to those aspects of the Executive accountable to Parliament, particularly the Commonwealth Parliament. But the courts, of course, are not accountable to Parliament. The independence of the judiciary from legislative and Executive influence is a basic principle of the Constitution, more fundamental even than the separation of powers. So we say the conduct of the courts is not of itself a manifestation of any of the provisions relating to representative government upon which the freedom is based, and that would be so both in relation to Federal Courts and to State courts.

Support for that proposition, Your Honour, is to be found in a case that is under tab 10, which is John Fairfax Pty Ltd and Attorney-General of New South Wales. The report of that we have given Your Honour, is 2000, 181 Australian Law Reports at page 694.
HIS HONOUR: Tab 10, you said?
MR GRAHAM: I am sorry Your Honour, I meant to say tab 14.

HIS HONOUR: Right. Sorry, it is which one? It is 181, 1 ALR.
MR GRAHAM: 181, ALR, Fairfax and Attorney-General. Now, I should say to Your Honour at this point that the High Court has granted special leave to appeal against the decision in this case, and the appeal is to be heard in December. It was a majority decision by the members of the New South Wales Court of Appeal.

It was concerned with a somewhat unusual provision in New South Wales legislation, which says that if there has been a prosecution in the Supreme Court for contempt of court, and the prosecution has been dismissed and the prosecutor wants to appeal against the decision to the Court of Appeal, the hearing of the appeal must be in camera. And challenge was made by John Fairfax to the validity of that provision, relying partly upon the well known case of Cable and Director of Public Prosecutions, but also to some extent upon Lange's case.

There is just one passage in the judgment of the Chief Justice, Mr Justice Spigelman, at pages 709 to 710. His Honour, in paragraph 82, summarised an argument put by the claimant, and the claimant was John Fairfax. His Honour said: "First, the claimant suggested that judges and courts are within the sphere of public officials and bodies about whom the freedom could be exercised. Mr Rares, SC, who appeared for the claimant submitted that the conduct of the judiciary was itself a legitimate matter of public interest". He referred to The King and Nicholls. " (To similar effect are the references to judges by Mr Justice Deane in Theophanous). Counsel also relied on certain observations of Justice McHugh in Stephens, which were quoted in the joint judgment in

Lange, Commonwealth Law Reports 570 as to 571. But it is a passage which I won't read, which doesn't talk about judges.

In paragraph 83, His Honour went on: "This passage, both as originally delivered and as approved in Lange, is concerned with the scope of qualified privilege for the purposes of the law of defamation. The inclusion of courts and judges in the scope of the subject matter with respect to which the public as a whole can be identified to have an interest, for purposes of applying the traditional rules of reciprocity in the context of qualified privilege for a defamatory statement, is not co-extensive with the constitutional protection of freedom of communication. That protection, as Lange made clear, is an implication to be derived from the text and structure of the Constitution insofar as it makes provision for representative government. The conduct of courts is not, of itself, a manifestation of any of the provisions relating to representative government upon which the freedom is based".

And then Their Honours went on, further, at paragraph 84, and I don't think that I need to read that paragraph, but I respectfully direct Your Honour's attention to it.

If it becomes necessary in this case, and at this stage, to go into the question of whether the laws of contempt of court, the law of contempt of court relating to scandalising the court need to be judged by reference to the question whether they are reasonably adapted or appropriate to serve a legitimate end, we would say that at a general level, justification for proceedings for contempt of court lies in the need to ensure that courts

are able effectively to discharge the functions, duties and powers entrusted to them by the people, and that in that regard we would refer Your Honour to, without asking Your Honour to look at the reference at this stage, to Theophanous, at page 187 in the judgment of Justice Deane.

I think I must say, with great respect to Justice Deane, as he then was, that his was the judgment that stood in the way of there being a single four-judge majority for any proposition. But nonetheless, we refer Your Honour to the passage at that page.

"We say that the judiciary has a primary duty to maintain a fair and effective administration of justice, and in order to discharge that duty it must have the power and the ability to enforce its orders and protect the administration of justice against contempts which are calculated to undermine it". And that proposition is supported by the case of Ahnee and the DPP, tab 10, which has been referred to several times, 1992, 2 Appeal Cases, 294, the relevant passage in the advice is at pages 303 to 305.

We then add the offence of scandalising the court is no more than a particular, if rarely invoked class, of contempt, and again, without taking Your Honour to the passage, we refer Your Honour to judgment of Mr Justice Callinan in the case of Re Colina ex parte Torney, 1999, 200 Commonwealth Law Reports 386, and the relevant passage in His Honour's judgment, which is quite short - the passage is quite short - is at page 439.
HIS HONOUR: Sorry, it was Justice Callaway that you said?
MR GRAHAM: Justice Callinan, in the High Court.
HIS HONOUR: Yes. Did you give me a tab citation for that? Do

I have that?
MR GRAHAM: Yes, Your Honour. It is tab 33.
HIS HONOUR: Thank you.
MR GRAHAM: Your Honour, if I can take Your Honour to a passage in Ahnee and the DPP, which helps to support the view the law of contempt of court in this field is appropriate and adapted, and not unreasonably disproportionate to the purposes sought to be achieved.

In Ahnee's case, which is tab 10 - and I have given Your Honour the reference - there is a passage at page 306 in the advice of Lord Steyn, starting just above letter B at page 306. The purpose of reading this is to show the narrowness of the scope of the offence of contempt by scandalising the court, and the narrowness serves to demonstrate the appropriateness and adaptation of this offence to the purpose sought to be achieved. Rather than reading the whole passage, starting at B, I refer to what appears from the letter B down to the next heading on page 306.

Now, as Your Honour is aware, in the case of at least some classes of contempt, the public interest in securing the proper administration of justice has to be balanced against the public interest in the free dissemination of information within the community. So built into the law of contempt, in relation to interference with the administration of justice, either by publication or by scandalising, is this countervailing concern in relation to freedom of speech that long pre-dates Theophanous Stephens, Lange and Levy.

And the leading case in Australia, which has been constantly cited and approved by the High Court is Ex

parte Bread Manufacturers; re Truth and Sportsman. And this is tab 8, 1937, 37 State Reports New South Wales, 242. And the oft-cited passage of the judgment of Sir Frederick Jordan is to be found at pages 249 to 250; and that countervailing consideration in the law of contempt has been applied many times. I don't know whether Your Honour wants the further citation, but Your Honour is probably familiar - Hinch's case is an example.
HIS HONOUR: Yes.
MR GRAHAM: And there are many others. There is obviously room for overlap between the public interest and securing a proper administration of justice, and the freedom of discussion which the law already allows, and which the High Court decisions suggest flow from the constitutional implication.

If I can give just one example. If Your Honour would go to tab 15, there Your Honour will find the case of John Fairfax Publications Pty Ltd and Doe, and that is reported in 1994, 37 New South Wales Law Reports at page 81. I would ask Your Honour to go to pages 109 to 111. I should pause to say that the then Chief Justice of New South Wales, agreed with the judgment of President Kirby, as he then was, in most respects, including the one to which I want to take Your Honour, at pages 109 to 111. I don't think I need trouble Your Honour with the facts of this case.

At those pages, President Kirby under the heading "Contempt and the Constitution", dealt with the matters which are close to the topic that Your Honour is asked to consider. If Your Honour would look - and I will just read one relatively short passage. Would Your Honour go

to 110, the last paragraph of the page, where His Honour said: "It would be unthinkable if the beneficial development of the implied constitutional right to free communication upon certain matters integral to the political system established by the Constitution were seen by the appellant or anyone else, as a vehicle for destroying the essential power and duty of the courts in this country to protect the fair trial right of persons accused of crimes. That right may itself be implied in the Constitution". It referred to Polyukhovich and Dietrich. "I say nothing more of that for it has not been argued. But it would be a complete misreading of the recent development of constitutional law in Australia to suggest that the implied constitutional right of free communication deprives courts such as this, of the power and, in the proper case, the duty to protect an individual's right to a fair trial where it is, as a matter of practical reality under threat. Whatever limitations may be imposed by the constitutional development protective of free communication upon certain matters upon the law of contempt (for example, in terms of scandalising of the courts) I would not accept that the constitutional implied right has abolished the long-standing protection of fair trial from an unlawful or unwarranted media or other intrusion. Fair trial is itself a basic right in Australia".

Now, Your Honour will see President Kirby left to one side the other branch of the offence of contempt by interference with the due administration of justice; but we would say that, logically, from that passage, and His Honour's statements, if the scandalising publication

undermines the public confidence in the courts, then the same reasoning would apply as the reasoning of His Honour in relation to necessity of ensuring a fair trial.

Then, could I take Your Honour back to Hammersley Iron and Lovell, which is at tab 12, and could I direct Your Honour's attention, firstly, again, to the judgment of Mr Justice Ipp - I should say, in this case, there had been an argument raised, based upon Lange and the other cases, as appears from the headnote at page 318.

In dealing with that aspect of the case, at pages 323, His Honour - I might say with whom the presiding member of the court, Mr Justice Pidgeon, agreed, starting on 323 at letter F - indicated the limits which he perceived upon arguments based upon implied limitation in the context of curial proceedings.

To the like effect is the judgment of Justice Anderson, the third member of the court, page 342 to 3, and again, the passage, which I won't read and I will take Your Honour to, commences at 342, just before letter E, and goes on to almost the end of page 343.

Now, Your Honour, lastly, on this particular proposition, can I take Your Honour again to the High Court's decision In re Colina ex parte Torney, under tab 33. It was a judgment of Justice Kirby. Your Honour, I think, was taken to this case by my learned friend and knows what the nature of the proceedings were. If Your Honour would go to page 407 in the judgment of Justice Kirby - page 407, paragraph 61. His Honour said: "There was more substance in an objection to a belated attempt on behalf of the prosecutor, in these proceedings, to challenge the validity of the charge brought against

him upon the basis that the law upon which it purportedly rested was inconsistent with the constitutionally protected freedom of communication on matters of political concern".

Now, Your Honour can see - and I think Your Honour may have been taken to this - that in the argument of counsel this point was attempted to be raised, and counsel wasn't allowed to raise it. Nonetheless, Justice Kirby made a comment about it.

He said: "The authority of this Court upholds the proposition that the Constitution protects freedom of communication between people concerning political or governmental matters relevant to the free and informed exercise of their rights as electors. Some judicial remarks have suggested that such freedom of communication is not incompatible with the law of contempt. However, that question has not been decided by this Court. One day it might be". Your Honour sees a footnote reference number 85 to the passage in the judgment of Justice Deane, and to the passage in the judgment in Fairfax and Doe, to which I have taken Your Honour.

But lastly, in relation to Lange's case what Your Honour is here dealing with is a common law offence. The cases concerning freedom of speech, Theophanous, Stephens, Levy, Lange, indicate that the common law, mainly in relation to defamation, must conform to the Constitution. That is a proposition which is very easy to advance. But obviously, where one is concerned to strike a balance in a case such as this between the court's protection against interference with their own processes and an ability to speak freely, we would say that none of

the cases would extend to say that the court has lost that power,.

Now finally, Your Honour, I would like to say something briefly about Levy's case itself. That is to be found, as I have said, at tab 18.

Now, it is correct to say, with respect, that the court found it not necessary to pass upon the question of implied limitations upon the legislative powers of the States arising either by reason of the Commonwealth Constitutions or their own constitutions. I can give Your Honour page references to what the members of the court said about that.

Firstly, the Chief Justice, Sir Gerard Brennan, at page 599, under the heading "The Constitution of Victoria", said: "It is unnecessary in the light of the conclusion just stated to consider whether a freedom to discuss government or politics is to be implied in the Victorian Constitution similar to the freedom of that kind implied in the Constitution of the Commonwealth".

May I pause there to say, Your Honour, that if one is talking about legislative power as distinct from the common law - legislative power to enact legislation or to make regulations - there are obvious difficulties about finding a restraint upon the Parliament of Victoria to make laws where the very constitution which would have to be relied upon to develop this argument is a law made by the Parliament of Victoria, capable of being amended by it, and if departed from it, sometimes with a need to follow manner and form requirements.

Mr Justice Dawson, at page 609, said this, starting at about point 4: "Notwithstanding that the regulation of

which the plaintiff complained was a Victorian regulation, he chose to base his argument principally upon the freedom of communication which is protected by the Commonwealth Constitution, being content to say that the Constitution Act 1975 (Victoria) affords freedom of communication of the same kind and to the same extent. That being so, it is unnecessary to enter upon any examination of the provisions of the Constitution Act" - which His Honour had defined that term to mean the Victorian Constitution Act - "for the result which they produced could, upon the plaintiff's argument, be no different from the result under the Commonwealth Constitution".

At page 610 in the joint judgment of Justices Toohey and Gummow, Their Honours at point 4 said: "For the purpose of argument in this case, the defendants assume that the power of the Victorian legislature to enact laws which impede freedom of discussion or communication of matters of public concern at the State level is subject to the limitations propounded in the authorities and that those limitations arise from either or both the Constitution or the State Constitution Act. However, the defendants correctly submit that what was classified in the authorities as the constitutional freedom has not been treated as conferring an absolute or uncontrolled licence".

Perhaps I might pause there to say that the assumption attributed to the defendants may be slightly overstated; but, in the event, it certainly was the - the argument was put on the basis that you never ever got to that point in looking at this particular regulation.

Page 617 in the judgment of Justice Gaudron, starting

at point 2, Her Honour said: "The defendants have filed a defence and demurrer to the plaintiff's Statement of Claim. They support their demurrer on various grounds including that the 1994 Regulations did not 'unreasonably have the purpose or effect of restricting any implied freedoms contained in the Commonwealth Constitution or in the Constitution Act 1975 (Victoria). I am of the view that the demurrer must be held on that ground and it is, thus, unnecessary to refer to the other grounds advanced in its support".

Justice McHugh, page 626, at the bottom of the page said: "It is therefore unnecessary to determine whether the Victorian Constitution contains an implication identical or similar to that contained in the" - insert Commonwealth - "Constitution. It is equally unnecessary to determine whether the intended protests of the plaintiff and others related to matters concerning federal political or government matters".

Finally, Mr Justice Kirby, page 644, the top of the page, His Honour said: "For the purposes of the demurrer, I am prepared to assume that the powers of the Victorian Parliament to enact laws which impede freedom of discussion on matters of political and governmental concern in the State are subject to the same limitations as apply to the laws of the Federal Parliament".
HIS HONOUR: I am not with you. What page are you on?
MR GRAHAM: 644, Your Honour. Perhaps if Your Honour will just read the first seven lines on that page, 644.
HIS HONOUR: Yes.
MR GRAHAM: His Honour said: "Such an assumption is neither fanciful nor unreasonable. However, the defendants

submitted that even if such limitation were established, Regulation 5 was nonetheless valid".

And at page 647, His Honour, having made that assumption at 647, in a series, in the last of some numbered propositions, referred to the test recently stated in Lange's case, applying the principles, and came to the conclusion that the regulation didn't go beyond the bounds of reasonableness. So we perhaps await the day when the question will be decided by the High Court of how far the limitations on Federal Legislative Executive power, which are to be found to be implied in sections 7 and 24, apply in the States.

However, there was one final development which has happened quite recently, Your Honour. In so far as it has been said, or argued, as it has been on several occasions in the High Court, that the State Constitutions derive their legal force and effect from the Commonwealth Constitution, particularly section 106 and 107, that proposition has been clearly denied in the judgment of the High Court just handed to Your Honour.

In Yougarla and Western Australia, reported in 2001, 75 Australian Law Journal Reports, 1316. There, the court accepted that the legal source of the State Constitutions, formerly the Colonial Constitutions, derive from United Kingdom legislation, either directly enacting those Constitutions or confirming their enactment by colonial Parliaments, or authorising the making of such constitutions by Executive Act. That appears in the joint judgment in Yougarla in the paragraph at page 1329 of the report in the Australian Law Journal Reports, in the joint judgment of six Judges of the court, and also by Justice

Kirby at pages 1333 to 1336.

I might add, Your Honour, as long ago as 1902 Sir John Quick and Sir Robert Garran had said in their commentaries, page 928: "The States existed as colonies, and prior to the passing of the Federal Constitution had possessed their own charters of government in the shape of their own ... (reads)... have been confirmed and continued by the Federal Constitution, not created thereby". So at least one of the arguments which might be advanced for the suggestion that implied limitations, including common law limitations for offences such as contempts, can be found by - - -

HIS HONOUR: So it leaves open the potential argument as to whether the State Constitution, of itself, has an implied freedom.

MR GRAHAM: Yes. But as I said, there are difficulties about maintaining that proposition in the case of what is effectively in each case of any State a sovereign Parliament.

Your Honour, those are our submissions in support of the argument that the submission of no-case should be rejected.

HIS HONOUR: Yes. Thank you. Any matters in reply?

MR NICHOLAS: Your Honour, to assist, Mr Maxwell is reducing his reply to writing, and I anticipated he would be back - here he is.

HIS HONOUR: I would say that is fairly perfect timing. I will leave the Bench for five minutes whilst you get organised, and then I will take the reply.

MR MAXWELL: If Your Honour pleases.

(Short adjournment).

MR MAXWELL: We are indebted for that short adjournment and, as my learned junior was, I am sure explained, and we had formed the view - and I told my learned friend the Solicitor that we would do this - that it would enable us to finish this afternoon if we reduced to writing the main points of our reply. We have done that, and I will hand up a copy to Your Honour and to our learned friends.

Now, Your Honour, I will assume, as with the original outline, that it is of more assistance if I take Your Honour through it, and the purpose of it, naturally, is that Your Honour will have it to refer to subsequently.

But if I might, before going to the document - would it be more convenient for Your Honour to read it?
HIS HONOUR: Yes. That's all right. Go on.
MR MAXWELL: I was going to jump ahead one point, but I won't. If I might be permitted to begin, as each of us began, with reference to the dictionary - and this is really only said en passant. My learned friend took you to the Oxford English Dictionary, to which I made reference.
Your Honour will see, to the extent that you go back to the dictionary definitions at all, that every one of the definitions, other than the one we have relied on, is said to be "rare, relatively rare or obsolete". That is why, in the Australian dictionary, the only one that appears is "horrify or shock by some supposed violation of morality or propriety".

As I conceded on the first day, Your Honour is dealing with a term of art in the law of contempt. We only make the point that the very word "scandalising" is archaic. It is different from "obsolete". It is just a

word that belongs in another century, and we put the point no higher than that.

Now, Your Honour, we have put together in paragraphs 1 and 2 - I withdraw that, paragraph 1, and the footnotes, some references on the "no case to answer" point with the assistance of what Your Honour said in argument, in particular about the Attorney-General's reference No. 1 of 1983; and we have also - one of my learned juniors drew my attention to Wilson and Kuhl which says what we say in paragraph 1. His Honour Mr Justice McGarvie applied May and O'Sullivan, and then Zanetti and Hill is a decision which comments on May and O'Sullivan, and the passages from Justice Kitto which were cited with apparent authority by the Full Court.

The only point we rely on is there has to be evidence going to each element of the charge. We say there is no evidence going to the critical elements of the charge which is a tendency, as a matter of practical reality, to damage the administration of justice; and that is point 2. It is an element of the offence that it must be shown that the matter published has, as a matter of practical reality, a tendency to interfere with the due course of justice. As we note in the footnote, that passage in John Fairfax was described by our learned friend, the Solicitor-General, as the locus classicus. They adopt that passage. They do not satisfy the test which it defines.

Our essential no case to answer submission is, taking all the relevant matters into account, there is no evidence before the court from which it could be concluded that the relevant books had that tendency as a matter of

practical reality.

We deal with that term, that crucial criterion, in paragraphs 4 through to 6. We there make the point that the Crown has led no evidence and addressed no argument directed to the question of the effect of the publication as a matter of practical reality. This is evidently because the Crown contends that the court should "determine the tendency of the publication by looking at the publication itself, not its impact.

Now, Your Honour will - - -
HIS HONOUR: Can I just take you back to that John Fairfax case. What tab was it again?
MR GRAHAM: 13.
HIS HONOUR: I will just see - the citation there it is 370. You have described it as the element of the offence of contempt with respect to scandalising; but that passage seems to me to be addressing itself to the question of the caution with which the finding should be made that there is a contempt, rather than to the question whether - because the court goes on subsequently to speak about sometimes a court may think that, technically speaking, a contempt has been committed, but for various reasons, including the ones that you have just discussed - whether as a matter of practical reality it is an occasion on which the jurisdiction of the court should be invoked.

It seems to me that the passage to which you are referring is one which is highly pertinent to the question of whether a case has been proved beyond reasonable doubt; but it is not inconsistent with what the court there appears to be saying; that as to whether the elements of the offence of contempt have been established or not, they

are not suggesting that it is an element of the offence of contempt if there is scandalising of the court which is capable of lowering the reputation of the court within the eyes of the public. But nonetheless, concluding that, however, in all the circumstances, the practical reality here is not such as should lead the court to be satisfied beyond reasonable doubt that the matter has been established.

That seems to me to be the way in which the court is there dealing with it in that passage.

MR MAXWELL: Well, in our respectful submission, Your Honour, the notion of a technical contempt is a difficult one; that is to say, if that means anything other than that, yes, the words are abusive and make serious imputations against the person, if that is all it means, then we would still respectfully submit that there is no contempt. The offence has not been committed. It is described as technical in the sense that, well, on some of the language in some of the older cases I would say this imputes an improper motive to a judge. So it does.

HIS HONOUR: Yes.

MR MAXWELL: But no contempt, because as a matter of practical reality, it will not interfere with the administration of justice. And in our respectful submission that is a logically and analytically satisfying way to view the case law because, of course, the purpose of this law is to protect the administration of justice, and the argument goes, in Fairfax and elsewhere, you invoke the summary jurisdiction, as the Attorney-General has in this case, only with great caution, and only where, as matter of practical reality, the requisite tendency is demonstrated.

HIS HONOUR: Except that, of course, what we are dealing with here is not a no-case submission. They are dealing with the question whether, the material having been laid out, there is, therefore, on the face of it, a contempt. "Is it one where we should now exercise our jurisdiction", and in effect saying that, "Even though we have found that it is capable of supporting a conviction for contempt, is it one which in the circumstances we should nonetheless say we are not going to punish?" Those paragraphs are all about punishment.
MR MAXWELL: I accept that the passage we rely on is followed by a statement, "A penalty will not be imposed in its exercise".
HIS HONOUR: "Unless it is of such a nature", et cetera, "as to require...". That is the nature of the discussion. It seems to me that they are having there, rather than the sort of considerations which the - the immediate one for me is that whether a no-case has been established. It might be highly pertinent on the question of proof beyond reasonable doubt.
MR MAXWELL: Yes, Your Honour. But in our respectful submission this discussion is directed at when the court assumes the jurisdiction, and in that sense it is a threshold question, in our respectful submission. We are dealing with it as a no-case point, but some of what we have argued has been directed at the matters which ought to have to have been addressed before this case was ever thought about being begun - and I will come back to that.

Their Honours say further down on that same page: "Sometimes the court may think that, technically speaking, a contempt has been committed, but that, because

the tendency to embarrass is slight, or because of special circumstances, it ought to refuse to exercise its summary jurisdiction". That means refuse to punish a technical contempt or refuse to exercise summary jurisdiction to make a finding of contempt at all.

I want to come shortly to Torney, because what we say about that needs to be, in my respectful submission, reinforced, and there we will find the references in Borrie and Lowe, and in other Australian cases, to the notion of a real risk, that being a defining element of the offence - not something which only arises at the stage of conviction or penalty, but whether the offence has been committed at all.

What is important about what my learned friend, the Solicitor, said this morning is that issue is clearly joined on this. It is the case for the prosecution that impact is irrelevant in establishing the offence - I meant to say before, I have quoted him on the basis of my own notes; I don't have access to the transcript yet. So those attributed submissions in what we have provided this afternoon must be understood subject to that caveat. I have noted them contemporaneously and have endeavoured to do so fairly, and I say no more about that.

But in any event, in our respectful submission, it would be a strange result if Your Honour accepted our submission in paragraph 3, there is no evidence from which it could be concluded that the books had the tendency, as a matter of practical reality, and yet said "But I accept that the words have a tendency to insult, so I find a case to answer on contempt, even though I find as a fact that there is nothing before me to show that the publication

had, as a practical reality, the tendency to impair the administration of justice".

But that finding of fact which we ask Your Honour to make is one which would make it inevitable that the case would be dismissed at final determination, because the Crown has closed its case, and there is no evidence of the requisite tendency as a matter of practical reality. Accordingly, it is inconceivable that the court would convict, let alone punish.

So in our respectful submission, as I said earlier, it is analytically preferable to treat that, as we say the cases do, as a condition of liability, rather than as something to be considered once a "technical contempt" has been found in the mere words used, which appears to be the way the Crown has approached this. They say you look at the words by themselves. If it suggesting that a judge has departed from his or her duty, that is enough for contempt. That is scandalising the court. Whether you get penalised will depend on whether it is a slight or a large embarrassment, and whether it was a hundred or a thousand copies, for example. We say all those matters go to the question whether there is any risk that the publication has the requisite tendency.

Your Honour, we say boldly in paragraph 5, so to formulate the test, that is, not to look at the impact, is to mis-state applicable law in a critical respect. The point relied on by the respondents - this is paragraph 5 - is made abundantly clear by the approach of Justice Ellis in Colina.

And paragraph 6, what is important about the decision in Torney is not the decision on the particular very

different facts but the two step approach which His Honour adopted, and we have referred to where, in the transcript, we endeavour to make that clear in our opening submissions - 110. That is, the first question was whether the words themselves had a tendency to bring a judge or judges into disrepute, and they plainly did. They were of a very severe kind, as I pointed out. A second and necessary question was whether there was a requisite tendency, as a matter of practical reality, to harm the administration of justice.

In most of the instances referred to His Honour concluded that the words had the requisite tendency, but in each case dismissed the charge on the ground that there was insufficient evidence of any real risk of damage to the system of justice. And we have referred to Your Honour, there were five informations, and those are the relevant discussions in respect of each of them.
HIS HONOUR: Well, of course, again, he wasn't dealing with a no-case submission.
MR MAXWELL: That is so. He wasn't. But he is dealing with whether the charge is made out, and he is asking the question which Your Honour would ask at the end of a trial: Has the prosecution proved the elements of the case? His Honour said, "No, they haven't". And we are saying, by direct analogy, one of the elements is that element. There is no evidence and no argument to suggest that, as a matter of practical reality, these publications would have that effect.
HIS HONOUR: But there never is any evidence. What case has ever had evidence called about practical reality? That has only ever been a question for the tribunal of fact to

assess, on the basis of however tribunals of fact assess these things - - -
MR MAXWELL: Yes, Your Honour.
HIS HONOUR: Jury or judge, as to what is the capacity of a statement to bear upon public attitudes towards the system of justice. Obviously, if there was evidence, that would be admissible and would be relevant - - -
MR MAXWELL: Yes, Your Honour.
HIS HONOUR: Going to that question; but its absence doesn't mean that there is no evidence.
MR MAXWELL: With respect, we would respectfully disagree with that.
HIS HONOUR: Well, point me to a single case in which the evidence was led - - -
MR MAXWELL: No.
HIS HONOUR: On contempt scandalising the courts; evidence was led that was regarded as an element of the case.
MR MAXWELL: Your Honour, - we do deal with this in our outline. It is best if I come to it straight away. I do want to finish the point on Torney. But we concede - and I think it is on the same page we are at - might I just quickly finish on Torney.

Paragraph 7, we were puzzled by the comments made more than once by my learned friend, the Solicitor, that the charges in Torney were dismissed on the issue of publication, and that it was otherwise held that "all the other elements of the offence had been made out". It may be that my learned friend was meaning only what Your Honour is putting to me. But we say, in paragraph 7: it is apparent from the reasons for judgment of Justice Ellis that the charges failed precisely because

the critical element, the likely practical effect on the administration of justice, was not made out. Nothing to do with publication, and everything to do with - well, let's look at who wrote this - where he distributed, the extravagance of the language. "I am not satisfied beyond reasonable doubt that it has the requisite practical tendency to affect justice". That is the issue, and the paragraph numbers are all there set out. So it is simply not right, with respect to our learned friends, to suggest that all the other elements of the offence had been made out. The critical element was not made out.

Now, paragraph 8 is now responding to what Your Honour has been asking me. We concede that it is not necessary, and in some instances will be impossible, to prove actual damage to the administration of justice. That is not an element any more than it is in defamation, to prove actual damage to reputation. Indeed, in cases where a real threat to the administration of justice is apprehended, the urgency of the consequent court action will, of necessity, prevent any such examination, as a matter of fact, of actual impact on the justice system. But equally, an examination of that kind is unnecessary - this is paragraph 9 - where, as in Gallagher, the circumstances of the publication and its content are sufficient, without more, to enable the court to be satisfied that the publication has the requisite tendency as a matter of practical reality.

10: Thus, in Gallagher - - -
HIS HONOUR: Just to make it clear, you are reading paragraph 10?
MR MAXWELL: Paragraph 10.

HIS HONOUR: So it doesn't need be typed.
MR MAXWELL: Thank you. I will try and be more explicit about that. And I am only putting back, with respect, what Your Honour put to my learned friend. We understand it was only arguendo, but we adopt it and rely on it.

The statement in Gallagher was made by a highly prominent union official to representatives of the mass media, and it was inevitable that the remarks would receive the widest circulation. And Your Honour will recall that Gallagher had said "It was because my members demonstrated that the court changed its mind".

The court had a proper basis, there, to conclude that this wasn't just technical contempt. This was real live threats to the administration of justice, because of the speaker, the circumstances and the extent of dissemination, and the authority which his words were carrying across the nation.

Likewise in Borowski, on which our learned friends rely, where the remarks were made by a Minister of the Crown to media representatives - and we point out, Your Honour, included an actual threat of dismissal. The Minister had said "Oh" - my learned friend read it - "I will have him defrocked if he sits on that case", as if to say, "If he goes within a mile of that case I will sack him". And the judge says, as Your Honour will see, we don't need to enquire as to whether the defendant actually had the power to do that. The fact that he could only have done so in his capacity as a Minister, and that he made this threat publicly to media representatives, means that it was evident, manifest, that there was a threat to the administration of justice because there, as in our

system, the Executive is the appointor of judges, and is in a position to move motions in Parliament for dismissal. So for a Minister to say, "I will get you if you sit on the case" is a most outrageously threatening thing to say, and we wouldn't be at all surprised that the court would hold scandalising the court there, without need for any evidence of damage. It is self-evident.

In a case such as the present, we say in paragraph 11 - I will read - where considerable time has elapsed since the publication the Crown could prove actual damage or threat of damage to the system of justice if any evidence exists. Again, that was Your Honour's point, and we respectfully adopt it. That is not to say we had to, but we say in answer to Your Honour's question, in the next sentence, there being no such evidence before the court, Your Honour is entitled to infer that there has been no such damage, and that the publications did not have, as a matter of practical reality, the requisite tendency.

If there were letters to the paper saying there should be a Royal Commission into what Mr Hoser has said, and this was followed by some serious attack on the integrity of the County Court, or the viability of the Magistrates' Court, still there would be room for argument as to whether that was contempt. We would be arguing, probably, that that was a healthy debate to have in a democratic society. But for practical purposes, these books have sunk without trace, and sunk quickly to the bottom, presumably, given how heavy they are. And the point is only made half-jokingly, it is 760 pages. It is an arduous task to get from front to end, let alone to find the particular passages which have been plucked out.

But we make the point in the last sentence in paragraph 11, the court is in a better position than usual because of the lapse of time to make that judgment, to say, "Well, there is nothing before me, and after two years I would expect there would be if these publications had in any real or practical way had the alleged tendency".

In paragraph 12, we deal now with the delay point, because we made in our opening outline a strong submission about the eloquent testimony constituted by the delay. Nothing the Crown has said rebuts the inference to be drawn from the delay, that is, that there has been no concern about these publications or no sufficient concern, no sense of the need for immediate action, as the court said in, perhaps it was Gallagher that - we drew Your Honour's attention to it earlier - that something needed to be done to protect the system of justice against this wrong. We understood our learned friend, the Solicitor, to be saying, "Well, we weren't sure, you know, who Mr Hoser was, or whether he was connected with the company". I am not quoting him specifically, but we say that that cannot be taken seriously. It cannot be seriously suggested - and I am reading - that there was any difficulty in discovering the identity of Mr Hoser whose photograph appears in the each of the books. It has turned out to be possible to track him down in another proceeding in this court and - - -
HIS HONOUR: Well, I don't regard myself as having evidence about that, so you don't need to concern yourself as to that.
MR MAXWELL: But we are only rebutting the submission that this is how, an explanation of the - - -

HIS HONOUR: I appreciate that.
MR MAXWELL: They put in the company search which shows that it is his company, and they rely on it to say, well, they are one and the same.

My learned friend referred to, you know, John Fairfax and Herald & Weekly Times, which are companies which are required to file information. Well, this is a private company. The information is on the file. It has always been there.

Nor is there any evidence before the court of any action taken by the Attorney-General to stop publication. The evidence merely discloses that Mr Lee of the Victorian Government Solicitor sent letters in July 2000, a year and three months ago, directed to ascertaining the extent of publication. There was no cross-examination on the issue of preventative action at all, but Your Honour will see that the evidence is completely silent about what action was taken, if any, to stop the publication. In any event, that is a letter of July 2000 gathering evidence. It is not until May 2001 this proceeding is instituted.

14: The prosecution asserts that it need not be concerned with the truth or falsity of the matters relied on by the author; yet, at the same time, the Solicitor-General made the following important concession in argument - and again I am quoting from my notes. Let it be assumed that a publication alleges that Judge X had received bribes in brown paper envelopes. If that was true, I could not suggest it was contempt unquote.

The Crown has thus acknowledged, as it should, that there is a question which arises before an allegation of contempt is made, namely, whether the criticisms are

founded on fact. Yet, as Mr Lee acknowledged in evidence, there has been no investigation of the truth of factual matters upon which Mr Hoser bases his criticisms.

16: The submissions for the respondents do not assert that the books themselves are evidence of the truth of the matters stated in them. Rather, it is the submission of the respondents that the books are to be taken at face value, in the absence of any basis for a suggestion that they should not be so treated. And again, the prosecution has eschewed any such exercise. As Your Honour put to my learned friend, they put the books in, in their entirety, and with no other material from which any discrediting could be inferred. I think my learned friend's best point was, "Well, the word 'disgruntled' in brackets, in the purported transcript extracts, shows that they are not to be regarded as accurate extracts".

Well, Your Honour's response was absolutely right. The reader of ordinary good sense will know that it is highly unlikely that a transcript writer would have described His Honour's demeanour or attitude in making the relevant remark. And yet that is put as the basis for Your Honour seriously to conclude that these transcript extracts are not to be taken as they appear to be, that is, accurate transcriptions from the court transcript. The submission is risible, in our respectful submission.

Then we move on to the topic of good faith, paragraph 17. Where, taken at face value, a publication presents as criticism in good faith on the basis of facts and matters identified therein - which is this case - then notwithstanding that derogatory language may have been

used, no contempt of court is committed unless it is shown by the prosecution that the author/publisher was acting maliciously, dishonestly or in bad faith.

It is a repetition of what we said in our outline. It is contested, and the prosecution says "No onus on us to disprove bad faith". Well, that may be so in the case of Colina and Torney where the person is saying "These are murderous judges who hate men. His Honour immediately comes to the conclusion that that is unwarrantable, could not possibly be justified, or true. That is not this case. This is, as we have submitted at length and Your Honour has referred to in argument, a set of publications which are notable for their earnestness, and their loving attention to detail which, as I submitted earlier, is a characteristic of publications by aggrieved persons. Not surprisingly, because in this case, for someone being convicted and imprisoned, there is a grievance which is likely to burn, and every detail of what went on is happily rehearsed by the aggrieved person to anyone who cares to listen. That doesn't make it otherwise than in bad faith. On the contrary, it is consistent with good faith, and Your Honour asked the question which we answer?

Number 18: In the present case it is not reasonably open to a person reading the books, with ordinary good sense, to conclude that they were published otherwise than in good faith. So if we are right, that in a case such as this, where the books present as being exercises in good faith for a proper purpose, that is, "I want to improve the system of justice", and if the onus is on the prosecution to show want of bad faith, then we say that

element of the charge is not made out either, because there is no evidence from which it could reasonably be concluded that there was a want of good faith. Everything in the books points to the opposite conclusion, in our respectful submission.

Next, we move on to the relevance of context. As my learned friend pointed out with some degree of triumph, I did say at transcript 101 that the propositions in paragraph 16 of the outline, our outline, were uncontentious. I was wrong. I had forgotten I used that word. But more importantly - and this makes his triumph all the more surprising - it became evident from the Crown's submission that I was right. These are uncontentious proposition, and we explain why.

20: In response to a formulation by the court this morning, the Crown did not dispute that context is a matter to which the court should have regard.

21: The Crown calls in aid authorities which demonstrate that the purpose of a publication is always relevant. Now, we mention "purpose" in 16(c), one of my uncontentious propositions. Well, they have produced the very authority that I would have cited, if I had had it to hand at the time, to show why that is a matter that you have regard to - not because the prosecution has to prove an intent, but because it is relevant to your judgment of the publication. Likewise, the status, purpose and content in particular reasons of criticisms by superior courts are said by the Crown to be relevant to considering their likely effect. No-one, we would agree, would suggest that when His Honour Justice Nathan is trenchantly critical of a judge behaving as a prosecutor, that that

scandalises the court. Why? Because that is the function of a judge to do that, and because he gives his reasons for so doing. But the words are scandalous in the literal sense, because someone reading that will think much the worse of the relevant judge, and will think of him as someone who doesn't do his duty. That is what the judgment says, in terms, in Gilfillan.

We say our learned friends say said they couldn't understand the proposition we made about trenchant criticisms in the courts, and how that could be relevant. But it is relevant, because this is an author who is not, he has no function of passing judgment, so his words carry none of the authority of a superior court. But at the same time he does give reasons for his views, and it is because he gives reasons, and sets about it in a rational and relatively logical sequence, that the books are not going to have the likely effect.

23: Furthermore, the prosecution relies on what is to be inferred from the books themselves about the expertise or otherwise of author, and Your Honour will recall my learned friend saying that because Hoser describes himself as an expert in zoology and refers to all these publication, he is wanting it to be thought "I know what I write about, and I put forward the facts". Well, that is our case. That is what you would think, reading the book. What we don't understand is, if that is what the reader would think, why haven't the facts been investigated?

Secondly, the prosecution relies on what my learned friend described as Mr Hoser's unbalanced and obsessed view of the police and certain judges. That is our case.

That is precisely why you would discount the impact of the books: because they are partisan, angry books.

Let's say he had an obsession, he is obsessed with the issue of taking proceedings. The fact that I couldn't remember what I said a day ago is a pretty good support for the proposition that transcript is a very useful thing for all of us, a fortiori, for lay defendants.

23: They rely on what is inferred from the books themselves, about the reliability or otherwise of statements made by persons quoted in the books. For example about Bingley, he is said to be a corrupt policeman - and this is relied on as the basis for the claim about Magistrate Adams - how reliable is Bingley. Well, precisely. That is our case: the less reliable, the less impact.

In 24, we just simply draw attention to the fact some particular parts of our argument about context weren't challenged; that it is a self-published account; the works makes clear the perspective from which the author writes, and his expressed intent is to secure improvement in the administration of justice by drawing attention to its perceived deficiencies. None of that was challenged.
HIS HONOUR: Just on 25: you are saying there is no evidence at all about the circulation of the book on - - -
MR MAXWELL: I withdraw that. That is incorrect.
HIS HONOUR: Yes. I thought there was something - - -
MR MAXWELL: There is, Your Honour, and there is evidence from the distributor of 680 copies. I am sorry. That is incorrect, and I would delete altogether that part of that sentence.

But we do say that there is no basis to draw the

inference that our learned friend warrants Your Honour to draw, which is that there would have been the same number of thousands of Book 2 sold. Your Honour, with respect, aptly put the alternative, which was if you had read Book 1 the last thing you would think of doing is buying Book 2. It is just sheer speculation. This case has been a year in preparation, and yet, they haven't been able to prove how far Book 2, the one which contains all but one of the purple passages, was disseminated.

26: In a city of more than - - -
HIS HONOUR: Well, I have read that. I understand your point. Four and a half thousand: you say limited publication. I have got no idea what books sell these days. I would imagine, on the sale of books, it is pretty good; but you would say in terms of the population it is not substantial.
MR MAXWELL: And the figures in footnote 8 are taken from the newspapers themselves. Your Honour can have judicial notice of what a newspaper in wide circulation says about its own circulation, and take that with the proverbial grain of salt. It is still an order of magnitude, several orders of magnitude different.

In any event, we move on finally, Your Honour, and I hope briefly, to the particulars - no, not finally, because I need to deal briefly with Lange.

Paragraph 27: The respondents, it is our submission, sought at some length to place each of the passages complained of in its proper context. The Crown's cursory response, and that is how we would characterise it, to the particular matters, choosing not to deal with a number of them - nothing in relation to Judge Waldron, a number

of the ones in relation to Judge Neesham, nothing in relation to Magistrate Heffey - is evidently explained by the contention referred to earlier, Your Honour, that it is the words alone to which regard should be had, regardless of their impact.

It would indeed be an easy task if you just had to ask, are they insulting words? Plainly, they are: guilty. That is not what the law requires, as we have endeavoured to argue.

28: Some specific matters are to be noted. First, it was asserted by the prosecution that Mr Hoser's belief that the jury would be provided the transcript was a complete misunderstanding. Well, that is our case - or not complete misunderstanding but, as Your Honour put to me very early on, things said by judges are open to misinterpretation by lay observers, in particular unrepresented defendants, and I think Your Honour said in argument, and we respectfully adopt it, the inference he drew was a reasonable one for a lay person to draw from what was said in that part of the transcript which is quoted. My learned friend said it didn't matter. It did. At the page we gave Your Honour earlier, Mr Hoser sought to have the jury given the transcript and that was refused, so it was a pertinent matter.

There is a reference in the book, which I hope someone will provide me with before I sit down, to a different trial, before Judge Nixon, where the jury was given the transcript. So it provides some corroboration by reference to another proceeding of which he is aware in which the jury was given the transcript.

The second specific point is the reader of ordinary

good sense, and we have made this point about "grudgingly"; I don't repeat it.

In relation to Magistrate Adams, the Crown apparently accepts - this is a matter Your Honour was taxing me on - that the reader would ascertain that the 1995 publication referred to on the back cover was the Hoser Files, and that was how my learned friend made the point about Bingley not being reliable. But we note something we hadn't noted before. Your Honour: reference to the front cover clarifies that the confession of Bingley occurred after, rather than during, the court proceeding because, as Your Honour will see on the front cover, it says "After one case Bingley confessed..."

Your Honour was concerned with the "in another matter", the reference on the back cover, and whether that was misleading by asserting that he had made an official confession in the court proceedings. Taking the two covers together, in our respectful submission, it is not open to conclude that there was either any intent or effect of that misleading kind. If, as my learned friend, the Solicitor, says, you find your way to the Hoser Files, then again, that is our case: you would find your way to the Hoser Files if you were interested, and you would know that it is a conversation and not an official confession.

I am indebted to my learned juniors - and I apologise for the discourtesy to my learned friend, the Solicitor, for not being here for the last part of his submissions, but I will make the short points in reply that we would make about those submissions, which have been transmitted to me by process of osmosis.

Your Honour, as I said previously, before my learned

friend began this morning, we assert that the category of communication with respect to government and political matters comfortably covers discussion of matters relating to administration of justice - not just because the judicial arm is axiomatically an arm of government, but because governments appoint judges, governments fund courts, governments create courts by statute, or Parliaments do, and representative democracy is about Parliaments and Parliament's make the decisions under which the County Court Act is made, the Supreme Court Act is made, the Magistrates' Courts Act is made, and governments via Parliaments determine the scope and limits of the jurisdiction of the courts.

It seems, with respect, to be an obvious proposition that that would be within the ambit of matters which - let me take an example, not in the State sphere: what the Federal Parliament has done in relation to the migration jurisdiction of the Federal Court is a highly contentious political matter. Your Honour would be aware of that. Indeed, more recent legislation directed at ousting of judicial review - again, highly controversial and political - and it is likely to affect the way people behave, sorry, the way people cast their votes. That is to say, if it is right that particular judges or magistrates behave improperly, then it follows that, for a citizen concerned about that, those matters, he might say, "Well, I am, I keep hearing criticisms about judges appointed by a particular government. That is a political matter". Of course it is.

As we understand it, at the end of this argument our learned friend's proposition ends up to be the same as

ours, in the sense that the narrow scope of the offence means that it is appropriate and adapted, so if Lange were relevant it survives the Lange test. And also, as we assert and agree, the balancing between the need for criticism and the need for preserving the courts pre-dates Lange. That was a point Your Honour put to me and, with respect, is plainly right, and on our primary argument you don't get to Lange at all because the offence, properly defined, is as narrow as it would be in an application of Lange; that is, you would only find the offence proved if there was the requisite real risk of damage to the system of justice in the ways we have defined, that is, inhibiting judges from performing their duties according to law, or reducing the likelihood of obedience to orders of the court.

Your Honour, apart from making a reference to the discussion in Torney about real risk - this is important Your Honour, because, as is evident, we place considerable weight on the approach His Honour adopted in this case. The point about the need for a real risk of prejudice is dealt with at paragraphs 17 and 18, where His Honour quotes a lengthy extract from Borrie and Lowe, and the reference to the Australian courts having taken a more radical attitude to what amounts to an actionable contempt and applying the test of whether there is a real risk as opposed to a remote possibility of prejudice. That is the BLF case, which Your Honour hasn't been taken to, but is referred to - is Your Honour looking at the page in the judgment?
HIS HONOUR: 17 and 18, you said.
MR MAXWELL: Yes, 17, on page 7, does Your Honour - - -

HIS HONOUR: Paragraph.
MR MAXWELL: Paragraph 17, I am sorry, Your Honour.
HIS HONOUR: Right. Yes, I have it.
MR MAXWELL: The caption "The Need for a Real Risk of Prejudice", and then I was reading from that part of the quote which begins at the foot of the page about the more radical attitude of Australian courts, and over to the top of the next page where there is reference to Victoria and the Builders' Labourers'; then reference to the practical reality test in John Fairfax to which we have had reference, and then reference to a number of other cases. And it is said, in the middle, that "The courts appear to no longer recognise technical contempts". And Your Honour will note the reference to what Justice McHugh said in, when he was in the court, His Honour was in the Court of Appeal in New South Wales: "the distinction between technical and actual contempt - between contempt which will be punished and those which will not - should be abolished and that a publication should no longer be regarded as contempt unless it fell within the class of case which would previously have been held as a punishable contempt". Does Your Honour that have passage?
HIS HONOUR: Yes.
MR MAXWELL: Your Honour, that was what I was endeavouring to say in answer to Your Honour's question to me before, about Fairfax, where Your Honour pointed out, well, they are concerned, there, with identifying what you would punish and what you wouldn't. We respectfully adopt what Justice McHugh says, and say disregard technical contempts now, and you only Connell convict for contempt where it is of the kind that has the tendency, as a matter of

practical reality, or real risk.

Then there is a reference, in 18, to Ahnee - a real risk of undermining public confidence. We again say, well, that is an element of the offence, not a question that goes to discretion or punishment; and it is that element which crucially, in this case, has not been established, as it wasn't in any of the charges in Torney.

For those reasons, in our respectful submission, Your Honour should find that neither respondent has a case to answer.
HIS HONOUR: Yes. Thank you.

Now, the question of my ruling on this question, which is the threshold question, of whether there is a case to answer: traditionally, and I think as a matter of law, I would like to say that a ruling as to whether there is a case to answer or not is not one which is given to great elaboration, which would be appropriate if the question was proof beyond reasonable doubt. But nonetheless, notwithstanding that, I need some time to consider it as a threshold test.

What is the availability of counsel? I am in two minds whether to adjourn it until late tomorrow, or adjourn it until Monday. Either of two things will happen: either I will find that there is no case to answer at all, in which case that time would not give me sufficient time to write an elaborate judgment which would be appropriate; but by the same token, it would be sufficient to deal with that issue, and I could publish reasons later, if I came to that conclusion.

On the other hand, if I found that there was a case

to answer, in whole or in part, then it seems to me it is appropriate and in everybody's interests that that be determined as quickly as possible so - - -
MR MAXWELL: Yes, Your Honour.
HIS HONOUR: So that the parties can then deal with whether any evidence is going to be called subsequent, or what submissions are then going to be made as to proof beyond reasonable doubt. So the question arises, really, as to timing. If I was to adjourn this until 10:30 on Monday morning, would both counsel be available?
MR MAXWELL: Yes, Your Honour.
HIS HONOUR: I should say, if I was to come to the conclusion that there was, in whole or in part, a case to answer, I would be anticipating that we would then immediately go into the question of whether there was going to be evidence called, or the case was going to close at that point.
MR MAXWELL: Yes. We would come along prepared to - - -
HIS HONOUR: Yes. You would be available if that was the case?
MR MAXWELL: Yes, Your Honour.
HIS HONOUR: Mr Graham?
MR GRAHAM: Your Honour, I would be available tomorrow, on which occasion Your Honour would indicate whether or not there was a case to answer. If there was, then there would, no doubt, be indications of what course was intended to be followed thereafter. I am not certain whether Your Honour intended, then, to go straight on with the case, or whether to, as it were, allow the parties to - - -
HIS HONOUR: If I reach that conclusion, I have got a fair bit of work to do. Even without the requirement of there

being a substantial exposition of law and fact for the purpose of no-case submission, there is still a huge amount of material to wade through, just for the purpose of treating this a threshold question.

My present inclination is that, whenever I adjourn it to and that decision is made, I will be available to proceed, subject to what the parties tell me is their availability; and if that point is reached, and counsel tell me that they are not available for one reason or another, that is a bridge which I will then cross.
MR GRAHAM: Well, Your Honour, the position is this: I am available tomorrow. I am not available for any part of next week. My learned junior is already alerted to fact that I would not be available next week, and he would have the conduct of the matter next week. However, he is not available on Monday. So if Your Honour wished to make a pronouncement on the question now pending, that could be done tomorrow; but we would have - - -
HIS HONOUR: Well, it couldn't really. I think I need the time. I don't think I can reach a conclusion on this issue in that time available without, and give adequate attention to the issues which have been put to me so - - -
MR GRAHAM: Perhaps, Your Honour, I would respectfully ask that Your Honour adjourn it to next Tuesday.
HIS HONOUR: Does that affect you, Mr Maxwell?
MR MAXWELL: No. I am available on Tuesday, if Your Honour please, and we would be able to proceed. I have a difficulty on, I think it is Wednesday, or Thursday morning; but in any event, Tuesday is clear, and we would be content with an adjournment until Tuesday morning.
HIS HONOUR: Well, I don't want, by it being adjourned to that

date, to reverse the indication I give; that I would not be anticipating giving substantive reasons on this application at that stage - - -
MR MAXWELL: Yes, Your Honour.
HIS HONOUR: And depending on what the outcome is, it will either be published in due course or it will be published as a conclusion at the end of the trial.
MR MAXWELL: Yes, Your Honour.
HIS HONOUR: Well, I will adjourn the further hearing of the matter until 10:30 on Tuesday. No other matters?
MR MAXWELL: No, Your Honour. No other matters.
HIS HONOUR: All right. Thank you for that. Adjourn the court until Tuesday at 10:30.
ADJOURNED UNTIL TUESDAY, 29 OCTOBER 2001