HIS HONOUR: Mr Langmead?
MR LANGMEAD: Thank you, Your Honour. Your Honour will recall that when we rose yesterday afternoon I was responding to matters that Mr Maxwell had put by way of submission.

Mr Maxwell, in various forms, raised the issue of Mr Hoser's sincerity. We simply say that whilst that may be a relevant matter at some stage of this proceeding, sincerity is not a defence if the words complained of, objectively assessed, have the necessary relevant tendency.
HIS HONOUR: Do I take it from that, that the Crown concedes sincerity, or not?
MR LANGMEAD: No. In fact we say there is evidence of bad faith that arises from (a) the face of the document, and (b) the face of the document in combination with evidence given by Mr Hoser yesterday, including one of the exhibits to his affidavit.

Perhaps it would be useful to refer to that matter now, given that Your Honour has raised the matter.

A recurring theme, and it has recurred in express terms, is that Mr Hoser has said, "Look, I have given, I have told people that I have sources", and one of them is said to be transcript, and indeed, of course, that is one objective source that one might think would have the potential to at least clarify certain factual allegations.

Now, if one looks at - and it is an important credit issue, because yesterday Mr Maxwell was saying, look, the Hoser affidavit, it corroborates the notion of the prosecution having some form of exchange with the jury. It shows that, Mr Maxwell said, he didn't imagine it. In

other words, this is true. This is evidence that my client is not simply snatching these things as fantasies out of the air. Well, if one looks at Mr Hoser's affidavit and the exhibit to it, the second exhibit, which is the letter from Judge Neesham, what we have - I will just find the relevant - yes. What we have is this: in relation to ground 20, and the nature of that ground is apparent from Judge Neesham's response - this is at page 2. Does Your Honour have that?
HIS HONOUR: Yes.
MR LANGMEAD: "Counsel for the prosecution did at an early stage of the trial behave in an inappropriate manner in the presence of the jury; that his behaviour was inappropriate was brought to his attention at page 50 of the transcript, lines 4 and 9. Reference to that episode was made in the course of my charge at page 1602".

Now, that is put before the court by Mr Hoser. His evidence is also that, obviously, he was present during this trial; and it is instructive in terms of his assertions of good faith to look at count 8 in relation to Judge Neesham - and I think it appears on page 2 of my copy of the summons, Your Honour. I appreciate this is one of the passages in which you said there was no count to answer.
HIS HONOUR: Yes.
MR LANGMEAD: But it is very important because it does give an indication, we say, of what approach you should take to Mr Hoser's credit.
HIS HONOUR: Yes.
MR LANGMEAD: The opening paragraph there at Roman (viii) describes in Mr Hoser's words the communication between

the prosecution and the jury. It then goes on to say: "Of course Judge Neesham should have stopped this carrying on by Perry's side. But, no, he had been green-lighting the whole lot". Well, the evidence put before this court by Mr Hoser is that Judge Neesham red-lighted such conduct and, furthermore, that that fact appears in the transcript at two places, one where it occurred and one where a reference was made to it. And third, of course, Mr Hoser's evidence that he was present throughout.

Now, whilst it may be that he says he didn't notice the conduct of which he makes complaint, it is to be submitted that when he produces evidence, that transcript reveals something which is diametrically different, the exact opposite of what he says, then it is submitted that his credit has to be cast in doubt.

This is an example where it is proven in chapter and verse to the most detailed level of particularity that Judge Neesham did the opposite of what is alleged.
HIS HONOUR: What it does bear out, though, is something which is evident, I think, in a lot of passages relating to the trial and probably to other matters, the absolute critical importance of those involved in a trial where there is an unrepresented person, to be conscious of the fact that the unrepresented person is highly likely to perceive everything that occurs from a particular framework which might not be apparent to legal practitioners, or who, by virtue of their experience, would simply - - -
MR LANGMEAD: Put a perspective on it.
HIS HONOUR: Have a totally different perspective of what is occurring. But the passage which is shown there of the

report of the trial Judge is quite instructive, it seems to me, because whilst I understand the point that you are making, and it has plainly got validity, what His Honour's report also indicates is that counsel was acting in an inappropriate manner; an absolutely inappropriate course at the best of times, and an outrageous course when a person is being unrepresented, and one which is exceptionally dangerous in the interests of justice; because it is precisely the sort of smart alec advocacy which is likely to produce an impression on members of the public who are seeing a trial in progress that conduct of a quite improper kind - and indeed it is improper kind - is being conducted.

But to read even more into it than that - I mean, the sort of smiling, ingratiating oneself with the jury, one might know as a matter of experience is more likely than not to get the backs up of the jury. But the fact that it is tried by an experienced prosecutor as is indicated in this passage of His Honour's remarks, seems to me to go to a very long way in explaining why a person might come out of a trial at the other end with an impression that they have been hard done by if the result has gone against them.

MR LANGMEAD: Yes. Of course, one of the critical good faith issues is - and we, without hesitation, accept all that Your Honour says as undoubtedly being correct - but one of the critical issues on the good faith point is that a party - I will take you to authorities shortly, but a party is required to refrain from imputing improper motives to a judge. And the gravamen of the Crown's complaint is not so much the conduct from which a

reasonable perception of an unrepresented person with Mr Hoser's perspective that he might take, it is that he goes the next step; and in this case, having, as Your Honour says, a reasonable perception of some problem, and indeed a perception that at least on one occasion was shared by the judge, he says Judge Neesham had been green-lighting the whole lot. Judge Neesham says "I issued the appropriate warning".

Now, given Mr Hoser's admitted perspective that, indeed, the system was against him and he couldn't take a trick, one might think that he would have noted (a) that Judge Neesham said that, thereby corroborating his allegation; but also that His Honour did something about it. To move to impute the improper motive that Judge Neesham had expressly condoned - and that is all that green-lighting can mean - conduct which Judge Neesham says, on Mr Hoser's own evidence now, that he in fact, in effect, red-lighted it, that is the imputing of an improper motive, and that is the gravamen of the, that is the sting.

HIS HONOUR: That is all so. But you see, you might assume that the fact that I no-cased that, it was in my mind that one of the considerations was that, whilst there was force in the proposition that you have just made, the very fact it arose out of a circumstance which gave cause for it to be an issue at all might be a quite significant factor, and bearing upon the question as to how a court should look at that particular behaviour.

MR LANGMEAD: But if Your Honour goes up the page on the summons to (vii) of that count: "Of course, Connell had been doing effectively what Neesham had told him. It was a

classic case of bent judge improperly helping prosecution witness". We say that there is a case to answer there, obviously, and that that demonstrates the same modus operandi, and it is the modus operandi that is the vice - it is not necessarily the issue of the improper communications with the jury, and that that modus operandi of Mr Hoser's is repeated throughout the remaining counts.

If a statement, objectively assessed, has the necessary tendency, it is no defence that a respondent genuinely believed he was entitled to say it. But we say that the baseless and unwarranted opinions and the imputing of improper motives to judicial officers that typified Mr Hoser's publication, at least in respect of the passages complained of, that it would be difficult to say that one could reasonably have a genuine belief as to the conclusion, the opinion expressed, on the basis of the material which was provided.

An example was given yesterday, in some discourse in which Your Honour was involved, that on the basis of lenient sentencing there was an allegation - I mean, logically put, it can be put a lenient sentence is logically consistent with a judge accepting a bribe, with a judge having all sorts of improper motives. It is also consistent with a judge giving attention to particular mitigating factors. It is also - well, I don't need to keep enumerating. It is logically consistent with many things, and we submit that is the law of scandalising the court by imputing improper motive. The principles are not obsolete and neither should their application be, and a court shouldn't resile from conviction in a circumstance where, with an entirely unreasonable basis that leap is

taken to the improper motive with no grounds more than that the improper motive imputed is one of the logical possibilities. There is not even anything that indicates it is a probability in most of the cases that Mr Hoser has given.

Now, my learned friend said yesterday that Mr Hoser had a degree of insight into his position, that he is not paranoid. We simply say that that moves Mr Hoser further down the spectrum from the raving, incompetent, drunk lunatic on a corner who is hurling abuse about the judicial system, through to, for example, the far end, a retired judge who said the system was corrupt. We say that Mr Hoser's insight as put by his own counsel, that indeed that enhances his credibility and that has an impact on the practical reality or the real risk of the material, he said, having a tendency to interfere with the due administration of justice.

Much has been said about the conviction of perjury. We simply take that matter no further than Your Honour did, which is to say that we don't ask you to go behind the verdict of the jury; and in any event Mr Hoser's belief that he was wrongfully convicted is in no different category to his other beliefs about various things that have occurred.

HIS HONOUR: I asked the question yesterday - and I suspect I got the answer but I didn't check the passage - as to where in the books or where anywhere else the question of the attempts by Mr Hoser to have his tape, which he had secretly taped in front of Judge Balmford, played in the trial before Judge Neesham. Are you able to assist me on that? Perhaps I was told it yesterday.

MR LANGMEAD: I think it was my learned friend.
MR NICHOLAS: Your Honour, at pages 278 and 279 of book 2, there is a reference to an application by Mr Hoser to have the tape played, but we would say that it clearly shows that there was some attempt.
HIS HONOUR: Right. I raised it because, just looking - and I am sorry to interrupt Mr Langmead, but whilst you are on your feet you might be able to help me - just looking at the matters which the trial Judge reported on, there didn't appear to be a reference by him to - and it is difficult to say because I don't from the grounds - but there didn't appear to be any reference to a ground which complained that the tape had been denied.
MR NICHOLAS: Yes. I am also at the disadvantage of not having seen the grounds of appeal, and I noted that in the judge's report there is no reference to it. Would you just excuse me a moment, Your Honour?
HIS HONOUR: Yes. I am not asking, I might say, either party, unless it is done by agreement, to give me those grounds, because the evidence is closed. But if on either side it was thought that I should have them, or counsel were content for me to have them, I will certainly take them to make sense out of what is in Judge Neesham's report. But I could make a pretty fair estimate of what is in his report as to what the ground must have been for those that he has reported on. But plainly there is grounds he hasn't reported on.
MR NICHOLAS: Yes. I am instructed, Your Honour, that at the Court of Appeal there was no ground relating to putting in the tape. But it was later agitated before the High Court I believe. So I don't - perhaps I can look at the grounds

of appeal, Your Honour, whilst - - -
HIS HONOUR: As I say, look, I am not asking either side to put those in; but I have raised the query. If either of you think that I should have them, I will deal with it. If either of you thinks that I shouldn't, well, at this stage I take a fair bit of persuading that I should.
MR NICHOLAS: Yes. Well, in terms of the evidence that is before Your Honour, pages 278 and 279 - - -
HIS HONOUR: Yes. I will accept what you said from the Bar table anyway, as to there having not in fact been a ground specifically dealing with that.
MR LANGMEAD: I have no instructions inconsistent with that. Indeed, we are happy to leave it at that point.
HIS HONOUR: All right.
MR LANGMEAD: And we would see one procedural problem if indeed the 26 draft grounds were to be put in now. Obviously the evidence is closed.
HIS HONOUR: Yes, precisely.
MR LANGMEAD: There would be the usual problems. .
MR LANGMEAD: Your Honour, the final chapter in Exhibit B, to which we drew the witness's attention and yours, the covert taping and the instructions to others, would-be, I use the word corruption busters, but those interested in corruption issues. We say that the relevance of that is as to Mr Hoser's position in the community of those concerned with official corruption; in other words, there is a manual on how to covertly tape, and he is the author of it, and he must have some status by reason of that, and that is to be considered in conjunction with his evidence that many people have been in touch with him seeking advice on how to protect themselves in this context.

If I can move now to the matters that Mr Maxwell raised in relation to the publications complained of, about Magistrate Adams. My friend says liberty is not the word, but he says with great ease, one looks at the Bingley confession on that page, the paragraph about Bingley on another, one goes back to the Hoser Files and looks at this passage, and one puts together this jigsaw and one gets a picture which we say, even then, provides absolute inadequate, or provides no justification for what was said. But we point out that this jigsaw of Mr Maxwell's is an impossible one for any reasonable reader to put together.

As was said early on by Mr Maxwell, if you read volume 1 you probably wouldn't get volume 2. Maybe one can argue that you wouldn't bother going back to read the Hoser Files either. But then, given the forensic attention that has been given to these books, and the time it has taken for Mr Maxwell to get to that position of putting that jigsaw together, we say it is entirely unreasonable to suggest that they should be, the passages about Magistrate Adams should be read in that broadest of contexts. And indeed, we say the opposite: they should be read when one looks at the photo and the passage that appears under it, and it is the sting that is contained there that is the vice. A reader is highly unlikely to find their way back to the Hoser Files.

We say it is patently open to the view that the confession was official by reason of the wording used, but I will come back to that.

Mr Maxwell says, look, one has to look at this Adams matter in light of the Bingley confession, the view of

Mr Hoser as to his own innocence and the fact that it was overturned on appeal. Well, the prosecution didn't lead evidence of that matter, and we say that that is a matter that the reasonable reader would have, never be apprised of. It may be in the Hoser Files; but the difficulty that was demonstrated by Your Honour is trying to correlate one passage to other. Similar language was used, sometimes there is an overlap of the persons involved, and it is quite a difficult matter to work out which passages are related.

The reference in the passage complained of about Magistrate Adams, that after one case a confession was made, Mr Maxwell uses that to mean, well, so, it plainly couldn't have been official "in a case". Because it was "after a case". But plainly, it could equally be read "in another case"; it could be read "after one case", that is, as a result of one case, a confession was made in another one. The language is that of some form of credible confession, not the conversation to which Your Honour took the witness yesterday, which we say is as consistent with having his leg pulled or with a trite conversation with some meaningless bravado by a police officer attempting to niggle a defendant.

With great rhetorical flourish it has been repeatedly put by Mr Lee, and in submission, that the prosecution has not investigated the Bingley tape. The Bingley tape is not part of the prosecution case. What is part of the prosecution case is that it is asserted in terms that Magistrate Adams accepted a bribe, committed the ultimate, the most atrocious breach of his oath of office. We point out that the respondents, if they have investigated the

tape, have led no evidence in relation to it.

There is no requirement on the Crown to demonstrate the falsity of the allegation, but as this case has unfolded, it has become apparent that in this proceeding it has been put, and both parties are aware, that it is a highly relevant matter if allegations made are true. And we say that the unexplained absence of evidence on that matter by the respondents is highly pertinent.

HIS HONOUR: Well, let me understand how it is being put as to that. Against you it is put: "Well, how do you know it is not true? I have got some evidence, I have got a tape, and he said he bribed a police officer, bribed a Magistrate, so that is some positive evidence of a bribe. You have got no negative evidence that there was not a bribe, because for all you know, if you went and spoke to Mr Adams, he would say "It's a fair cop. I took a bribe". So you put it on the basis that it is for the defence to prove truth. The defence puts it: "Well, here is our evidence of truth"; are you putting it to me on the basis, well, that is not evidence of truth. That may be evidence which he asserts is enough to cause someone else to take it seriously; but it can't be evidence of truth. Or do you put it on the basis that - or do you put it on some other basis.

MR LANGMEAD: Well, as it appears in the book, of course it is simply hearsay. It is not evidence of its truth that there are assertions there as to what Mr Bingley says, and Your Honour yesterday in fact asked the witness if he had a tape still and he said yes, and Your Honour is entitled to draw every adverse inference available from the fact that that tape was not adduced in evidence. In other

words, we have what, in the book, purports to be a record of what Mr Bingley said. It is said on oath, "Yes, I still have the tape". But to lend credibility to what was said in the book, no attempt was made to get that tape in by calling Mr Bingley or indeed any other person in relation to it. So we say that the Jones and Dunkell inference is fully open there.
HIS HONOUR: So you put it the Crown is under no obligation to prove the falsity, citing some authority for that no-case submission.
MR LANGMEAD: Yes, Your Honour.
HIS HONOUR: You say the Crown is under no obligation to prove the falsity of an assertion. There may be a defence as to truth. But if that is so, the person has to establish the truth, not merely an assertion of the truth based on inadequate evidence.
MR LANGMEAD: Yes.
HIS HONOUR: You say the evidence doesn't establish the truth of the allegation.
MR LANGMEAD: Yes, we do. We say it is inadequate, and in the context where, unlike the doctor or professor who is said to have been in court, no photo, no letterhead, no address on his letter, and there is not even any evidence that he exists other than the assertion of Mr Hoser. There at least is a photo of Mr Bingley and one can assume that he exists; that would be reasonable. But he is not being called, and again, as Your Honour is aware under Jones and Dunkell, there has to be an explanation, not from where I stand, but from the witness box, and you are entitled to draw the inference that his evidence would not have assisted. We submit also that - - -

HIS HONOUR: Well, that would only be as to any passage which I left in, relating to that which that witness was concerned with.
MR LANGMEAD: Absolutely, yes. That would be the one passage in Exhibit A, and the back page of Exhibit B.
HIS HONOUR: Well - - -
MR LANGMEAD: It only relates to those.
HIS HONOUR: What did that witness have to do with those?
MR LANGMEAD: Sorry, you are talking about the other one?
HIS HONOUR: I thought you were talking - - -
MR LANGMEAD: I was illustrating that there may even be some doubt that that fellow exists, the fellow on page 414, on the evidence as it stands; but I point out in terms of Jones and Dunkell, with Mr Bingley, at least, there is what purports to be a photo of him. But the person so photographed, if he is Mr Bingley, has not been called and no evidence has been adduced as to his absence. And simply the same submission is made in respect of the tape. An explanation - - -
HIS HONOUR: I mean, Jones and Dunkell only applies if there is no reasonable explanation for the non-calling. There is a pretty strong explanation which would spring to mind for not calling a police officer who, it is put, admitted bribing a Magistrate to get someone convicted. You wouldn't think he would be absolutely sprinting to a witness box to say that, would you?
MR LANGMEAD: There has been no evidence given at all about - well, the explanation given by Mr Hoser, was that Mr Bingley later asserted that it was a joke.
HIS HONOUR: Yes.
MR LANGMEAD: Well, one might think he would be keen to firm

that up, if that indeed was his evidence. So that evidence also has to be viewed in light of his absence.
HIS HONOUR: I am simply making the point I don't think a Jones and Dunkell point helps, is likely to be particularly significant either way so far as this issue is concerned.
MR LANGMEAD: Then in respect of the tape, though, Your Honour, we say that is in an entirely different category.
HIS HONOUR: The tape is in a different category, yes.
MR LANGMEAD: And the principles have been put, and I don't propose to repeat them. But the onus that the respondents bear, if it is sought to say that there is some truth in the allegations, has failed to be discharged in the most comprehensive way.

Now, if I can move now to the outline of submissions. Your Honour has a copy of those.
HIS HONOUR: Yes.
MR LANGMEAD: Your Honour will have deduced from the time at which these were handed to you, that they were prepared at a time prior to Mr Hoser having given evidence.
HIS HONOUR: Yes.
MR LANGMEAD: And I hasten to take you to page 7, where there is a sub-heading, "Lack of evidence as to truth of matters alleged", that had this document been produced this morning, that heading would probably read, "Lack of any adequate or satisfactory evidence". There is no attempt to characterise incorrectly the evidence that has been given. That is the explanation for why that sub-heading appears.
HIS HONOUR: Yes.
MR LANGMEAD: Can I say at the outset in relation to the Lange case and the principles in it, as to the implied freedom,

that we simply adopt and ask Your Honour to have consideration of all that my learned leader has put before you. And he has put before you detailed argument as to why the principle is inapplicable on a number of grounds, a number of bases, and he has also put that argument in detail, that if the principle does have application in this context, that in any event it doesn't avail the respondents.
HIS HONOUR: It might say, I more I have looked at it, I am not at all persuaded that the Lange decision, even if it applies, takes the matter any further than what is regarded as a principle which must be applied to these cases anyway, namely, the right to free speech. I mean the assumption of there being a right to free speech is embedded in the common law so far as this offence is concerned. I really don't know why one needs Lange's case to emphasise the point.
MR LANGMEAD: In fact Your Honour made a similar point earlier in this proceeding and I haven't heard it contested by anyone. We would certainly say there is considerable congruance in the sort of enquiry undertaken in a contempt proceeding and the sort of enquiry if Lange is applicable. But of course, we point out the difference between that area of jurisprudence and the Lange principle, and contempt is neatly encapsulated in a lot of judgments when they start with the general statement "The freedom of speech is not absolute..."
HIS HONOUR: Yes.
MR LANGMEAD: There are exceptions; for example, sedition, defamation, contempt - - -
HIS HONOUR: Yes.

MR LANGMEAD: And it is neatly excised by the highest authorities in that regard. But I won't get - - -
HIS HONOUR: Yes. It would only be if Lange was changing that and suggesting that the words were "any exceptions to the right to free speech"; and there is the obvious one which they make, which is that there is another legitimate purpose for the restraint. So it doesn't seem, despite all the very complicated cases which have flowed from it, that the end result is that one is doing a much different exercise to what you would have done anyway.
MR LANGMEAD: Despite the attractions of waxing lyrical on constitutional issues, I will resist and I will move on to the contempt issue, and we just ask you to note that we adopt the submissions already made.

I put in shorthand form on the outline that I have given Your Honour page references, which are to a variety of passages, and without wanting to spill over into repetition, I think it is useful to take Your Honour to some of these passages just briefly.
HIS HONOUR: You might take it I have read your outline, and - - -
MR LANGMEAD: Thank you.
HIS HONOUR: And most of the cases, not all, most of the cases are familiar.
MR LANGMEAD: Yes. The passage in Dunbabin, which is really a seminal passage, we say, calculated to impair is an objective test - it is used in that sense as a term of art, and that is "calculated to impair the confidence of the people in the courts' judgments because the matter published aims at lowering the authority of the court as a whole". "Aims" there is, doesn't add anything to the word "calculated" - that is a reference to the tendency of the

passage - "and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of judicial office".

We say that the remaining passages about crooked judges, corrupt and dishonest judges guiding juries towards a guilty verdict, bent judges, improperly helping the prosecution, bias in favour of the police, predetermining outcomes, and accepting bribes, on any view can do nothing but excite misgivings as to the integrity, propriety and impartiality brought to the exercise of judicial office.

Your Honour, can I say at this point that we put a little higher than I think Your Honour apprehended, and I take responsibility for that, the other passages that I put to Mr Hoser about the context where he - I used the clumsy phrase "aimed a broadside at the entire system" or "a body blow" or something. But if I can try to phrase that more elegantly we say he has gone to the highest level of a extrapolation from a particular to say that the system is corrupt: "Most judges and magistrates won't accept what a civilian witness says against what a prosecution witness says".

HIS HONOUR: Well, in effect, you say he was arguing a case that the system is corrupt, and he is demonstrating that was in fact his purpose.

MR LANGMEAD: Indeed. And that that, rather than simply going to a credit point as I understand Your Honour apprehended, we put it higher and we say that that is the context which not simply gives the sting, but adds to the sting of the passages. He asks rhetorically, earlier in Exhibit B, "How can one have confidence in the judicial system when

the Chief Judge has no concern with the truth?" He goes to the highest level of generalisation and it can have no other effect than that in the third limb of the Dunbabin formulation. The respondents have sought to argue that the offence should be narrowly confined, and in a sense that appears in various authorities. We support that. But they go on to say: "It is asserted that there are archaic aspects of the offence".

Well, there are certainly venerable and aged aspects of the principles; but we say, plainly, in what the High Court said in Torney's case last year, the offence is certainly not obsolete, although an academic commentator might be excused for thinking that its application by conviction is certainly falling into some, the most sparing of use, if not disuse. But that aside, there is no doubt that the offence and its rationale are as current as they have ever been. The offence hasn't lost its currency, the rationale of it, and indeed nor has it lost judicial support. We say, in overview, that the law remains that the maintenance of the administration of justice requires the visiting of criminal consequences on those responsible for such publications.

Gray's case, if I can just take Your Honour - ignoring the passages at page 37 and 39, which are really there for completeness as to the scurrilous language limb - the passage at page 40, it is tab 28. The passage at about point 3 or 4, at page 40: Any act done or writing published calculated to bring a court or a judge of the court into contempt or to lower his authority is a contempt of the court. Has Your Honour found that passage?

HIS HONOUR: Yes.
MR LANGMEAD: Yes. We submit that Lord Russell there has defined the offence in terms which retain judicial approval; that it is a little question begging to say that it is contempt to publish something calculated to bring a court into contempt. But then the next part is not question begging, "or to lower his authority", and I don't propose to keep skimming through the "corrupt judge, crook, judge bent judge, bribed judge", series of statements, but we say that they can have no other effect. And indeed, that what is calculated to lower the authority, we say that if one tries to identify the conceptual boundaries of statements that might tend to lower the authority of the judge, that there are a considerable number of statements of, types of statements much less serious than the ones that Mr Hoser has made, which could have the requisite effect.

So we use that passage simply to make the submission that this is not simply an - Mr Hoser's publications are not simply examples of contempt by scandalising the court, which just stumble over the boundary of the conceptual area as it were; rather, he is in there by a country mile if I can descend to the vernacular. Plainly, they lower the authority.

An important qualification has to be put in Mr Hoser's interests, and that appears also at page 40 - this is at about, just below point 5 or point 6, "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". We say that the defence of reasonable argument or expostulation, that the respondents have led no acceptable or credible evidence in that regard. Indeed, in respect of most of the publications that have been complained of, they have led no evidence.

We come back here to the notion that it is plain, as Your Honour has put, as Mr Maxwell has put, and as we accept, that if one works from the premise that "they are out to get me", then reason on that premise flows in a lot of Mr Hoser's conduct that he has the perception, if there is a choice of "Hey, you are pulling my leg" or "Was there a bribe?" he will go for the bribe. If there is a choice between "What do I make of the communications between the counsel for the prosecution and the jury? I can say it occurred and I was there and I purport to have seen a transcript and I can say that the judge tried to stop it"; "No, I will do the opposite to that. I will say that the judge green-lighted the whole lot". This can only be described as unreasonable argument.

The defence - the qualification on what constitutes the offence, the defendant has not been able to avail himself of, or rather the respondent - - -

In the Crown and Fletcher, which I know that Your Honour is familiar with - - -
HIS HONOUR: Sorry, which one?
MR LANGMEAD: The Crown and Fletcher, 1935, 52 Commonwealth Law Reports, 248, and that is at tab 27.
HIS HONOUR: Yes.
MR LANGMEAD: Your Honour, before moving to that case, a general

point that appears to be made is that the Crown steadfastly resists attempts by the respondents to caricature this prosecution as an attempt to unreasonably curtail free speech. Mr Maxwell put yesterday, and I alluded to it yesterday, what vice is there in Mr Hoser communicating his common interest with like-minded persons? The answer is resoundingly none. But the Crown's case is simply that, as Justice Dawson said in relation to the Lange principle - in a case that escapes me at the moment - he made an interesting point. He said it is not really that there is an implied freedom of speech in the Lange principle.

He said there is freedom of speech; and indeed there may be some incursions into it of necessity. The categories, we have gone through, and that is the Crown's position, that there is a broad freedom of speech that is to be defended, and it is the Crown's position, apart from plain logic, that the authorities all say that; that freedom of speech, freedom of criticism and the boundaries are pushed right out to give persons the maximum opportunity to put things - they can put some things in a wrong-headed way - all sorts of allowances are made to maintain that important freedom. But we say what seems to have been implicit in some of the respondent's submissions on behalf of the respondent is that "wrong-headed" means that anything that is said that is wrong-headed is somehow defensible. There is a point at which the wrong-headed statement spills over from that which the law allows into that which it does not.

Now, you might recall that it decision of Evatt, J., of Justice Evatt in the King and Fletcher is significant,

not so much for its facts; it was a motion for committal for contempt at the High Court. It was heard by Justice Evatt alone, but it is the principle stated by him - and it is to be recognised that this case preceded Dunbabin, of course, and that Dunbabin's case applied the principles stated by Justice Evatt. And I don't repeat those principles, but at 257 to 8, at about point 3, under the paragraph numbered (1) there, Your Honour - - -

HIS HONOUR: Yes.

MR LANGMEAD: This is the first principle stated by Justice Evatt and I am reading from about four or five lines down. It talks about unjustified attacks upon the members of the court in their public capacity, and at point 4, at the bottom of that page: "Fair criticism of the decisions of the court is not only lawful, but regarded as being for the public good; but the facts forming the basis of the criticism must be accurately stated, and the criticism must be fair". So this really provides further elucidation of the summation of Lord Russell in Gray's case, and applying those criteria - and they have been adopted, whilst this is a 1935 case, as recently as Re Colina and Torney at paragraph 127, last year - these passages were expressly adopted by some members of the court.

HIS HONOUR: In the High Court, was it?

MR LANGMEAD: Yes, in the High Court. This is the template that is to be applied to Mr Hoser's conduct: Are his criticisms fair? Is it fair to say, on the basis of a perception of Mr Hoser, and from the perspective that the system was out to get him, that what he saw in court, in the conduct of a witness, Connell - this is in respect of

count 7, relating to page 329 of Exhibit B - "it was a classic case of a bent judge improperly helping a prosecution witness". It is submitted that that is not a fair criticism. It is submitted that, without exception, the counts remaining, that their basis is either not stated at all, or is inaccurately stated, or is unsatisfactorily stated.

We take the view that it is fair to generalise, without taking you to each particular at this stage, and say that generalisations as to judicial misconduct which characterise Mr Hoser's statements, that in no case is there an accurate, complete, fair, satisfactory description of the basis - one that would stand any form of analysis, and it doesn't have to be rigorous analysis - in other words, rather than fair criticism accurately stated, it is extravagant hyperbole which can only have the effect of exciting misgivings as to the integrity of the system.

If the decision in Dunbabin needed any bolstering I do no more than refer Your Honour to the subsequent approval by the High Court of those principles; and the relevant passages are given there and I don't propose to take you to all of those. But if I can just highlight one passage, and I am confident that Your Honour will have a highlight through this in Dunbabin and you don't need to look at it, and I will read it. It is at page 442.
HIS HONOUR: What is the tab number for Dunbabin?
MR LANGMEAD: It is 26. If I can just ask Your Honour to give consideration and, indeed, effect to what appears in the start of the judgment of Justice Richard about point 4 of his judgment on page 442. "But such interferences may

also arise from publications which tend to detract from the authority and influence of judicial determinations"; and on it goes. We point out that the element of the case of course is not by analogy with defamation. One has to prove, for example, damage with a slander. We don't have to prove that the walls of justice came tumbling down. Indeed I will take you to later authorities that say at least with contempts in the face of the court the relevant effect of the contempt is to be assessed at the time it was made, not at a later time. So if one is to make a statement critical of those in judicial office, it must be done with the basis accurately and fairly stated; in which case of course it is unlikely to have the necessary tendency.

We say that the statements of the respondents in this case are plainly, not only tend to detract from the authority and influence of judicial determinations - and that again allows the conceptual boundary and perhaps allows for some nice distinctions. We say we don't need to get into those because to talk about bent and crooked judges in cahoots with the prosecution and accepting bribes can only have one effect: it is bound to lower the authority of the court as a whole.

And again, and it is important to note, that in the seminal passages in Dunbabin at page 442 to 3, that the right to fair criticism is preserved.

At page 443 to 4, after quoting at page - sorry, after referring at the bottom of page 443 to the writer's conduct and indeed the passage complained of, at the top of 444, "The tone in which these matters are discussed is not that of informed or reasoned criticism but of

sarcastic suggestion". And it is submitted that that is pertinent to this case too, that indeed even sarcastic suggestion, on this authority, suffices - the language of sarcastic suggestion, when it is combined with publication that is neither on its face informed or reasoned, is sufficient to constitute the offence when one reads the entire judgment. We say that sarcastic suggestion, of course, is an equivocal statement. It is not necessarily said as to its truth. In fact it may be said for rhetorical effect, simply to give a particular impression. But here what is said is not one would think the judge is bent, one might think that the judge has been accepting bribes. What is said here is that the conclusions are stated in clear express terms: they are not even sarcastic. They are put across as either purportedly credible opinions or indeed they are put across as facts. So again, the distance by which these publications over-shoot the boundary of what is required is considerable.

In Brett's case, the Crown and Brett, reported at 1950, Victorian Law Reports 226, and that is tab 24, Your Honour will recall this was an article in the newspaper criticising the appointment of Justice Sholl to the Supreme Court, and it criticised the general character of the Bench. At page 227 it is revealed that Justice Sholl was alleged to have no knowledge of life, the criminal law was below his dignity and he was appointed by a grateful government which he had served repeatedly as counsel; and that of course resonates in one of the passages in which complaint, to which I cross-examined Mr Hoser as to judicial office being granted as

consideration for favours rather than on the basis of merit. The editor saw it as reasoned criticism of the methods of judicial appointment.

The case is more useful for its statement of principle. Plainly Dunbabin and Fletcher were applied, and at 229 - yes, quoting from Ambard and Attorney-General for Trinidad, at about point 2 in the middle of that quote in the smaller font: "The path of criticism is a public way: the wrong-headed are permitted to err therein. Provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune".

Now, it is submitted that the tenor of the respondent's submissions to date, or their case, has been to take note, in effect, of the first part of that statement, that the wrong-headed are permitted to err therein, without noting the manner in which that permission is circumscribed by what follows. To simply say that he is wrong-headed, a bit obsessive and reasonably upset about his case, is, plainly, if that can fairly be described as wrong-headed, he is permitted to make complaint. It is not the fact of complaint that is the essence of this case. It is the terms of it: and this is what Mr Hoser has done. Some of his documents, indeed the majority of them, probably are fairly described as the wrong-headed erring. But we submit that in respect of the pertinent passages that he has imputed improper motives, pulled together the other strands in a manner which is not

fair, in a manner where the basis is not accurately stated, and that the imputation of proper motives can only have the effect alleged.

The closing words at 233 of Brett's decision we ask you to look at.
HIS HONOUR: 233?
MR LANGMEAD: At 233, "It is to be hoped that the respondent will appreciate that though fair criticism of those who hold public office is not to be discouraged, malicious and improper comment is not to be tolerated, and that this article is one which is close to the borderline of cases which merit summary punishment". As Your Honour would be aware, it was found that contempt wasn't found there. But in terms of improper comment, we say that suggesting that a judge had no knowledge of life and that the criminal law was below his dignity and that he was appointed by a grateful government brings back to mind Your Honour's comment the other day about free speech at the Bar. But it is close to the borderline, we submit, that a fortiori bent, crooked, bribed, corrupt, assist the prosecution, again, must be seen as close to the other end of the conceptual boundary, if I can put it that way.

Now, a decision which I apologise was not in the agreed bundle of cases, is the Attorney-General and Butler, and I apologise for that. I hand up a copy for Your Honour.
HIS HONOUR: Yes. Thank you.
MR LANGMEAD: In overview - this is the Attorney-General and Butler, 1953 New Zealand Law Reports 944 - the issue was contempt of court in an arbitration ruling and contempt was found, but there were mitigating circumstances. In

overview - and I will take you to the passages - it was held that strong criticism is permissible but the language of abuse and invective is not. Criticism in moderate language is satisfactory and the defendant indeed was ordered to pay costs in that case.

The passage I seek for Your Honour's benefit - at the bottom of page 945 the publication appears, which was a complaint about the finding of the commission. But I don't ask you to read that at this point.

At page 946 the decision in the Crown and Brett was applied, as well as a number of New Zealand authorities. At page 946, at about line 49, this passage appears. "Extravagant and inflammatory language, calculated not only to incite disapproval of particular decisions, but also to shake confidence in the courts themselves, and provoke discontent and ill-feeling, is considered so plainly contrary to the public interest as to constitute an offence calling, in proper cases, for the application of the summary power for punishing for contempt". And it goes on to say "which is to be used sparingly and only in serious cases".

It is submitted that a key characteristic of the passages complained of by the respondents is that they are extravagant and inflammatory language. We don't say that the scurrilous abuse limb - this is not a case of profanity and of simply vulgar abuse. This is a case of, as I have said a number of times, extravagant hyperbole, the capacity for exaggeration and for unreasoned and unfair extrapolation from simple facts which bear a number of constructions characterises Mr Hoser's publications.

At 947, and this is also redolent of Mr Hoser's

position to some extent, at line 15: "The language of the circular is expressive of the strong resentment that the defendant felt at the court's decision, though it failed to state explicitly the grounds that may have been the dominant cause in arousing it". In some cases Mr Hoser, we say, has erred in a similar manner; or he has simply stated a ground which is entirely inadequate, such as a lenient sentence, the illogical enormous leap to judicial corruption, that is in effect the absence of stating any ground that may have even been the cause because it is an improbable ground.

Can I ask you to note that, just looking at the top of page 946, the sort of language used by the writer in the top line, he talks about "a travesty of justice". In the next paragraph he talks about "ruthlessly disregarding the rights of employees". He talks about a "sceptical regard of justice as administered by the court"; "ignore the elementary principles of equity and justice". And it is submitted that this, by comparison to Mr Hoser's statements, is the language of restraint, and we ask you to contrast that with the language used by Mr Hoser.

And again, at 948, we ask you to note that at 948 this is said - in mitigation of his conduct, albeit that the offence was found proven - "He limited his criticism to recent decisions and, having indicated confidence in methods of arbitration, can hardly be considered to have had any intention of impairing the due administration of law or of justice", because the - - -
HIS HONOUR: Sorry, is that the argument that was put or is that what His Honour is saying?
MR LANGMEAD: No, I understand that His Honour accepted this.

Plainly, it was an argument that was put.
HIS HONOUR: Yes. "There appears to us to be no doubt that he did consider that he had a strong case for an improvement in the conditions of the workers, and that his representations had been given insufficient consideration and had been dealt with in an arbitrary and peremptory decision". So they are accepting that that was his view, and I think they are stating it as - - -
MR LANGMEAD: I understand - - -
HIS HONOUR: I think they are stating it as his view.
MR LANGMEAD: He was a trade union official, and I understand what they are doing is reflecting that he does, indeed by his position, and presumably by some evidence he is indicating confidence in the methods of arbitration. In other words he wasn't rattling the very foundations of the system that he was criticising. He didn't extrapolate from the decision to go to other decisions. In other words he refrained from doing all the things that regrettably Mr Hoser has done. He didn't go to the level of generalisation, and of course it is pertinent that he had no intention to impair the due administration of the law or justice. And indeed, with the language of restraint that was used, that is certainly consistent with that reasonable conclusion.

The court says: "We have regard", that is going on at 948, "to the fact that there is great freedom of discussion allowed in respect of decisions, once given, and of the fact that if his criticism had been expressed in moderate language, however strongly it was put, he would have been within his rights". And then, it goes on to say that whilst recognising the "unusual mitigating

circumstances which largely palliate the offence, the court considers it is bound to mark the serious nature of criticism couched in" what they describe as "such intemporate and inflammatory language".

We don't resile from that description, even though in comparison it looks restrained by comparison to Mr Hoser's language, and the third last line reveals that they found him guilty of contempt but with an appropriate disposition in light of the facts that they found.

In this regard, one of the cases that has been put before Your Honour is Anissa and Parsons, and notwithstanding that it might be unkindly construed I have a vested interest in some of the comments I am about to make on the decision, having appeared in it, we note that what Your Honour did - Your Honour probably recalls the case because of an offensive comment made about Mr Justice Beach by a solicitor having been served with an injunction.
HIS HONOUR: Yes. It was Saltalamacchia and Parsons at the Court of Appeal and it was Anissa and Parsons at first instance.
HIS HONOUR: What is its tab number? Do it have it?
MR LANGMEAD: Yes. It is tab 2 is the decision of Justice Cummins; and 37 is the corollary in the Court of Appeal.
HIS HONOUR: Yes. Thank you.
MR LANGMEAD: We say there, with respect to His Honour Justice Cummins, that what he did was take the vulgar phrase and paraphrase it, and therein found that the defence was not made out. And the paraphrasing was that in this day and age it is not contempt to accuse a judge of being a "wanker". Now, we say with respect that to paraphrase

the substance of a passage upon which complaint is made, and then to judge whether it has the necessary tendency accordingly, is not to apply the law; that it is the actual words used. And the Attorney-General and Butler makes this clear - a criticism can be validly put, or a criticism can be put in the way that constitutes contempt; and indeed the choice of language and its context are key elements. If one were to adopt a contrary position and say, well, if we paraphrase what it is that Mr Hoser is saying, he says bent judge, helping prosecution with witness, but all he is really saying is "I am unhappy with it". The distinction between the two is he is allowed to say "I am unhappy with it". He is not allowed to say he was a bent judge improperly helping a prosecution witness, unless he can prove it; and no attempt has been made in that regard.

With respect, a court is not entitled to settle the words chosen by the respondent into a more benign form and to find that therein an offence is not committed on that basis.

Your Honour, I am aware, is familiar with Attorney-General of New South Wales and Mundey, through this case and probably otherwise. You will recall that was a case of where there was malicious damage to goal posts at the Sydney Cricket Ground. It was a part of a protest at the South African rugby team visit with apartite issues and the likes, and at a press conference outside court following a conviction on those damage issues, it was said that there was a miscarriage of justice, that the judge was "racist, deeply ingrained racism, and there should be a stop-work meeting by

members" and so on. Your Honour would be familiar with it.

It was held a contempt of scandalising the court had been committed. This is at tab 3. Can I ask Your Honour to turn to page 910, and I know Your Honour has already had reference to this. At G, in effect, what is occurring here is that the two limbs are recognised in Dunbabin, the scurrilous abuse and the criticism that excites misgivings as to judicial lack of integrity and so on. At the foot of the page that is applied in this form: "On the other hand it may, and generally will, constitute contempt to make unjustified allegations that a judge has been affected by some personal bias against the party, or has acted mala fide, or has failed to act with the impartiality required of the judicial office".

Now, we say that that aptly describes much of what Mr Hoser has said; it is "unjustified, the most serious allegations not just of bias against a party or of acting mala fides, but of acting in complete contravention of the oath of judicial office".

I move on from this case, but that is not to be read, Your Honour, as my suggesting that is the only pertinent passage. I imagine Your Honour's copy of it is as voluminous as mine by now.

I come down now to a point that hasn't featured in any of the submissions made to date. And I come to the case that I intend to use in this regard in this context - and I intend to come back to it later - but it is useful to look at the case in this context of general principles, and it is Re Ouellet (Nos 1 and 2), 1976, 72 Dominion Law Reports (3rd) 95. This appears at - in my instructor's

hand.
HIS HONOUR: Right.
MR LANGMEAD: This concerned, Your Honour, a case where a Federal Cabinet Minister was convicted of contempt of court for having made disparaging remarks regarding a judge who dismissed a prosecution brought by the Federal Department for which the Minister was responsible. The relevant Minister stated - and this appears at 97: "I will ask Ron Basford" - this is in the middle of page, "to launch an appeal. I find this judgment completely unacceptable. I think it is a silly decision. I just cannot understand how a judge who is sane could give such a verdict. It is a complete setback. I find it a complete disgrace.
HIS HONOUR: "It is a complete shock".
MR LANGMEAD: "I find it a complete disgrace" - yes, I am sorry, "It is a complete shock and I find it a complete disgrace". Yes, I apologise for omitting those words. The Minister contested, Your Honour, that this was said, but the Court of Appeal stated in relation to these words - this appears lower down the page, just under that quote in fact: "This statement, if it was made, constitutes a contempt of court". Moving down a few lines, "Certainly, the decisions of judges are subject to criticism as are the decisions of all other public men". And the important passage that we ask you to look at in this context is: "But criticism of a decision is not stating that the person who gave it is an imbecile, which is contempt of court 'by scandalising the court' and this kind of contempt is always prohibited. This proposition seems to me so evident I do not think it necessary to cite a long

list of authorities".

Now, we submit just in relation - the Minister was fined $500, in 1976. We submit that if one looks at the statements made, on any view the relevant Minister was in receipt of poor advice, if indeed he took any, on making these statements, that it is not the sort of thing one would hope a Federal Minister would say. But nonetheless, he again doesn't extrapolate beyond the judge concerned, doesn't extrapolate beyond the decision concerned, and doesn't suggest for a moment bias, doesn't allege any form of corruption, certainly doesn't allege that bribes were received, and it doesn't allege that there was anything but the incompetence of the judicial officer in arriving at the decision.

Indeed, it could well be argued that the language is, it is a form of scurrilous abuse that may well have been written off as mere puff, because of its very form. But again I ask you to note that in context of a finding by the Quebec Court of Appeal that this constituted contempt, I ask you to note the comparatively benign nature of what is said, and the limited nature of what is said, and indeed, it stands alone without any context to add to the sting, or otherwise add to the seriousness of it.

I move to Gallagher and Durack; and I will be returning to Ouellet's case; Gallagher and Durack being 1983, 152 C.L.R. 238. In the joint judgment of Chief Justice Gibbs, Mason, Dawson and Brennan, and Justice Murphy dissented. You recall the circumstances.
HIS HONOUR: Yes, I can't remember what tab it was.
MR LANGMEAD: I am sorry Your Honour. 9, tab 9.
HIS HONOUR: Thank you.

MR LANGMEAD: I will be returning to this case as well for other purposes; but suffice for present purposes to refresh Your Honour's memory as to the facts: that the Full Court of the Federal Court had acquitted Mr Gallagher of contempt after a judge, at first instance, had sentenced him to one month in gaol. He then attended a press conference and distributed leaflets and commented that the decision of the court, that is to reverse the decision to send him to gaol, had been influenced by actions of the members of the BLF, of which he was secretary, in demonstrating by walking off jobs; and for that conduct he was found guilty of contempt, expressly of making statements which tended to cause a lowering of confidence in the authority and integrity of the court. And that was found by Justice Northrop on the motion of the Attorney-General and he was sentenced to three months' gaol; on appeal to the Full Court was dismissed, and by a majority, a special leave application to appeal to the High Court was refused. The principles in Dunbabin were applied.

Now, again, we use the facts of this, which we urge on Your Honour as, for a basis of, again an a fortiori argument, that if this statement that one court, in one case, bowed to industrial strife to seek a particular result, in other words, took into account matters that it shouldn't have, that, again, by comparison with what Mr Hoser says, it pales against the suggestions of corruption, bribery and the like. And yet here we have not the Quebec Court of Appeal or New Zealand court, what we have is a 1983 decision, majority decision, of the High Court of this country, and we say that that is instructive in this case in assessing the passages complained of.

Nationwide News and Wills, which is at tab 22: this case dealt with what I will call the statutory analogue of contempt by scandalising the court under the Industrial Relations Act 1988. There is a statutory provision that bears some similarity, and this case concerned a challenge to its constitutional validity. But there is useful obiter relating to the analogous offence, of a common law offence, and that appears in the judgment of Justice Mason at pages 31 to 32, where His Honour said: "It is sufficient to say that scandalising the court is a well-recognised form of criminal contempt, though it was at one time said to be obsolete, and that it consists of any act done or writing published which is calculated to bring a court or a judge of the court into contempt or to lower his or her authority". And the reference at footnote 98 there is to the Crown and Gray, to which I have taken Your Honour.

In the judgment of Justice Brennan at page 38, that principle which appeared in an earlier High Court case in Fletcher's case is again repeated by Justice Brennan: "Thus, it has been said" - the reference there to Fletcher and Kische - "that it is no contempt of court to criticise court decisions when the criticism is fair and not distorted by malice and the basis of the criticism is accurately stated. To the contrary, a public comment fairly made on judicial conduct that is truly disreputable (in the sense that it would impair the confidence of the public in the competence or integrity of the court) is for the public benefit. It is not necessary, even if it be possible, to chart the limits of contempt scandalising the court. It is sufficient to say that the revelation of

truth - at all events when its revelation is for the public benefit - and the making of a fair criticism based on fact do not amount to a contempt of court though the truth revealed or the criticism revealed is such as to deprive the courts or judge of public confidence".

That is not a new principle, but I put it before Your Honour as part of the chain of consistency in High Court adoption that it is not as though we moved from cases last century to some throw-away lines in Torney and the High Court in the year 2000 with gaps in between. The High Court has consistently, in a reasoned way, had regard to these relevant principles.

By way of possible assistance to Your Honour I point to the comments in Borrie and Lowe, the learned authors of the Law of Contempt, Third Edition, 1996, Butterworths, at page 349, where, in essence they say: "The comments made mala fide fall outside the protective umbrella of the right to criticise". The learned authors at 349 cite the Crown and White, an early English decision decided in 1808, what "constituted a contempt because the article - and this is where the citation from White's case starts - "contained no reasoning or discussion but only declamation and invective... written not with a view to elucidate the truth but to injure the character of individuals and to bring into hatred and contempt the administration of justice in this country". And the learned authors note at 349, and we submit, and we adopt it, with respect, as being correct, that mala fides can be proved by looking at the language of the publication. Plainly it is the substance of conduct at which the court looks, not at the characterisation which a respondent

seeks to give to it.

Mr Maxwell, with incredulity in his voice, noted that I did not give Mr Hoser the opportunity to repeat his belief in respect of each of the passages that he had adequate justification for them. That was a considered decision and it is done in light of these principles that the protective umbrella, if it exists, its existence or indeed its absence can be ascertained simply by looking at the language of the publication.

It is submitted that whilst invective is not perhaps the cornerstone of Mr Hoser's publications, that indeed on any objective view, both in the specific examples given and generally, in the full context, especially of Exhibit B, it could not be said as an attempt to elucidate the truth. Wildly exaggerated and offensive allegations are made on a basis that cannot be said to be, to have any scientific, academic, intellectual or logical rea. It does not withstand any such examination.

In relation to mens rea, I think - my learned friend will correct me if I am wrong, but I understand the respondents to accept that it is not part of, an element of the offence to show mens rea. My friend is nodding his assent to that proposition.

We respectfully say that that is a proper concession. I point out just for Your Honour's benefit, that not all jurisdictions have a common approach in this regard, but we submit that the position in Australia is clear, and that Your Honour does not need to revisit that issue. And I have given you the appropriate passages and I don't read them to you again; save that in the Attorney-General of New South Wales and Mundey, in the

context of mens rea, of course the notion of intention and its relevance was raised, and that has featured prominently in submissions by the respondents, and I am bound to take Your Honour to it.

Attorney-General of New South Wales and Mundey is at tab 3. Before I take Your Honour to that, what is the next discrete area in these submissions, I note the time. It has been Your Honour's practice to have a short break. It is certainly a time that will suit.
HIS HONOUR: Yes, I will take a short break, just a five-minute break.
(Short adjournment).
HIS HONOUR: Yes?
MR LANGMEAD: Thank you, Your Honour. In Attorney-General for New South Wales and Mundey, the issue of mens rea was discussed at page 911. But it is submitted that a - it is useful beyond the issue of mens rea, because it clarifies absolutely what the precise relevance of intention is; and it is a bit like the standard of proof under Brigginshaw. There seems to be some contradiction, that you don't need mens rea when intention is relevant.

At the foot of 911 near F, what the court said is this: "In the present case I think that the question whether the defendant's statements constituted contempt must be determined by reference to their inherent tendency to interfere with the administration of justice". So that is just repeating the Dunbabin principle and, as I say on the outline, that is a resolution of the contrasting lines of authority in relation to mens rea and adopt the Fairfax position.

Then it goes to say: "In this regard it is of

importance", that is, intention is of importance, "mainly in relation to" - and I interpose, number 1 - "whether the matter should be dealt with summarily and", secondly, "if any of the statements did constitute contempt in relation to penalty". In other words, intention is not an element of the offence in any form, but plainly it is relevant in that sense.

I ask Your Honour - I will get the page reference in Fairfax and McRae, which appears at tab 13. At page 371, in relation to aspects in respect of which intention might be relevant, but not determinative, on the facts of this case the finding was - this is at about point 3, second complete paragraph - the actual intention or purpose lying behind a publication in cases of this kind is never a decision" - - -

HIS HONOUR: "Decisive" - - -

MR LANGMEAD: "Decisive consideration". And moving down about five or six lines, "For here, not only is it clear that nobody in The Herald office had the slightest intention of committing contempt, or the slightest intention or desire of doing or saying anything which might affect in any way the conduct or outcome of the proceeding" - and we say that that is to be - and indeed, down at about point 7: "If the allegations made were true, and any opinion as to their truth was expressly disclaimed" - it goes on about their seriousness couldn't be affected by matters that were pertinent only to that case. And we say, contempt wasn't found, but we say there that it is significant to note that, first, there was a resiling by the defendants from the truth of what was said; that as a newspaper, that they printed it - - -

HIS HONOUR: I understand the point you are making. But one does have to be careful with publications contributions. They do have particular features of their own.
MR LANGMEAD: They do have different considerations. And the point that Your Honour obviously grasps is that we ask you to contrast that with Mr Hoser, with an objective assessment of his publications.
HIS HONOUR: Yes.
MR LANGMEAD: I will move on to page 4, on good faith. There is no need to belabour any of those points.

Good faith is one of those concepts a bit like freedom of speech, Your Honour. It is easy to say, it has a good sound, it gives one a warm feeling and it is a bit of a flag to wave. But none of those concepts or ideas are pertinent in the legal context. What is the relevance? What is the concept of good faith in this context of this offence? And what are the limits of the concept?

Ahnee and the DPP provides some support for the existence of such a defence by using these words - and they are highlighted there, "No wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein. Provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism".

I have taken you to that passage earlier and I have also said that not all wrong-headed statements are immune;

indeed, that it only be read that the locus in the authorities of a defence of good faith also contains the clear statement of principle that shows clearly why it is unavailable to the respondents in this case. In other words, that passage can only be read as saying that imputing improper motives to those taking part in the administration of justice cannot be good faith. That is outside the conceptual boundary.

If I can paraphrase what is said in Ahnee and DPP; it is this: that it is saying no more than that legitimate criticism is permitted, wrong-headed criticism is permitted to a certain extent, but the line is crossed when improper motives are imputed to the judiciary. In other words, imputation of improper motive is entirely inconsistent with the concept of good faith.

I turn to Exhibit B at this point. This is going to the contextual point that I raised earlier in my submission this morning. At page 655 of the Exhibit B to the affidavit of Mr Lee - 655 - these words appear in the second complete paragraph:
HIS HONOUR: Just hold on. Yes. I have got that.
MR LANGMEAD: "Then there is" - the opening sentence, sorry, of the first paragraph: "Then there is the Judges and Magistrates who look after hardened criminals with lenient or non-existent sentences". What we find there is the factual premise for the conclusion that follows a couple of lines down, and this illustrates the reasoning process of Mr Hoser: "so under the heading "Looking after the criminals", a reference to "lenient or non-existent sentences" as he calls them, and then the process that he asserts exists in our judicial system is particularised.

"The criminal is then forced to front court, but a deal is done with one or more of the clerk, the prosecution and the person hearing the matter (Judge or Magistrate), to give the person an easy ride through the system. Instead of a penalty such as gaol, the offender may get a suspended sentence, bond, or whatever". It is submitted that that, in the clearest terms, imputes improper motives to those taking part in the administration of justice.
HIS HONOUR: But one does wonder, if you are going to refer to that, it wasn't made a particular of the Crown case.
MR LANGMEAD: No. But it is put as part of the context in which the particular complaints of particular cases are made, and the context of a book that the principle thesis in it is that the system is corrupt, and that what occurred to Mr Hoser were merely examples of broader - - -
HIS HONOUR: I mean, you do wonder about some of these things. It is so obviously stupid one wonders if it is really a topic which could ever have a capacity to be read, unless people who are reading it were totally stupid; that it really is just beyond belief.
MR LANGMEAD: In that regard Mr Hoser certainly was answering in his book some passages I will take Your Honour to later, that many people on the basis of his books get in touch with him and seek advice; and he has given similar evidence in the box. The perspective of participants in the legal system of course is bound to be different to those of a lay reader, and we submit of course that it is that audience that regard that is where the relevant dissemination has been.
HIS HONOUR: Well, I am not sure to what extent the system has to be determined by stupid people's perceptions.

MR LANGMEAD: That is a very harsh literary review of the books but it is submitted - - -
HIS HONOUR: Well, if anyone read that or regarded that or the passages under it as evidence for the statement, it seems to me they would have to have an extraordinary capacity to suspend disbelief. I mean, is that the basis on which one would judge the importance or significance one should attach to such passages?
MR LANGMEAD: It is, in effect, the backdrop to the passages of which specific complaint is made; that these general complaints, entirely unsubstantiated, plainly, when one moves into unfair criticism, that are inaccurately stated without an adequate basis. There is a point, if one continues down that continuum of such statements, where a point of absolute and apparent irrationality is reached, where it wouldn't be perceived by anyone as other than nonsense. But it is submitted for reasons that have been, some reasons that have been given to date, and for reasons that will be given shortly, that this represents that the author has some scientific training; that he is credible; that he is authoritative; that he has done his homework and that he has reached these conclusions on an informed, and at the very least on a voluminous basis; and the Crown, with respect, doesn't accept that only the stupid would take that statement at face value.

But even if a particular statement - and there are no doubt examples in here of statements that do defy belief, but there are also many other statements and assertions that don't, and the tip of the iceberg principle can be applied here. That people say, "Well, maybe I don't accept that, but he has got all these photos, all these

people named and there might be something in it, and also the book weighs a bit; it has got all these pages that purport to lead to these sorts of conclusions". It is submitted that this is not rabid and entirely unauthoritative by reason of its either stupidity or its inherent irrationale. It purports to a level of scientific rigour and logicality that it plainly lacks on any sort of scrutiny; but that is perhaps not the test that the lay reader would apply.

I just refer Your Honour to page 679. I don't seek then to add to what is on the outline. In relation to what appears at point 22 of the outline - plainly, B (i) and (ii) and (v) and (vi) have a line put through them, insofar as that they no longer count, but they nonetheless retain some relevance as backdrop to the imputations of improper motives against judicial officers which have survived the no-case process, and they appear at (iii) and (iv).

It is submitted that in terms of good faith, such as it could be a defence, it is saying no more than to say there is a defence of good faith; and to say if something is put fairly, which is surely the cardinal evidence of good faith, if something is put fairly with the basis that it is accurately stated, then it won't constitute contempt.

But the preparedness of this respondent, the first respondent, to use hyperbole - and I give the examples in footnotes there; page 245 of Exhibit B - "wanton disregard for the truth", page 260; "Judge Neesham disallowed taping therefore he was a crook judge, corrupt and dishonest", and so on; and to make serious allegations without

foundation, we just say that is an apt generalisation, plainly evidencing lack of good faith.

Evidence of actual harm, Your Honour, is not an element of the offence. Useful principles in this regard can be taken from cases dealing with contempt in relation to particular proceedings, but we say in this regard, before going to those authorities briefly, that if in a particular proceeding there was a contempt by way of a publication or tampering with a juror or some other conduct which would constitute contempt, if it were relevant to look at what the effect of it was, one could say, "Well, look, let's put the juror in the box and see if he changed his mind" or "Let's see who read the publication" and so on. It would be easy to find it there, one would think, by comparison with contempt of scandalising the court.

So we say if the test in a case relating to a particular proceeding is that what harm actually flows from the contempt is not part of the offence, in other words, as it was said in the Crown and David Syme, 1982, Victorian Reports, 173 at 177: "The tendency of the publication must be judged at the time of publication, and is not determined by the fact that for some reason no harm has resulted". That case applied the Crown and Pacini, 1956, Victorian Law Reports, 544 at 547,.
HIS HONOUR: Just give me that citation again.
MR LANGMEAD: That was the Crown and Pacini, 1956, Victorian Law Reports, 544 at 547. In this regard, if it assists Your Honour, I point you also to Borrie and Lowe in the authority, the work already cited at page 84, and I point out that they assess this proposition that you assess the

risk to the administration of justice at the time of publication, and not with hindsight, as well-established. So we say in this case that the relevance of evidence of actual harm that the walls did in some way come tumbling down would be simply to exacerbate if there were a penalty.

It is easy to spill over and to fall into error in this area of law because of the many obvious corollaries in the law of defamation. But there is one useful parallel here, which is of course that when a defamatory publication is in durable form, in a libel, damage is presumed, and we say that reflects the logical proposition that the damage can never be ascertained realistically; that evidence of it would be, could be impossible to get. Because in looking at the practical reality test - and I will come to that in some more detail - it is not just the number 5,000 and 7,000 that Your Honour is to look at, it is the book, of course, and you are entitled to take, obviously, judicial notice of this, that the books could be lent. They are almost bound to be talked about. The flow-on effect of 5,000 publications circulating is indeed not to be under-estimated.

Now, I will move then to the notion of the publication being required to have a tendency, as a matter of practical reality, to interfere with the administration of justice. I cite there authorities, for completeness, where the proposition - and I think it is a proposition on which there is agreement. Borrie and Lowe considered this to be, correctly considered this to be the effect of the authorities in Australia. It is to be noted that there is a lower threshhold in the English authorities, and indeed,

an example would be Attorney-General - - -
HIS HONOUR: I think you can take it that unless you want to persuade me to the contrary my view of what the law is as to this is what I said on the no-case submission.
MR LANGMEAD: Yes, all right. I won't give the citation for that English authority. Suffice to say they apply the de minimus approach; that as long as the de minimus threshold is crossed, the contempt can be made out. The bar is a little higher here. I suppose I put that in the context that in terms of other jurisdictions - and not all jurisdictions take a common law approach - it is not as though the practical reality test is the most lenient amongst the jurisdictions. If you like, it posits a higher test, a more difficult one for a prosecution to succeed on - Colina and Torney - and I would ask Your Honour to return to this briefly, which appears at tab 6.
HIS HONOUR: This is the single judge case, is it?
MR LANGMEAD: Yes, it is, Justice Ellis of the Family Court.
HIS HONOUR: Just wait a second. I haven't got it in my bundle. If it is a near obsolete jurisdiction it has generated an incredible amount of authority. I think I am up to about 60 cases that you have cited, or between you, so far. Yes. I have got it.
MR LANGMEAD: I will try not to add to that. We submit that this case was initially used by the respondents for a purpose that it doesn't entirely sustain, and that is, look at the vile nature of the assertions made and note that they didn't constitute contempt. That was the initial starting point with this case. And I think we have moved on from that unsustainable proposition, because

whilst there are vile offensive allegations that the Chief Justice of the Family Court was murderous and so on, that is not the basis on which identify failed. And indeed, what occurred in relation to the relevant four counts that were sustained, and they were counts (a), (b), (d) and (e), is that in respect of each count it was held that it satisfied all relevant criteria but the practical reality test, if I can encapsulate it thus. And indeed, it is probably not being unfair to Justice Ellis to say that in writing this judgment, whoever did it, had the benefit of the word processors cut and paste capacity because that is what appears to have happened. A very minor change in wording, but the same things appear in relation to each of those four offences, and they are these - and I will use offence (a) which appears at page 18 in paragraph 48 as illustrative of what occurred in each of the four matters, and it is this- - -

HIS HONOUR: Where are you reading from?

MR LANGMEAD: Paragraph 48, page 18, middle of the paragraph 48: "What is asserted in the document amounts to a grave breach of duty by the court and its judges and is probably defamatory of the Chief Justice. Those assertions are baseless, unwarranted and unwarrantable". Next test - so in other words absence of good faith - "The material so published had, in my judgment, the necessary tendency to interfere with the administration of justice" - in other words, so calculated to have that effect, objectively assessed. "The publication, however, will only constitute a contempt of court if it satisfies the test of having, as a matter of practical reality, a tendency to interfere with the due course of justice". And then what he goes on

to do is to point out the very limited distribution, and to conclude that it didn't pass the practical reality test. In fact, it was only the applicant who was handed the document by the respondent.

I don't want to labour the point, but it is repeated in respect of count (b), at page 21, paragraphs 56 to 59, in respect of count (d) at page 25 paragraphs 72 and 73; and in respect of count (e) at page 29, paragraphs 83 and 84.

And it is a fair summary of the case to say that in each case distribution was either to the applicant or its agent, and that it was on that basis that His Honour found that there wasn't a real risk to the administration of justice. In other words, there was no evidence beyond that, and plainly in a case on the criminal standard, the inference that it was therefore distributed to others would not have been a safe inference to draw.

We say that rather than assisting the respondents, this case, if it is accepted by Your Honour - and we certainly accept the principles that His Honour applied - absolutely reinforces the Crown's position, that is, that if you form the view that the statements made by Mr Hoser have the necessary tendency, objectively assessed by looking at their terms, and if you form the view that on their face they don't bear the construction that they were made in good faith because they are not fair, not accurate and the basis was not sufficiently stated, then you come to the practical reality or real risk test, and we say that, contrast distribution of each pamphlet, if you like, to the applicant, with 5,000 copies of Exhibit B going into general publication.

We say that that is on any account a very significant publication, and that the practical reality of the person in Mr Hoser's position - one I will return to - making this publication, and the second respondent as well, with absolute certainty, we put it that high, satisfies the practical reality test that it will have the relevant tendency to lower the authority of the court and that it imputes improper motives to judicial officers.

Our friends raise in passing the Pennekamp decision - - -
HIS HONOUR: You say Gallagher and Durack didn't follow Pennekamp.
MR LANGMEAD: Yes, we certainly do, and we say that - and indeed that passage from Gallagher and Durack was cited by Justice Ellis in Colina and Torney, paragraph 8; and that High Court line of authority determines the principles to be applied not be highly distinguishable Pennekamp. Pennekamp is a useful case to discuss at a seminar at Melbourne University on this topic but it is not useful in this case and ought be rejected by Your Honour for the same reason that, Your Honour, the High Court rejected it. The contents of the Exhibit A, the evidence is - Mr Hoser's words were, in response to a question from me, it would be fair to describe distribution as 7,000 copies of Exhibit A, 5,000 copies of Exhibit B - the reason I alluded, a moment ago, as to why the practical reality or real risk test is made out so thoroughly in this case, Your Honour.

Another basis for it is the status of the writer, and in Ouellet, if I can just - I think what appears - yes, at page 99 of that decision the following appears, this is in

the third complete paragraph, second sentence: "Furthermore, this statement was not made by just anybody. It is a statement made by a Minister of the Federal Crown which necessarily enjoys considerable credit and authority. This statement was advertised all over the country" and so on. It is urgent that a strong disapproval be pronounced in order to stop the harm done to the administration of justice in our country from spreading".

It appears from the judgment in Torney that what were handed out there were flyers or leaflets which, by their very nature, are more transient, more temporary, than a bound book for which one pays. So again, if I can establish a spectrum, Your Honour, of various publications, one has the throw-away line verbally to a small audience; one has the speech to a captive audience who come of their own volition to see you and perhaps accord you some respect accordingly. Then there is the flyer that gets read and thrown away and simply communicates a few ideas to save having to say them. Most people's houses don't have flyers in them. They are temporary.

Then we get to Exhibits A and B, a publication like this, which has all the form of - it has all the ISBN numbers. This is not something rattled out on a Gestetner by some lunatic in Central Australia. This is something produced by a corporate publisher; albeit we know in this case that is one and the same with the first respondent, in substance. There are copyright claims; there is a foreward by Mr MacGregor. Its very get-up is of a commercial publication, and indeed, that is what it is.

I won't repeat the issues that we have taken the court to as to Mr Hoser's use of himself, of his scientific background as a journalist; but Mr Hoser does present himself as a person to whom authority should be accorded. He is patently well organised - that is evident from this book; and he presents himself as a focal point for those disaffected by the legal system.

I ask you to go to page 729 of Exhibit B, to the affidavit of Mr Lee, in the second complete paragraph, Your Honour, at the second sentence. "The following chapter has been written here as a response to the thousands of requests for information I receive about how to insure oneself against the adverse affects of corruption and/or improper prosecution by government authorities and police".

It is submitted that at face value we don't need to go behind that assertion, but the assertion is that this man not only writes books about corruption, as appear in the opening pages of his book, but that he is a focal point for those, as I say, disaffected by the legal system - thousands of requests. Such an assertion, if indeed it was accepted by a reader, might effectively rebut the proposition that Your Honour floated earlier today, that one would have to be stupid to accept a lot of what appears in this book. And my instructing solicitor has handed up some transcript, at page 355, of Mr Hoser's evidence yesterday where at line 11 he says: "one of the few questions I can't answer very well is to why did I write the book, but one of the consequences of my writing earlier books has been that people have approached me, after reading the books for advice in terms of dealing

with alleged corruption, the legal system as unrepresented litigants and a whole host of associated matters". That is at 355, page 355 of yesterday's transcript.

Also at page 730, the first complete paragraph "In my meetings", in Exhibit B - "In my meetings with whistle-blowers, corruption fighters and others, I am constantly asked the best ways to combat the problem at a grass roots level and how to guard against the inevitable lies" and on it goes. It is submitted that he doesn't just say, "I mingle with like-minded people". He presents himself as indeed having met with many of these people, not with a view to obtaining information but to being a source of it. He presents himself as a person with some influence in those circles.

And at page 693 the passage I took Mr Hoser to, he presents himself as an authority on the subject of legal corruption, using the words, "However, as one who has made a study of police corruption Australia wide, I can assure readers that the problems are general".

His book, Your Honour, purports to be a manual for the like-minded, and I refer to chapter 45, which is at pages 729 to 765 which has already been a matter of some discussion.

We say that the discharge of the duty we bear in relation to the issue of whether there is, as a matter of practical reality, is borne out by the first, of course, by the nature of the words used and the context in which they appear; second by the form of distribution and publication; third, by the extent of publication; and fourth, by the audience or one of the audiences in which it has been promulgated, which is those like minded, and

it would not be an unfair assumption or inference for Your Honour to draw that this material in the hands of an organisation or members of an organisation that calls itself whistle blowers might resonate more readily than it would in the hands of persons who had no predetermined view or no developed view as to such issues.
HIS HONOUR: Well, that is just saying there are people with a predisposition to believing anything they are told.
MR LANGMEAD: Well, no, that is saying that there are people who may share Mr Hoser's premise that the system is out to get him, stroke them. And then this would resonate more readily with such people than with persons who didn't share that basic premise.

And finally, of course, apart from the volume and location of the dissemination of it, there is the status of Mr Hoser on the spectrum that I posited yesterday. We say that he is at the very least down that spectrum towards the end of having purporting to have some authority, and indeed, objectively assessed, having some authority for the reasons that I have given, and that it cannot be said that these publications are at the end where, by reason of their inherent stupidity, the form or the source of the publication, it can be safely said that they would be discounted.

We say that as a matter of practical reality, and that is all that has to be shown, just as the words themselves, objectively assessed, said it has to be shown to have a tendency. The other factors I have just enumerated simply have to show that there is a real risk. Had Mr Lee been the only purchaser of the book, we would be in the same position as the prosecutor was in the

Torney case. It is difficult to imagine a more contrasting set of facts to the Torney position than this case.

As to the lack of evidence as to the truth of matters alleged, I have explained the context in which that is put in light of evidence yesterday. But we say that there is absolutely no satisfactory evidence in relation to the truth of the matters alleged, and that the Judge Neesham letter to which I took you earlier today, Your Honour, as Your Honour says, it does show that there was a grain of substance in what occurred, but importantly, that the opinion expressed on the basis of what was said to have occurred there is diametrically opposed, it is antithetical, to what Justice Neesham says on the respondent's own evidence.

I interpose there, just harking back a point, that Mr Maxwell yesterday referred to Mr Hoser, repeatedly, as a campaigner too. We say that is a pertinent matter. We accept that characterising of the matter, but that it is a pertinent matter that, rather than a person simply saying, "Here is my 'beef'. If you are interested have a look at this", we have a proper, we have a person with missionary zeal who has gone out to foist his views on the community - as evidenced by the door-knocking.

I think enough has been said about the assertions in relation to a person said to be a Professor Sawyer, and of course, in relation to all of the issues of evidence on which I have made Jones and Dunkell submissions, we point out plainly that there has to be evidence explaining. Your Honour has certainly allowed that in respect of some things. Some things are so apparent that one might not

need evidence, but we say that in respect of most of those absences of evidence, the adverse inference is open.

I have pointed, Your Honour, there to the presumption of regularity. We say that it is not necessary to really invoke that because it is not part of our case to have to prove the truth of anything, but we do point out that there is a presumption regularity that has to be rebutted, and this is regularity of, as the passage quoted there in the outline shows, and it has not been rebutted in any sense by any evidence here, not as to the allegations of crook judges, those in cahoots with the prosecution and those accepting bribes and like matters. We mention again that the contents of the book are not evidence as to their truth.

So in assessing the contents of Exhibit A and Exhibit B, Your Honour, we ask you to do so with those principles in mind. My learned leader was criticised by my learned friend Mr Maxwell for the cursory nature of his dealing with the various publications complained of. I don't propose to utilise excessive court time to rebut that, but some of these matters - and they are now in fact a reduced number, of course - do need to be gone through in light of the principles that I have put before you.

Can I just say, in overview, that the passages through, the particulars of the two counts through which Your Honour has effectively placed a line as there being no case to answer, plainly there is no case to answer on the offence. We don't say that they become irrelevant thereby. They plainly fall into the category of other passages we have taken you to as relevant context for the pertinent publications.

So if we move first to page 57 of Exhibit A, which contains the stand-alone proposition: "In a separate matter a policeman admitted to paying a bribe to Adams to have an innocent man sentenced to gaol". That is the essential of the sting. We adopt, with respect, Your Honour's observations in relation to the nature of the photo used. We also point out that the photo credit is given to The Age, in bolder and larger font than perhaps such attribution is typically accorded. And that to perhaps adopt a little of the first respondent's style of reasoning, that face is certainly consistent with one who is having a bad day - if I can just leave it at that.

We say that all of those things, taken together, the impossible jigsaw of bits and pieces lying in other books, earlier publications, later publications, Your Honour should just ignore. What is said, when one thumbs through this book and comes to the first full page photo - sorry, it is not the first - comes to a full page photo on page 57, is an unwarranted, baseless attack on Mr Adams, and we say so by the notable absences in the respondent's evidence in this regard. It plainly has the tendency to excite misgivings as to the integrity of a judicial officer. It plainly imputes an improper motive, and in light of the absence of any fair basis or any articulated basis for the assertions made, it can be defined as extravagant and inflammatory. And the concept - it is difficult to imagine a concept more likely to have all of these effects than the assertions that the Magistrate has accepted a bribe. And not only that he has accepted a bribe, but the effect of so doing has been to send an innocent man to gaol. Indeed, the statement alone, "a

Magistrate accepted a bribe", without more, has all of the relevant tendencies. But when it is in the of a person going to gaol as a result, it becomes an even more improper motive with a stronger imputation.

Moving to the second book, at page 260. This is another example of the process which I have earlier submitted characterises Mr Hoser's reasoning process in respect of the passages of which complaint is made. What is put is that Judge Neesham - in respect of Judge Neesham, that he was "a judge who refused to allow me to have the case tape recorded". So much would appear to be true. If we accept it - let's accept it as such for argument's sake: what is the conclusion drawn, even if it is true? - "thereby effectively stamping him as a crook judge, who wanted his activities never to be opened up to scrutiny. My initial judgments of Neesham as corrupt and dishonest" - Mr Hoser's copy must be very well thumbed at the page of pejorative adjectives, because that is all that has been done. He has delved into his supply of these adjectives and descriptions and, without any basis, moved from "I could not tape the proceedings" to "he is crook, corrupt and dishonest". The relevant principles are exemplified with startling clarity and completeness, in that passage alone.

At page 276 this is an assertion that his whole modus operandi of Judge Neesham was, first, it was informed by his bias against Mr Hoser, and his modus operandi was to guide the jury towards a guilty verdict, and he talks about actions to separate, being separate to others; in other words there were further particulars apparently of this count against Judge Neesham, which also appeared to

have been taken to ensure the jury's verdict was predetermined. Now, it is submitted again that that satisfies all of the relevant tests. It lacks fairness. The bases are not articulated or such bases as do appear or have been asserted by Mr Hoser or on his behalf are entirely inadequate, and that can only be viewed, again, as a grievous example of the offence.

At page 329: "Of course Connell had been doing effectively what Neesham had told him". Well, if one reads what comes before it, one gains some understanding of what is asserted there. But we don't worry about, we don't bother with that for present purposes because it is the conclusion that follows. And it is to misuse the word "conclusion" because it is presented as a conclusion, but of course it is entirely without logical link to what precedes it, "a classic case of a bent judge improperly helping a prosecution witness": not a classic case of a judge doing something that on one view might be construed as having assisted; not an example of a judge perhaps falling into an error of inadvertently assisting a prosecution witness; not even a classic case of a judge improperly helping a prosecution witness; but of a "bent judge". In other words, it is difficult again to conceive of how more complete the damnation of Judge Neesham's conduct could be.

To page 142, now going back in relation to Judge Balmford: and whilst the premise and the conclusion are stated in the reverse order to the similar premise and conclusion, which I have taken you to earlier in relation to Judge Neesham, it is a repeat of the same flawed analysis. I will read the last sentence. "Recall, she'd

refused to allow the matter to be tape recorded". So the refusal of a judge to cater to Mr Hoser's enthusiasm to tape recordings in which he is a participant leads to the conclusion in respect of Judge Balmford. "Like I've noted, Balmford wanted to convict me and get the whole thing over with as soon as possible. After all she'd obviously made up her mind before the case even started".

Now, again, that is not an allegation that permits of two constructions. It is not an allegation, for example, that could be put in a benign form, "My application to tape record the matter was refused. I felt this put me at a disadvantage both for this proceeding and for subsequent proceedings. I felt that in so doing Judge Balmford had, whether consciously or not I don't know, but had given an advantage to the prosecution". These are all comments that could be made fairly and on sound basis. But, no, what is the conclusion? "She wanted to - couldn't even be bothered, you know, that the due time being taken, wanted to convict me, get the whole thing over with, and she had predetermined the result" - a most serious allegation which could only excite misgivings as to the integrity of the judicial officer concerned. At page 144 there is also a reference to her bias.

HIS HONOUR: It has gone one o'clock. We might adjourn at that point.

MR LANGMEAD: If Your Honour pleases.

HIS HONOUR: We will resume at 2:15.

LUNCHEON ADJOURNMENT.

UPON RESUMING AT 2.15:
HIS HONOUR: Yes?
MR LANGMEAD: Thank you, Your Honour. Before the luncheon adjournment I was about to take Your Honour to (iii) under the comments re Judge Balmford, as she then was, on the summons at page 4. Just briefly, in relation to the allegation which appears at page 144 of the Exhibit B, in relation to Judge Balmford's bias, there were some exchanges yesterday in relation to this word.

You heard Mr Hoser say, "Look" - he looked at Your Honour and he said "you might use the word 'bias' in one way but I just use in the ordinary way". I think it would be fair to paraphrase what he says. "Look, as a matter of law 'bias' may be a term of art, but I don't use it in that way. I just use it in the ordinary way". Well, we say that whether it is used as the term of art or in the ordinary way, indeed neither construction ameliorates the sting - and indeed, on one view, the ordinary sense of the word has more of a sting than the legal sense, because "bias" plainly entails the notion of apprehended bias as distinct from actual bias - but we say that especially when that word is used in its common meaning in conjunction with the sentence, "in fact, three Supreme Court judges have noted it as well", I simply ask Your Honour to refer back to the question that you asked of Mr Hoser and his answers in that regard.

Going over the page on the summons to (iii), under "Comments re Magistrate Heffey", which deals with page 208 of Exhibit B, the sting of these words is that Magistrate Heffey is accused of siding with the police, but merely going through the motions of stating the

alleged facts for her decisions, suggesting that they are other than the proper facts and reasons. The word "facts" and the word "reasons" appears in inverted commas.

We then get to an assertion that, moving up now in the scale of generalising and the illogical leaps to "her statement was an obvious lie, demonstrated by reference to Hampel's files and her own court records", we note that neither of those have been produced or any reference made to them. Then again, and then we get to what is by now seen as a typical generalisation based on what went before: "a case of not letting the truth get in the way of a predetermined outcome"; again, that can be seen as nothing more nor less than, in express terms, accusing Magistrate Heffey of acting in breach of her judicial oath. And that is repeated at page 212. We have nothing further to say about that.

As to the comments concerning Magistrate H.F. Adams - and I have dealt with those earlier - I have nothing further to say about that, and indeed, I have dealt with Exhibit A.

Your Honour, the offence of scandalising the court is not obsolete. Much of the material that has been put by way of defence for Mr Hoser, both in submission and indeed in some of his evidence, is really more material that goes to mitigation, in our respectful submission, and that if an adjustment is to be made in considering the conduct of Mr Hoser, it ought be after a conviction; that the appropriate place for the adjustment is as to penalty, if indeed Your Honour gives the weight that the respondents urge on you to those various mitigating matters.

There is no doubt that if Mr Hoser had held a genuine

belief, and Your Honour was so persuaded as to the reasonableness of what he said, notwithstanding that objectively that is entirely unsustainable - it being objectively unsustainable - that is one reason to start with, to doubt his assertion as to his genuine belief on the relevant issues. But another strong one, another strong basis is the considerable erosion in our submission of his credit by the accusing of Judge Neesham of green-lighting misconduct by the prosecution with the jury, and purportedly with recourse to evidence in the transcript that would justify it, when the transcript, on Mr Hoser's own evidence, reveals that in fact Judge Neesham was red-lighting that conduct. On any view, the publications are baseless, unwarranted, unfair, and without any accurate statement of any basis that might justify them.

We submit, and we put it as highly as this, that the High Court's pronouncements, a clear body of principle has emerged from the cases that we have taken you to, and that considering those statements of principles and the manner in which they have been applied by the High Court, and indeed by other courts, that - to put it in a different way - that if this conduct doesn't constitute, doesn't have the relevant tendency, and of course that is the area of principle most developed there; and we say that on the authorities to date, and the principles that are distilled from them, these statements complained of here absolutely have the tendency. That is very, very clear that they do, and that the only issue where perhaps the principles are less well developed judicially is the practical reality stroke real risk test.

There is less on that in the authorities. But we say that in light of the nature of the publication, the authority, apparent authority of the author or the authority that he appropriates to himself through his book, objectively assessed, and the extent of the publication that on any view - it may be difficult to define a boundary for that practical reality test, but we say this is a case of it not being difficult to recognise a form of publication of statements, the contents of which very clearly demonstrate a commission of the offence. And we say that notions such as belief, good faith, sincerity, disavowal of purpose, to do that which has been alleged, these are matters that are more appropriately heard at a subsequent stage of this proceeding, if indeed we were to get to it.

So we submit that if the developed and authoritative principles of the offence of scandalising the court - they are not obsolete, obviously, and if their application is to have any meaning in the chain of precedent, that this is a case where plainly those principles have to be given full effect, and otherwise the principles enunciated and developed so carefully over such a long period and such authoritative jurisdictions could be said to have the meaning or weight of the principle diluted accordingly.

Unless there are any matters that Your Honour wishes me to further submit on, they are the submissions for the Crown.
HIS HONOUR: Yes. Thank you. Any matters in reply, Mr Nicholas?
MR NICHOLAS: Yes, shortly Your Honour.
HIS HONOUR: Yes.

MR NICHOLAS: Yesterday, Mr Maxwell, I think, indicated to Your Honour that we would identify references to Magistrate Adams in the Hoser Files. If I can just refer Your Honour generally to the parts of the book between page 52 and 73 and pages 89 to 100. That deals with both the proceeding before Magistrate Adams and the Bingley tape.
HIS HONOUR: Yes. Thank you.
MR NICHOLAS: There are three instances where Mr Langmead said that the principle in Jones and Dunkell has application. If I can deal with each of those briefly.

The first one is the absence of Dr Sawyer from the witness box. Your Honour will recall that in his no-case submission Mr Maxwell referred Your Honour to page 404 of book 2, on which is reproduced a statement which is signed by Dr Sawyer. There is also a photograph there. So both he and Mr (?) have been photographed. If I can refer Your Honour to pages 165 to 169 of the transcript, and that is where Your Honour was referred to that statement in connection with particular 8 of count 1, on page 2 of the motion - and as Your Honour ruled yesterday, the defendants have no case to answer in respect of that particular - my friend has referred me to the photograph that we say is of Dr Sawyer, and there is a writing alongside the photograph which says "Raymond Hoser", in the same font and size as The Age newspaper. That indicates that Mr Hoser himself took the photograph. That isn't a photograph of Mr Hoser.
HIS HONOUR: I see.
MR NICHOLAS: And indeed you can see Mr Hoser for yourself, Your Honour.

So we would say that there is no issue between the parties that any evidence of Dr Sawyer could go to, and the principle is applied.

So far as the non-tender of the list of sources and the Bingley tape, both of those documents were referred to by Mr Hoser in his cross-examination and re-examination yesterday. The sources were referred to firstly by him in cross-examination at pages - well, they are referred to in a number of parts of the transcript. I can just give you these references Your Honour. Pages 365 and 366 of the transcript; page 374 - that is where Mr Hoser says the list of sources runs a hundred odd pages; and finally at page 384 where he says the CDs - this is in reference to the CD; the CD has Exhibits A and B and the sources, the list of sources I should say. And he said that he put the list of sources on the Internet so it was publicly available to those that were interested in checking them out.

The list wasn't called for by Mr Langmead during cross-examination, nor was the tape. And in re-examination Mr Hoser confirmed that the tape of the Bingley conversation, or rather a transcript of it, was one of the sources that was published on the Internet; and Your Honour heard evidence from him as to the contents of the list, and he gave the address at which the list or the sources could be found.

Your Honour, in our submission nothing turns on this non-tender, but to the extent that it does, I would seek to tender each of those documents, the list of sources and the tape. I should say, Your Honour, that we have not got the tape physically with us in court today, but we would

be able to provide Your Honour with a, Your Honour's Associate with a copy, and the prosecution - I have the list here to tender.
HIS HONOUR: Well, let me - - -
MR NICHOLAS: I understand - in making that submission I understand that evidence is closed.
HIS HONOUR: Yes.
MR NICHOLAS: But we are wanting to say that there is nothing that really should be made of this point, because we are not in any way seeking to keep either document hidden.
HIS HONOUR: Yes. Well, it is a matter for you. I am not - it is a Jones and Dunkell point only.
MR NICHOLAS: Yes.
HIS HONOUR: I am not making any comment whether I require them or not. The Jones and Dunkell point stands or falls - - -
MR NICHOLAS: I understand.
HIS HONOUR: As an item of evidence in proof of other matters.
MR NICHOLAS: Yes. Well, I do formally seek to tender each of those documents.
HIS HONOUR: All right. Well, is there any objection to that?
MR LANGMEAD: There is, Your Honour. The case is closed. The submissions have been made on the basis of the evidence as it stands. As my friend has pointed out, the existence, for example, of the so-called sources and the tape were raised in cross-examination, revisited in re-examination, and now it appears to be admitted it was an oversight that they weren't put in, or it is sought for some reason to put them in. Is it proposed that, for example, we get a chance to look at these and to cross-examine Mr Hoser? Is the defence case to be re-opened, in effect?

We say that we are entitled to deal with the evidence

as it stands at the close of the case. And as Your Honour says, it is with all of those procedural complications, and it goes to a Jones and Dunkell point, on a point peripheral to a point that is on the edge of one of the elements. So we hear the application, but we say there would be some procedural unfairness in that occurring without a full re-opening of the case, re-examination, revisiting submissions and the like, the usual vices; and at this point of this trial, those matters are really outweighed. The case has been conducted, been concluded and I have concluded my submissions.
HIS HONOUR: Yes, Mr Nicholas, I don't propose to receive them, but the fact that you have made the offer is something which, if I am dealing with the topic, I would note.
MR NICHOLAS: Very well, Your Honour.
HIS HONOUR: At least I hope I would remember it and note it. But what I have just said then is also on the record.
MR NICHOLAS: Indeed. Thank you, Your Honour.

The next matter is Mr Langmead said that Mr Hoser went so far as to having complaints about the system and didn't take the optional next step, and referred to no approaches being made to either the DPP or the Ombudsman. I would simply just refer Your Honour to page 496 and - sorry pages 496 and 652 of book 2, where there are reproduced letters sent by Mr Hoser to each, to the DPP and also to the Deputy Ombudsman in relation to the contents of book 2. So it is not completely accurate to say that he didn't take any further step in relation to either of those bodies.

Mr Langmead referred to the New Zealand case of Butler. He referred Your Honour specifically to what

appears at the bottom of page 946. He went from point 50 down to around point 55 as "to be used sparingly and only in serious cases". He didn't go on and read the following sentence: "Criticism may be strong and forceful, but it is not to be couched in the language of abuse and invective". In our submission the criticisms that are made by Mr Hoser in each of the books are properly characterised as strong and forceful. They don't descend into abuse or invective; and the submission that is made by the prosecution in that respect should be read with that sentence.

There was the Canadian case of Re Ouellet, which involved the Federal Cabinet Minister. When we are dealing with the status of the alleged contemnor, the status of Mr Hoser, as Mr Maxwell said in his no-case submission, is wholly different from the public status of a Cabinet Minister; in both the cases of Borowski, which is another Canadian case, and Re Ouellet, and also the public status of the likes of Mr Gallagher or Mr Mundey in the case of Gallagher and Durack and Attorney-General and Mundey.

Now, Your Honour, Mr Langmead read to you the passage or a passage that appears on page 99, which starts: "Furthermore, this statement was not made by just anybody". Your Honour, reading that passage again, it really does throw up the stark differences between that case and cases where the alleged contemnor does have the status of a Cabinet Minister or a union official, and the status of Mr Hoser; the way in which it is important that we say the prosecution has sought to deal with this alleged contempt by Mr Hoser, as His Honour said in Re

Ouellet: "It was urgent that a strong disapproval be pronounced in order to stop the harm done to the administration of justice in our country from spreading". He also noted, His Honour also noted that "the statement was advertised all over the country". Well, I would invite Your Honour to contrast that with the extent of publication in this case.

During Mr Langmead's submission I conceded that intention is not an element of the prosecution case. I would qualify that by saying we don't resile from the submissions that we make in paragraphs 17 and 18 of our written outline of reply when we say lack of good faith, that is a matter that is for the Crown to prove. It is not a matter for the defendant. And indeed, there is recognition on the part of the prosecution that those matters of intention and good faith, or lack of good faith, are separate concepts and they are dealt with separately in my friend's outline of submissions.

Your Honour, you inferred in relation to a passage that you were taken to by Mr Langmead for context, that the reader would have difficulty in suspending disbelief, and Your Honour, if I can refer you again, as you have been referred before, to the passage in Gallagher and Durack at page 242; and there what the High Court says about the good sense of the community being an adequate safeguard in most cases. And related to that, in going through the particulars that remained after Your Honour's no-case ruling, really as a matter of practical reality, in our submission it can't be said that the Crown has proved its case beyond reasonable doubt where Mr Langmead talks of inadequate bases, flawed analysis and a lack of

logical links between the conclusions that are drawn by Mr Hoser and the bases that he sets clearly out in the book. It is for the reader to read those and come to his or her own view as to whether or not the statements or the conclusions are made out.

And in saying that, it is an observation that, talking of spectrum, Mr Hoser has shifted in the prosecution's eyes from an unbalanced obsessed individual, at that end of the spectrum, to one of some authority. But that is an observation that I make.

We say, in respect of that, as we have said before, that the two books are to be read in their entirety, and the passages are to be read in the context in which they appear.

Finally, Your Honour, it is important in our submission to contrast the case of Gallagher and Durack and this case, and as an example of the wholly different exercise we would say that the receiver of this information or these statements goes through, and that is you have Mr Gallagher - I have already referred to his status - really making a sound bite outside the court; and in these two books you have someone who has spent - and you heard evidence from Mr Hoser - two and a half years, full-time to write them. He said the list of sources ran to hundreds of pages. He invited his readers to test what he had written in the two books.

If I can quickly refer Your Honour to page 365 of the transcript, he said this: "Others can view all the sources and independently decide whether I have got it right, whether I have got it wrong, whether I have quoted in context, whether I have quoted out of context, and the

list of sources - I have a print in my bag, but it runs about a hundred and something pages in a similar font to what you are looking at there, and that explains where all the information came from". In our respectful submission it is a wholly different exercise the reader of the two books goes through than those that were watching the television news or reading the papers in which the statements made by Mr Gallagher were published, and it cannot, in our submission, it cannot be open to Your Honour to find that in the circumstances and medium in which Mr Hoser has published these matters, that they have the required tendency, that the elements of the offence has been proved beyond reasonable doubt. They are my submissions, Your Honour.
HIS HONOUR: Yes. Thank you, Mr Nicholas.

I will reserve my decision on this matter. I should indicate that, as is probably obvious for those who have attended and will be obvious to the parties, there is a vast amount of material, including authorities, which have been referred to me, and I need to consider all of that material. I will, as quickly as possible, reach my conclusion, and give my reasons in the case; but having regard to the other commitments which I have for the court, I think it is unlikely that I could have a decision on this before about a month. I would hope it will be shorter than that, but I, doing my best, think it is probably unlikely that I could do it before that time. So if I can, I will give the parties plenty of notice, and if I have managed to get it finished before that, you will get ample notice so that you are aware.

Subject to that, I thank counsel and their solicitors

for their considerable help in elucidating the issues for me. I will reserve the case. Adjourn sine die.
* * *

.AL:LB IRS 31/10/01 P-528 MR NICHOLAS Hoser