IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE

COMMON LAW DIVISION

BETWEEN
No. 5928 of 2001
THE QUEEN
(Ex Parte THE ATTORNEY-GENERAL for the STATE OF VICTORIA)
Applicant - and -

RAYMOND TERRENCE HOSER
First Respondent - and -

KOTABI PTY LTD (ACN 007 395 048)
Second Respondent

Official Court Transcript.

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

HIS HONOUR: Yes. Thank you.

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

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

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

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

SOLICITOR: I do, Your Honour.

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

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

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

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

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

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

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

MR GRAHAM: May Mr Anderson be excused?

HIS HONOUR: Yes. Yes, you may indeed.

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

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

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

HIS HONOUR: I don't have them.

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

HIS HONOUR: Yes.

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

or caused to be disseminated each publication. It is

contended by the applicant that these publications contain material which constitute a contempt of court, being the contempt long described as scandalising the court. There is one such passage in Exhibit A of which complaint is made, and there are 22 passages in Exhibit B of which complaint is made.
The content and source of each of the relevant passages appears in the originating motion and is repeated in the summons. These passages, in summary, assert in varying but clear terms that two Magistrates of this State and three Judges of the County Court of this State were dishonest and corrupt in the discharge of their judicial functions.
If I may remind Your Honour, the gist of the offence of contempt consisting of scandalising the court is, in general terms, publication of material which has a tendency to interfere with the general administration of justice.
Whilst it is said in some of the cases that proceedings may be brought on indictment, there is no requirement to proceed in that manner, and there is ample authority, as Your Honour is no doubt aware, that at common law there is power to summarily punish as criminal contempts, including contempts which scandalise the court.
If I can refer Your Honour to one authority - helpful because it is very recent, and it is from the High Court - that renews that proposition. It is a case of Re Colina, ex parte Torney, 1999, 200 Commonwealth Law Reports 386.
If I can hand Your Honour an agreed folder containing, in effect, an agreed collection of authorities.

HIS HONOUR: Yes. Thank you.

MR GRAHAM: Now, I am told, Your Honour, that there are three authorities listed in the list at the front of the folder which are not presently in the folder, but that will be rectified at a convenient time.
If I can just ask Your Honour to note at this point without going to Colina, which is No 33 in the folder, the passage in the joint judgment of Chief Justice Gleeson and Justice Gummow, and I will give Your Honour paragraph references when they are available. Descriptions of punishment of criminal contempt by summary procedure has been the general practice and the proper procedure in this kind of case. I believe there is not a contest between the applicant and the respondents that summary procedure is appropriate.
Could I then take Your Honour to a few provisions of the rules of this court which govern proceedings of this kind. Could I ask Your Honour to look at order 75. If it helps, Your Honour, it starts at page 6,295.

HIS HONOUR: Yes. Thank you. Yes?

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

shall be by summons in the proceeding". So that therefore takes us to (3): "Where sub-paragraph (2) does not apply the application should be made by originating motion which shall be entitled The Queen v. the respondent on the application of the applicant".
And I interpolate, and Your Honour will notice, the applicant in this case is the Attorney-General for the State of Victoria, and sub-paragraph (b) "shall require the respondent to attend before a judge"; sub-rule (4), "the summons or originating shall specify the contempt with which the respondent is charged".
If I could then take Your Honour over to rule 75(11), which deals with punishment for contempt. Sub-rule (1): "Where the respondent is a natural person, the court may punish contempt by committal to prison or fine or both.
(2): "Where the respondent is a corporation the court may punish for contempt by sequestration or fine or both".
And finally, Your Honour, rule 75(14) relates to costs of an application such as this.
Your Honour would no doubt be aware the offence of contempt of court by publishing matter which scandalises the court has a long history and continues in existence on our submission. I believe that proposition to be in contest. I simply signal that point at this stage - I am sorry, I have misunderstood, Your Honour. From something that my learned friend has said, it is not contested that the defence still exists.
There is a convenient summary of the nature and ingredients of the offence in the passage in the case of, a very well known case of The King and Dunbabin, in 3 Commonwealth Law Reports, 434, and that is under tab 26 in

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

it now.
The passage is at page 442 where Sir George said,
"Any matter is a contempt which has a tendency to deflect the court from a strict and unhesitating application of the letter of the law, or, in questions of fact, from determining whether exclusively by reference to the evidence. But such interferences may also arise from publications which tend to detract from the and influence of judicial determinations, publications calculated to impair the confidence of the people in the court's judgments because the matter published aims at lowering the authority of the court as a whole or that of its judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of judicial office".
The continued existence of the offence of contempt by scandalising the court was recently affirmed by the High Court in the case of which I just gave you the reference, Re Colina ex parte Torney, which is tab 33, and I would ask Your Honour to note what appears in the judgments of Justice Hayne at paragraph 110 and Justice Callinan at paragraphs 127 and 137.
In the joint judgment of Chief Justice Gleeson and Justice Gummow at paragraph 2, the passage which I read from the judgment of Sir George Rich in Dunbabin is quoted, and Their Honours described that passage as stating what they described as the essence of the offence of scandalising the court.
The parties to this proceeding agree that the contempt alleged is a criminal contempt, and the standard

of proof resting upon the applicant is proof beyond reasonable doubt. There is much authority for that proposition, most recently the decision of the High Court in Witham and Holloway, 1995, 183 Commonwealth Law Reports at 525. That is under tab 39.
There are two other authorities in point, Your Honour, in that regard: tab 13, John Fairfax & Sons and McRae 154, 39 Commonwealth Law Reports 351. Tab 16, Keeley and Brooking, 1979, 143 Commonwealth Law Reports, 162, tab 16.
It has been said recently both in Witham and Holloway and Re Colina, that the distinction between civil and criminal contempts is somewhat illusory in any event. Perhaps nothing more needs to be said about that distinction in this case, given the agreement of the parties.
It is perhaps something that I should note in passing, Your Honour, that a Magistrates' Court has no power to deal with contempts of the kind complained of in the present case. There are very limited powers to deal with contempts in the face of the court, and I think in

the vicinity of the court, and it certainly has no power to deal with attacks upon Magistrates which comprise that court.
In theory, the proceeding in relation to the County Court Judges whose conduct has been impugned could have been brought in the County Court. That would have resulted in a duplication of proceedings, because the Crown would have had to come to this court in relation to the Magistrates' Court in any event. So that we have taken the course which we submit is proper in the

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

HIS HONOUR: Yes.

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

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

MR MAXWELL: No, Your Honour.

HIS HONOUR: I will give you leave.

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

HIS HONOUR: Yes.

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

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

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

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

HIS HONOUR: Yes. Any objection to that?

MR MAXWELL: No, Your Honour.

HIS HONOUR: I give you leave.

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

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

Hoser

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

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

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

MR GRAHAM: Thank you, Your Honour.

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

MR GRAHAM: That's right, Your Honour.

HIS HONOUR: Right.

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

HIS HONOUR: Yes, I have got that.

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

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

HIS HONOUR: Yes. Very well.

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

HIS HONOUR: Yes.

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

respondent is the author and the second respondent is the publisher. These passages contain criticisms of certain Judges of the County Court of Victoria and certain Magistrates. Those criticisms concern the discharge by those judicial officers of duties. The applicant alleges that the material contained scandalises the court. It is dated the 9th of October and signed by the respondent's solicitors.
I should say to Your Honour at this stage there is very little dispute between the parties as to the matters of authorship and publication; but there may be some issue as to the scope of the publication; and accordingly, I wish to take Your Honour, briefly, through the evidentiary material, just to show, to layout the sort of chain of proof, and I shall do so as briefly as possible.

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

HIS HONOUR: Yes, I do.

MR GRAHAM: Of those books, with fairly colourful covers. Mr Lee goes on: "As appears from Exhibits A and B to this affidavit, the first respondent is the author of the publication. The second respondent is the publisher of the publications. Since receiving instructions to investigate the publications referred to in the originating motion herein, I have also caused to be obtained a company search of the second respondent. As appears from the company search the first respondent was at all material times a director and shareholder of the second respondent" and produces the company search. I will go through the exhibits after I have read the affidavit Your Honour, it is easier.
"On 26 July 2000 I sent a circular letter to various retailers and book outlets seeking details of the volume and extent of the sales and publication. An example of such a letter is now produced and shown to me at the time of swearing this my affidavit and marked D. I have

received a number of replies to my letter" and produces a bundle of replies. I don't know whether my learned friend takes issue to those replies on the basis that they are hearsay, but perhaps when I come to them he can make the point if he wishes to.
Paragraph 28 - I am sorry, in paragraph 7 he says:
"On 28 July 2000 Mr Nick Peasley a representative of McGills, phoned him in response to my letter dated 26 July to McGills and informed me that since January 2000 McGills had sold 16 copies of volume 1 and seven copies of volume 2 of Mr Hoser's publications, and had sold 22 copies of volume 1 and 13 copies of volume 2 since 1999. As appears from Exhibit E to this affidavit each respondent has publicly and extensively disseminated or caused to be publicly and extensively disseminated containing the words alleged to constitute contempt of court publications in this proceeding.
In proceeding number 7825 of 1999, issued in the Supreme Court of Victoria, in an affidavit dated 7 April 2000 and sworn by the first respondent in the defamation proceeding" - and that was a defamation proceeding brought by a third person against the first and second respondents in this case, sworn by him "in the defamation proceeding on his own behalf and on behalf of the second respondent, the first respondent made admissions relevant to this proceeding in respect of matters, indeed the authorship of the publications, dissemination of the publications, and that the second respondent was at all material times under the effective control of the first respondent. Now produced and shown to me at the time of swearing this my affidavit marked with the letter F is a copy of the said

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

HIS HONOUR: Have the exhibits been filed?

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

HIS HONOUR: No.

MR GRAHAM: I will just check.

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

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

exhibit notes which should be attached to two books which Your Honour has. And then I will hand Your Honour Exhibits C, D, E and F.
I don't know if any problem arises from the fact that the exhibit note is not attached to the court's copy of the exhibit. If needs be, I suppose it could be attended to by Mr Lee in swearing his affidavit.

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

MR GRAHAM: See if there is a problem.

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

MR GRAHAM: Exhibit C, Your Honour.

HIS HONOUR: Exhibit C.

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

providing that this sort of extract is prima facie evidence of its contents without further proof. But again I think there is no issue about the factual accuracy of the extract Exhibit C.
Can I just draw Your Honour's attention to a few points? First of all, in relation to Kotabi Pty Ltd, the second respondent, it gives the Australian company number, it gives the name of the company, then company address, registered office 41 Village Avenue, Doncaster, Victoria, 3108. I just ask Your Honour to note that address, because it has a little further significance.
If Your Honour turns over the page, a few lines from the top, "Principal place of business address: 41 Village Avenue, Doncaster, Victoria, 3108", and we have the company's officers; "Director, Hoser, Raymond, 41 Village Avenue, Doncaster, Victoria, 3108". Then all the other directors listed below are listed as former directors. So this is a case where the company only has one director, and as Your Honour is probably aware, that is something that can be done as a result of amendments made back in, I think, 1997 or 1998.
Over the page, the secretary, and that is Mr Hoser again, 41 Village Avenue Doncaster Victoria, 3108. Then follows the share structure, which I have had some difficulty with. It says that there are two classes of

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

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

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

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

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

number on it.

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

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

HIS HONOUR: It appears to be 7825 of 1999.

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

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

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

Paragraph 6 is important: "Approximately 7,500 books

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

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

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

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

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

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

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

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

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

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

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

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

MR GRAHAM: We are starting with the second book, Your Honour, because that is the way the notice of motion proceeds. Before I do that, and I am reminded by my learned friend Mr Langmead, there is two parts of this book which are not referred to specifically in the affidavit material, but I would invite Your Honour to look at them. Right at the beginning of the book, just after the first titled page, there is a list of books by the same author. It is just worth noticing that all those publications are the ones that were referred to by Mr Hoser in his affidavit filed in the other proceeding. If Your Honour turns over to page (iv), that page begins by saying it is published by Kotabi Publishing and states that the copyright is claimed by Mr Raymond Hoser.
Could I also ask Your Honour to look at the passage on page 182. This concerns an appearance by Mr Hoser before Mr Colin McLeod, a Magistrate, a former member of the Victorian Bar. He says - this is about point 3 on page 182. The book says: "Keating and his mates" - and earlier material indicates that Keating was a police officer - "decided to use the bail factor as a means to extract maximum punishment and inconvenience on me. They sought from the presiding Magistrate, a Mr Colin McLeod, a whole host of conditions which were granted without question by him. They were: Reside at 41 Village Avenue Doncaster". .
If I can then move back and ask Your Honour to note that we have grouped the comments complained of under a number of headings. And Your Honour sees paragraph 3(a), after reference to Victoria Police Corruption 2, a heading

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

also refers to Magistrate H.F. Adams.
In order to put these matters together, Your Honour, one has to jump around the book a bit. In the end, I respectfully suggest this will prove to be the slightly long way round, but it is better than taking a short-cut which might be confusing.
Thus, could I ask Your Honour to go to page 245 of Victoria Police 2. Your Honour will see at page 245 a statement starting at point 3, "Once Neesham had made it clear the matter wasn't being taped". Now, in order to understand what this is all about, it is necessary to go back a little. If Your Honour sees - perhaps it is necessary to go back to page 244. There is a heading "A taste of what was to come". If Your Honour just peruses that, it appears that the - - -

HIS HONOUR: What was the proceeding before Judge Neesham?

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

HIS HONOUR: And this is 1993, is it?

MR GRAHAM: Yes, Your Honour.

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

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

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

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

amended by inserting the heading immediately preceding the quoted passage.

HIS HONOUR: Yes. Any objection to that course?

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

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

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

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

HIS HONOUR: Yes.

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

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

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

none other than Thomas Neesham".

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

MR GRAHAM: The bottom of page 259. And then the top of page 260 it is said: "Perhaps most tellingly, he was one of those judges who had refused to allow me to have the case tape recorded, thereby effectively stamping him as a crook judge who wanted his activities never to be opened up to scrutiny. My initial judgments of Neesham as corrupt and dishonest were further proven during the course of the trial and its aftermath, much of which would be explained in the material that follows".
And then page 274, which is particular sub-paragraph (iv), His Honour can see from the passage before what the context is, "As soon as the trial proper commenced Neesham's bias against me commenced in earnest and his desired result was clearly known. His whole modus operandi was to guide the jury towards a guilty verdict. Furthermore, these actions were separate to others which also appeared to have been taken to ensure the jury's verdict was predetermined".
If Your Honour then would go to page 280; still speaking as is apparent about the same court proceedings, page 280, the following appears, starting at about point 2: "Throughout the case he" - it is apparent from the context that that is Judge Neesham - "gave prosecution witnesses an advantage by asking me in their presence what evidence I sought to get from them and what questions I sought to ask. From Neesham's and the prosecution's point of view this was designed to allow these witnesses time to think of the best answers they could give knowing in advance the answers I sought. When doing this, Neesham

made sure that the jury was hurriedly shifted from the courtroom so they's never know how he was actively aiding and abetting the prosecution witnesses.
Then if Your Honour would go to page 304, paragraph 6 the bottom of the page there is a heading "Judge Thomas Neesham - No concern for truth". "Neesham's attitude to the truth, or perhaps more directly his desire to ignore it came out throughout Keating's evidence and later in the trial through various uncalled for outbursts". And then some examples are given which are not in the particulars. That was page 304.
Would Your Honour then go to page 329 of the particular sub-paragraph 7. Talking about the evidence that was being given during the course of the trial, the book says: "Of course Connell had been doing effectively

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

HIS HONOUR: Where does this appear?

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

HIS HONOUR: Yes, I see.

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

HIS HONOUR: Who is Connell?

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

HIS HONOUR: Yes.

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

most of the day apparently chatting to jurors. I hadn't been aware of the extent of this until it was brought to my attention. What it probably meant was that while I was systematically destroying the credibility of the police side and various aspects of their case, the jury was being deliberately sidetracked by the prosecution side, so none of it really mattered. Of course the Judge, Neesham, should have stopped this carrying on by Perry's side, but, no, he'd been green lighting the whole lot".
Then at page 353, starting at about point 3 or point 4 there is a paragraph: "I directed" - this is in the course of - it is apparent from the context, the evidence of two of the prosecution witnesses. The passage reads: "I directed them both to the previous day's transcript where Brown had confirmed the Broadmeadows strip search. Neesham had attempted to write it off saying 'That is another matter altogether'. That Neesham had got it wrong didn't matter to him. However, it would be hard to believe that both he and Perry would be that stupid. Neesham then improperly made sure that the matter was now effectively closed".
Can I take Your Honour to page 367 which is the subject of the amended sub-paragraph 10. About point 8 this appears: "Neesham had probably made a deliberate mistake here because the date 1993 would indicate that I had premeditated and planned the alleged perjury in early 1994. It was part of his not so subtle and deliberate

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

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

HIS HONOUR: "Like he said himself".

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

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

too concerned with the truth, then what faith can Victorians have in their legal system? Not only that, but myself and any other concerned citizen has absolutely no power to do anything about the recklessness of judges like Waldron, even when the proof is there for perpetuity in the government's own transcripts".
Page 243, the third line down, in the heading "Waldron's form": "While Waldron was hostile on a known corruption whistleblower like myself, and has been seriously harsh on...."

HIS HONOUR: "Similarly".

MR GRAHAM: "Has been similarly harsh on others like me by ensuring we don't get a fair trial, he has simultaneously got a reputation for apparently looking after hardened criminals".
Then, Your Honour, if we can move on to the comments concerning Her Honour Judge Balmford, as she then was. That takes us back to page 140.
The context makes this appear, Your Honour, that this was, I think, an appeal to the County Court against the Magistrates' Court decision which came before Judge Balmford. At page 140, four lines from the top: ""After Balmford" - perhaps I should read it. "No taping -

Judge's mind already made up". "After Balmford had stated that she would not allow the case to be tape recorded, it was obvious that I was losing this one. Like the case in front of Blashki, the only question was the penalty".
On page 142 a short passage about point 9 on the page: "Like I have noted, Balmford wanted to convict me and get the whole thing over with as soon as possible. After all, she had obviously made up her mind before the case even started. Recall she had refused to allow the matter to be tape recorded".
Finally, concerning Her Honour, at page 144, at point 9, "Balmford's bias in favour of police and the DPP isn't just something I have noted. In fact three Supreme Court judges have noted it as well".

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

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

HIS HONOUR: Yes.

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

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

was quickly told by Ben Piper and the others that she has a long-standing reputation as", in bold, "a strongly pro-police Magistrate. In hearings in front of her it can come out that the police have committed the most serious of crimes and it seems she would still not do anything about it. Readers may also seek to refer to the police shootings section in Victoria Police Corruption for details of her past form. Complaints about Heffey's running of courts and the decisions have also appeared in the mainstream media. These usually follow her routine sidings with police after shootings, or death in custody matters".
If Your Honour then turns to paragraph 207, page 207, there is a photograph of, what one might infer from the sub-title is a photograph of Magistrate Heffey. The passage complained of consists of this: "Jacinta Heffey, a Policeman's Magistrate. Sometimes she seemed so confused and scatter-brained that one couldn't help but question the selection criterion for Magistrates in Victoria".
If Your Honour would then go over to page 208 - this is a particular sub-paragraph (iii), 208, five lines from the bottom: "in siding with the police, Heffey made her 'ruling' where she goes through the motions of stating the alleged 'facts' and 'reasons' for her decision. She said she was going ahead because I had failed to notify the other side of my intention to seek an adjournment pending legal aid. That her statement was an obvious lie was demonstrated by the multiple letters in Hampel's file and Heffey's own court records. Then again, I suppose it was a case of not letting the truth get in the way of a predetermined outcome".

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

given".
One can infer from the context that this was concerning the committal proceedings which led to the perjury trial.
Then we go to the matters concerning Magistrate Adams. If Your Honour goes to the rear cover, there is a photograph which one might infer was a photograph of Magistrate Hugh Francis Patrick Adams. Underneath that appears the following: "The Magistrate that the cops said he paid off", which must refer to the photograph.
"Following the 1995 publication of Policeman Ross Bingley's confession that he paid off Hugh Francis Patrick Adams to fix a case, some of his other rulings that seemingly flew in the face of the truth or logic have come under renewed scrutiny. This includes the bungled inquest into the murder of Jennifer Tanner which the police falsely alleged was suicide".
Now, that concludes the matters complained of in Police Corruption 2.
The main paragraph numbered 4 in the originating motion takes us to Exhibit A of Mr Lee's affidavit, and the passage complained of in that book concerned the same Magistrate. I invite Your Honour's attention to the words at the top of the page. There is the photograph, and then the words "Magistrate Hugh Francis Adams". "In a controversial decision he let corrupt policeman Paul John

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

HIS HONOUR: Yes. Thank you.

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

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

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

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

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

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

<STEPHEN JOSEPH LEE, sworn and examined:

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

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

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

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

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

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

MR GRAHAM: If Your Honour pleases.

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

<CROSS-EXAMINED BY MR MAXWELL:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I tender those.

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

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

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

HIS HONOUR: Yes. All right.

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

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

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

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

solicitor, surely that is a question of law.

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

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

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

MR MAXWELL: Indeed Your Honour.

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

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

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

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

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

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

MR GRAHAM: Mine are marked and - - -

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

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

HIS HONOUR: Yes. Hold on to that book.

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

is it?

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

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

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

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

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

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

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

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

HIS HONOUR: Yes.

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

HIS HONOUR: Yes, right.

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

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

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

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

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

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

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

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

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

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

MR MAXWELL: Prosecution.

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

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

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

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

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

HIS HONOUR: Yes. What do you say?

MR GRAHAM: Your Honour, I don't want to foreclose my learned friend from an argument which I see him wanting to put; however, there is a problem in putting admissible evidence before Your Honour in order to establish what Mr Hoser's motives may have been, or to establish that Mr Hoser had been engaged in some sort of campaign to publicise corruption, won't be achieved by the process that he is going through at the moment.
Whereas the affidavit that Mr Lee filed, that Mr Lee obtained, which I will call the Hoser affidavit, is relied on as containing admissions which we now put as admissions against interest, which can be clearly sheeted home to the first respondent and the second respondent; the material that appears in these books as to motive and purpose and campaign is pure hearsay. If that is to come forward before Your Honour, it comes forward through Mr Hoser. It doesn't come forward through what he or his publisher, whatever, may have chosen to write in the book, not on

oath and uncontested. It is straight hearsay.

HIS HONOUR: I accept - I put this to Mr Maxwell: plainly a document which is relied on for the purpose of admissions against interest, it doesn't follow that what otherwise is not relied upon as being self-serving itself becomes evidence of the truth of what is contained in the document.
But it seems to me that if you are putting it that this material is relevant - and I indicate making no indication of what the law is about that, I will leave that for arguments in due course - if it is a relevant question, and I so find it to be a relevant question as to what is the motive and the background to the publication of this particular material, if that, I am satisfied, is a relevant matter, then it seems to me the evidentiary point which is taken against you is one which I can address at that time.
At the moment, there is, as I apprehend it, a what could be said to be a tactical - not a tactical, a technical objection being taken, that it is not formally proved through this witness, merely because it is attached to the affidavit. That may mean that, in due course, you might have to formally prove it, whether through your client or in some other way. But I am prepared to receive this material on the basis that it has been put; namely, that if I, in due course, rule that this material is not relevant to the issues of contempt, and plainly the exhibits which have just been received couldn't be relevant to the decision which I will have to take, but I don't know what the answer is going to be to that, so I will receive it on that basis, and on that understanding at the moment.

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

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

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

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

did.

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

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

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

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

MR MAXWELL: I withdraw the question.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR MAXWELL: That is so.

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

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

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

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

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

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

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

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

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

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

HIS HONOUR: Yes, I would agree with that.

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

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

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

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

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

application for tape recording and it was refused.

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

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

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

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

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

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

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

matter for the Attorney. The books stands alone as a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR MAXWELL: Yes, Your Honour.

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

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

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

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

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

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

MR MAXWELL: Now, please go to 435.

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

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

MR MAXWELL: Yes, Your Honour.

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

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

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

MR MAXWELL: We had no idea until Mr Lee was in the box what the position was. The fact that this matter has not even been read is a matter about which submission will subsequently be made.
435 is where - I hope I have got this right - yes, at the foot of 435 is one of the sentences complained of in the originating motion. "It wasn't like he" - that is His Honour the Judge, "said himself he wasn't interested in the truth". Now, if you would go, please, to 304 to 5.

HIS HONOUR: 304.

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

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

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

make, wouldn't you?

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

MR MAXWELL: I won't press the question.

MR GRAHAM: Allow questions of that kind.

HIS HONOUR: It has gone one o'clock.

MR MAXWELL: Your Honour - - -

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

MR MAXWELL: If Your Honour please.

<(THE WITNESS WITHDREW)

LUNCHEON ADJOURNMENT

UPON RESUMING AT 2.15:

<STEPHEN JOSEPH LEE, recalled:

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

HIS HONOUR: Is this relevant?

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

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

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

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

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

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

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

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

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

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

Yes? --- To my knowledge, no.

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

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

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

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

got no knowledge of that at all, Your Honour.

If Your Honour pleases, I have no further questions.

HIS HONOUR: Yes. Any re-examination?

MR GRAHAM: No, Your Honour.

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

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

ASSOCIATE: These are tendered.

HIS HONOUR: All right.

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

HIS HONOUR: Yes, he may be excused.

<(THE WITNESS WITHDREW)

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

HIS HONOUR: Yes.

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

HIS HONOUR: Thank you.

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

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

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

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

And to leap forward a little: the essential submission there is that the offence is and should be narrowly confined, and in particular that the common law courts have recognised the necessity for and the legitimacy of public criticism of courts. So that the definition of the offence itself accommodates that recognition of the importance, necessity, indeed public benefit, in public criticism of the system of justice.

Paragraph 2, alternatively, if we fail to persuade Your Honour that the law of contempt did not, properly understood, apply to this conduct, then we would seek to call in aid the implied constitutional freedom of communication, that being the point raised in the section 78B notice, which is to say - and it is important how the question is asked - not that the existence of an offence of scandalising the court can't be justified consistently with the existence of the implied freedom. That, with respect, is not the question. The question is whether the common law offence of scandalising the court validly extends to these respondents in respect of these publications.

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

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

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

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

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: Yes.

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

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

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

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

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

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

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

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

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

MR MAXWELL: Your Honour, I accept that unreservedly, and we will be coming to what the common law courts have said about it. But in our respectful submission, reference to the word in ordinary parlance highlights what a curious concept it is, which the common law is still utilising - that is not to say that the dictionary would enable Your Honour to disregard what the High Court has said, but rather, that when scandalising was identified, and there is a reference to its origin in one of the decisions I will take Your Honour to - but I think I am right in saying 18th Century - there is a very different view about the proprieties and the dignity of the members of the Bench.
We make the point in paragraph 5 that the law of contempt is not concerned with feelings at all. It is concerned that it is the province of the law of

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

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

HIS HONOUR: Yes.

MR MAXWELL: If Your Honour would go to 242.

HIS HONOUR: Excuse me one second. 242?

MR MAXWELL: 242, Your Honour. And Their Honours in the joint judgment set out what it was that Mr Gallagher had said, and Your Honour will see from the second part of the quote, that Mr Gallagher, the defendant, was asked about the decision of the Full Federal Court which had reversed an earlier decision, and Mr Gallagher says words to the effect, "I believe that by their actions in demonstrating walking off the job I believe that is the main reason for the court changing its mind".
Now, a wholly different case, and we take nothing from it as regards the facts or the circumstances. But the long paragraph on the right hand page is, in our respectful submission, an important passage. It describes, it refers to the category of imputations on courts or Judges which are calculated to bring the court into contempt or lower its authority, and references to Bell and Stewart, Fletcher ex parte Kische and Dunbabin,

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

and immediate method of repressing imputations upon courts of justice, which, if continued, are likely to impair their authority". Your Honour, I pause there to draw attention to the phrase "some certain and immediate method", and the phrase "which, if continued, are likely to impair their authority".
As Your Honour will see from the outline, we respectfully submit - and this is paragraph 15 at the bottom of page 3 of the outline - that the delay in the bringing of these proceedings bears eloquent testimony to the lack of any relevant impact on the administration of justice; and we will seek to make good the point in paragraph 9, at the top of that page, that the entire

rationale for the availability and utilisation of the summary procedure is that the publication is such as to create an urgent need to protect the administration of justice; hence, the phrase "certain and immediate method of repressing imputations", because, if they continue, they will be likely to impair justice. Your Honour is entitled to assume that if these publications on any reasonable view had such a tendency to cause damage, then action would have been taken much earlier than this.
And we rely, in relation to that, on the fact that no proceedings were ever taken in relation to the Hoser Files, being, as Mr Lee fairly agreed, a book of like character. And that is my words. That is the substance of what - I accept that. We will submit to Your Honour that it is a book of like character. I withdraw any reliance on Mr Lee's concession. It is true that he hadn't read it, and we will make other submissions about that.
Then, to read on in Gallagher, there is another - there is a further very important passage beginning after the reference to Dunbabin, Your Honour: "The authority of the law rests on public confidence, and it is important for the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges". Just pausing there, Your Honour, the vice is that the authority of the law will be undermined. Public confidence is not an end in itself, so Their Honours are saying, but a means to the end of maintaining the authority of the court.
And Their Honours go on: "However, in many cases the good sense of the community will be a sufficient safeguard

against the scandalous disparagement of a court or judge" -

and we draw attention to the strength of that statement, "scandalous disparagement of a court or judge" - "and the summary remedy of fine or imprisonment is applied only where the court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable".
And e would draw attention again, Your Honour, to the notion of the "ordered and fearless admission of justice". If this branch of the law of contempt has a legitimate concern, it is confined to preventing conduct which will - and we say this towards the end of our submissions, in paragraph 25 - it is to protect the administration of justice against actual damage, that is to say, against conduct calculated to inhibit the ability of Judges and Magistrate's to decide cases fairly and free of external pressure; or (b), reduce the level of community obedience to orders of the court, which is a long-winded way of saying reduce the authority of the court.
And we submit, as we have put it in paragraph 10, page 3, the test of impairing or undermining public confidence in the administration of justice is unacceptably imprecise, subjective and uncertain. That is to say, it is objectionable as a matter of law for persons to be subject to a law of such imprecise definition, but we say, from the point of view of the court, it is a standard which is almost impossible of application, because we ask rhetorically: How does a judge, absent exceptional cases which could be imagined, determine whether there is any likelihood of "public confidence"

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

HIS HONOUR: Where are you referring to?

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

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

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

without, on the evidence, any investigation of whether the matters on which, in every instance these comments are based in the book, whether those matters are true or not. And without any investigation of prior publications by the same person, and in particular any consideration of whether any of the complaints made in those earlier publications have been shown by other events to be vindicated, we have already made reference to the Magistrate Meagher, and we will come to the Full Court decision in that regard.
If Your Honour would now go to paragraph 6 of the outline, because we are endeavouring to deal, still, with the scope of the offence. Indeed, it might be appropriate if I go back. I have not taken Your Honour to the House

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

HIS HONOUR: Sorry, letter - - -

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

HIS HONOUR: At what page, did you say?

MR MAXWELL: 1313, Your Honour.

HIS HONOUR: 1313.

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

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

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

HIS HONOUR: Yes. All right.

MR MAXWELL: The constitutional provision naturally is

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

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

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

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

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

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

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

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

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

footnote to paragraph 17(f) of the outline.

HIS HONOUR: Yes, I have got it.

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

HIS HONOUR: This is which one?

MR MAXWELL: Number 2, Your Honour.

HIS HONOUR: Yes. Whereabouts?

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

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

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

the book.

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

MR MAXWELL: You don't, Your Honour, no. But Your Honour, we invite Your Honour to infer that it is, as a matter of overwhelming inference, in our respectful submission, from the history of writing books on these subjects, which is now in evidence.
It is accepted that he wrote those books, from the fact that this is done in the form of a book rather than a pamphlet, that is to say, the inference is that what is said by the author - let me put that differently: his conduct is consistent with what he says about himself, that is, the conduct alleged against him, that he has sought to have this book, he has had this book published and printed and distributed because he is serious-minded with respect to the dissemination of these matters which he says are of concern to him. I can't put it any higher than that.

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

MR MAXWELL: That is so.

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

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

positively to prove the presence of it.

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

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

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

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

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

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

HIS HONOUR: In what sense?

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

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

MR MAXWELL: Your Honour - - -

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

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

HIS HONOUR: That is why I am putting it.

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

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

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

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

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

HIS HONOUR: In, sorry, who?

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

HIS HONOUR: Yes.

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

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

view, in our respectful submission, that the good sense of the community is a sufficient safeguard to the extent that this publication, these books, would otherwise be regarded as unwarrantable attacks on Judges or Magistrates: and in that sense, the presentation and character of the book is itself important.
This is a campaigning book. It is plainly an amateur job. The reader only has to open it to see that it is self-published. This is not written by an esteemed academic of national or international standing. This is written by somebody who is, by profession, what I think is called a herpetologist, that is someone who is expert in reptiles, but who is, as an examination of the Hoser Files and these two books shows, someone who has had his own encounters with the criminal justice system and has serious concerns about the way in which those proceedings, and proceedings in which others to his knowledge were concerned.
So that when the sensible member of the public, to whom Their Honours are referring here, picks up this book and reads this person as saying, "Well, in my case the Judge was backing the prosecution", the reader is going, as a matter of good sense say, "Well, after all, he was the defendant. You would expect him to say that, wouldn't you? And if it is right that he was unrepresented, well,

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

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

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

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

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

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

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

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

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

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

HIS HONOUR: Yes.

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

it is founded on the elementary necessities of justice, there must be no hesitation to exercise it, even to the point of great severity, whenever any act is done which is really calculated to embarrass the normal administration of justice".
Again, so as not to come back to it, Your Honour will note that the summary jurisdiction which is invoked in this case is justified because any other means would be too slow. The damage would be done if you did it on, by the time you got round to trying on indictment.
Then there is reference to the trial by newspaper.
Then exactly in the middle of the page, the sentence beginning towards the right-hand side: "On the other hand because of its exceptional nature" - the same phrase Your Honour saw in Bell and Stewart - "this summary jurisdiction has always been regarded as one which is to be exercised with great caution, and we rely on that, and this particular class of case to be exercised only if it is made quite clear to the court that the matter published

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

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

MR MAXWELL: Your Honour, I did read that.

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

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

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

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

MR MAXWELL: I certainly accept that it is important, and it is a strong statement. "No hesitation to exercise it even to the point of great severity whenever any act is done which is really calculated to embarrass the normal administration of justice". But we balance against that, the "on the other hand" section, which does, even in 1953, 55, Your Honour, identify this as an exceptional jurisdiction, the summary jurisdiction, as one to be exercised with great caution, and only if it is made clear that the matter published has, as a matter practical reality, a tendency to interfere with the due course of justice it says in a particular case - though that is a comment - or those words apply to a particular species where there are pending proceedings, and we don't suggest that that is a necessary element of the sub-category we are concerned with here. But in our respectful submission there is a clear thread from Bell and Stewart, through Fairfax, that this is an exceptional step to take, and the court would take it when the nature and tendency of the publication is such that something has got to be done quickly to prevent the damage which will otherwise flow to the system of justice.
Now, Brett's case, which is in the folder at tab 24, is one where, I think I am right in saying, the publication - there was a very short time between the date

of the publication and the date of trial. And Your Honour will see that at the start of Mr Justice O'Bryan's judgment there is a reference to a matter published in the Guardian newspaper of the 27th of January 1950. And this matter was on on the 3rd of March, so just a little over a month later. And we build on that, in paragraph 8, by seeking to do what Mr Gallagher's counsel failed to do in that case, - I withdraw that.
What we seek to do in paragraph 8 is to call in aid as a way of capturing the vice to which this subspecies of contempt is properly directed, to call in aid what the United States Supreme Court has defined as being the test for a contemptuous publication, that is, whether it creates a clear and present danger of high imminence. And we have given Your Honour reference to Pennekamp. That, we were told last evening, wasn't able to be copied. We will make a copy available to Your Honour as soon as it is available.
It is important to point out that Mr Gallagher, in Gallagher and the Attorney-General, sought to have the High Court apply a clear and present danger test, and that was rejected; and that is at the foot of the page that I had taken Your Honour to in the Gallagher judgment.
Your Honour, we move then to paragraph 9, and I have made the point and drawn attention to a couple of references already which refer to the need for a timely application because of the need to protect the administration of justice. If I might take Your Honour to Attorney-General and Mundy, which is in tab 3.
Your Honour, this is a decision of Mr Justice Hope. The particular passage relied on in relation to urgency of the

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

HIS HONOUR: Yes.

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

Your Honour. One of its virtues is that it sets out a number of important passages from a number of the key decisions.
Your Honour will see that at 906 D His Honour begins with the reference to McLeod and the need to balance against the interests of the administration of justice the right of free speech and what His Honour says is the right to criticise and indeed the desirability of criticism of public institutions.
And Your Honour, I just draw Your Honour's attention to the extracts from the various cases on 906 and 7.
Then at the top of 908, His Honour says - and we have quoted this in paragraphs 18 and 19 - - -

HIS HONOUR: Yes.

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

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

authorities through 908 and 909.
Your Honour, we then go to letter F on 910. There is a reference just above that to the passage from Nicholls, which the Privy Council referred to with approval in Ahnee about it being in the public benefit if a judge made a public utterance of such a character as to be likely to impair the confidence of the public.
Now, the book quotes what it says is a statement of Judge Neesham, that the criminal law is not concerned with establishing truth. That is a statement of such a character as, on one view, to be likely to impair the confidence of the public.

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

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

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

MR MAXWELL: Yes, Your Honour.

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

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

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

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

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

MR MAXWELL: Well, Your Honour - - -

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

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

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

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

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

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

MR MAXWELL: Yes.

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

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

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

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

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

MR MAXWELL: Yes, Your Honour.

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

MR MAXWELL: Yes, Your Honour.

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

MR MAXWELL: For the judge to say - - -

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

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

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

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

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

MR MAXWELL: With respect - - -

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

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

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

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

HIS HONOUR: Yes, which one is it?

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

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

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

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

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

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

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

HIS HONOUR: Right. Thank you.

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

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

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

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

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

MR MAXWELL: 569.

HIS HONOUR: I am with you. 360.

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

Now, Your Honour, what is said by Mr Hoser is naturally of a different character from what is said by an appellate judge in the course of his functions. But as Your Honour has heard from what I have read, and as Your Honour will see from reading the judgment in full, it is very severe criticism of a judge of the County Court for failing to perform his judicial duty.
The functioning of our system, in our respectful submission, depends on that kind of criticism, because it is calculated to improve, in the future, the administration of justice. Now, Your Honour will assume, rightly, that the Court of Appeal or a judge on judicial review is more likely to apprehend correctly whether what might have been thought to be bias was in truth that when the circumstances are properly analysed and the legal context in which the judge or Magistrate was functioning is properly understood.
But as was mentioned in Mundy and elsewhere, criticism of that trenchant kind can't be just the province of the well-informed external commentator or appeal judge. There is a proper place, in our respectful submission, for comment by someone who has been a participant in the system, who feels aggrieved about the way he was treated, and goes to the trouble of publishing a detailed critique, not consisting of a series of bald assertions, but consisting of a detailed recounting of the events from his perspective and the making of the kinds of criticisms to which reference has already been had.

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

MR MAXWELL: If Your Honour will just excuse me?

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

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

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

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

prosecution. That is exactly what, or effectively the same, as what has been said in the Gilfillan case. The County Court Judge assumed the role of prosecutor and investigator; and that is corrupt in the sense in which Mr Hoser uses the word - and I want to take Your Honour to that now. That is corrupt in the sense that it is contrary to the judicial oath for any judicial officer to assume the role of prosecutor. That is not what they are there for. They are sworn to uphold the law without fear or favour.
Your Honour, the definition of "corruption" is to be found at page 3 - no, perhaps, in the second one which we have been referring to, at page 17. It is a very broad definition.

HIS HONOUR: Sorry, where are you referring to?

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

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

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

MR MAXWELL: Yes, I would.

HIS HONOUR: Yes.

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

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

do you put it that - - -

MR MAXWELL: No, Your Honour.

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

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

HIS HONOUR: Yes.

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

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

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

HIS HONOUR: Okay.

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

HIS HONOUR: Yes.

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

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

Now, Your Honour, I want to deal with the - no, I will come to it when I get to paragraph 20, that is the point about good faith and that the publication is not punishable unless it is disqualified by absence of good faith.

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

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

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

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

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

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

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

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

MR MAXWELL: Yes, Your Honour.

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

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

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

wanted to get some general idea.

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

substantial concern with matters in which he was involved, and most, if not all, of the passages complained of are from parts of the book dealing with his own proceedings. And we rely on the fact in that regard, that Mr Hoser was an unrepresented defendant in those proceedings, or so it is asserted. We haven't led evidence to that effect, but the book asserts that he was unrepresented. Indeed, there was debate about whether he should be allowed to apply for legal aid or not.
In 17 we draw attention to the work being self published. My learned friend described the covers accurately as fairly colourful, and that goes to the weight or otherwise which would be attributed to the opinions expressed by the ordinary reader of good sense. We say in little (b) of 17 that the circulation is limited. It is not as limited as a statement made to four or five people at a particular moment; but on the evidence, which relates only to the first one, which is the one in respect of which only one complaint is made, there were, as at the date of the affidavit, some four and a half thousand copies sold. There is no - - -

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

MR MAXWELL: Book 1.

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

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

about - - -

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

MR MAXWELL: Volume 1 of this - - -

HIS HONOUR: I see.

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

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

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

HIS HONOUR: Yes; 690 or something like that.

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

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

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

justice? And in the case I am about to take Your Honour to, His Honour decided, "yes" to each. "Yes" to the first question, I think, in respect of each of the publications complained of, and "no" to the second, and accordingly dismissed the contempt charges.
And so the extent of publication is a matter going to the existence or otherwise of a real risk of damage to the administration of justice.
Your Honour, the case I am referring to is Colina and Torney. It is in tab 6. We have copies for Your Honour and our learned friends.
And Your Honour will recall my learned friend mentioned Re Colina ex parte - sorry, Your Honour.

HIS HONOUR: Yes.

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

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

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

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

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

HIS HONOUR: Yes.

MR MAXWELL: And then - - -

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

MR MAXWELL: Would Your Honour permit me - - -

HIS HONOUR: It is fairly lengthy.

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

HIS HONOUR: Yes.

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

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

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

HIS HONOUR: Yes.

MR MAXWELL: If Your Honour please.

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

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

HIS HONOUR: Yes, Mr Maxwell?

MR GRAHAM: Your Honour, one small point I would like to raise at this stage.

HIS HONOUR: Yes.

MR GRAHAM: It seems to happen that the courtroom door remains locked until about a minute or two minutes before Your Honour gets on the Bench, and it is a bit difficult for us to get organised in that time. Perhaps we could have a little more time.

HIS HONOUR: You want some time?

MR GRAHAM: Not now, Your Honour, but - - -

HIS HONOUR: I see. All right. I will see what I can do. Yes, Mr Maxwell?

MR MAXWELL: If Your Honour please. Your Honour, when we concluded last evening I had taken Your Honour to what, in our respectful submission, is an important precedent, being the decision of His Honour Mr Justice Ellis in the

Family Court. I understand Your Honour was going to be reading it overnight.

HIS HONOUR: Yes.

MR MAXWELL: And I don't wish to rehearse it at any great length but, subject to Your Honour's convenience, I would wish to start this morning by saying a few more things about the effect of the decision and its relevance for present purposes. Your Honour will have it under tab 6 in the folder.

HIS HONOUR: Yes, I have.

MR MAXWELL: If Your Honour would turn to page 17. I didn't draw Your Honour's attention to this yesterday, but it is important, in our respectful submission, for Your Honour to note how severe the criticisms were, and how extreme

the language. I won't read the quote in full, but Your Honour can see that at page 17 His Honour is setting out the text of a document which the defendant was handing out in the forecourt of the Family Court. And if I might just refer to some of the language used, Your Honour, at the end of the first paragraph under the heading "Why did this man commit such a crime?"; reference to the Family Court, and its incompetent and immoral system of justice; reference at the end of the second paragraph to unfair and biased practices. Fourth paragraph: "The blatant abuse inflicted on fathers in this court", and its incompetence and bias.
Then there is a reference in the next paragraph to "Those", being the court, "who inflicted these atrocities on families". "The Family Court is a tool of destruction". Next paragraph, "As long as judges are allowed to make decisions on their twisted morals and are protected by the secrecy of section 121, this court's evil deeds will go unhalted." Then he refers to the court as a "feminazi court", in how the court inflicts "unbearable torment on to unsuspecting non-custodial parents". Not surprisingly, as Your Honour saw last night, paragraph 146 concluded that publication clearly implied that judges of the Family Court didn't act according to law, didn't make decisions on the evidence and were biased against men.
His Honour went on, in paragraph 48 in the fifth line, to say that in his view there is "no basis upon which I can conclude that the material published by the respondent was accurate. Reading the document as a whole, the assertions made in it do not, in my judgment, amount to fair comment, nor were they made in good faith".

Leaving out a sentence: "What is asserted 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. The material so published, in my judgment, the necessary tendency to interfere with the administration of justice."
Then His Honour makes what we respectfully submit is the critical distinction based on the authorities referred to earlier in the judgment. "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 Your Honour will recall that is the phrase used by the High Court in the Fairfax case, which I took Your Honour to yesterday.
His Honour now refers to the kind of contextual circumstances that we deal with in our submission, some of them. "I take into account", His Honour says, in considering that question that the material published to the applicant was a printed document" - that it wasn't an oral statement. "In handing the document to the applicant, the respondent made it available to the general public in the vicinity of Marland House", the Family Court building, "even though the evidence in relation to this count establishes that it was only the applicant who was in fact handed the document". So in considering whether there is as a matter of practical reality the relevant tendency, His Honour has regard, as we respectfully submit Your Honour must, to the character, the form, the place, the extent of circulation, and we say other things as

mentioned in our paragraphs 16 and 17 and, against the defendant, His Honour concluded that it was generally available in that place, even though the evidence only showed one copy given to the informant.
But as Your Honour will have seen, in paragraph 49 His Honour concluded "In the circumstances, I am not satisfied beyond reasonable doubt that the publication had the requisite tendency to interfere with the due course of justice. The applicant has not in my judgment established beyond reasonable doubt that as a consequence of the publication there was a real risk that public confidence in the administration of justice would be undermined".
The burden of this no-case submission is that on the evidence presently before the court, Your Honour would find that it is a finding that is not open, that there is a real risk as a result of the publication of these books

two years ago, that public confidence in the administration of justice would be undermined. We don't put the test in those terms because we have drawn attention to the difficulties of imprecise phrases such as "public confidence," and we focus, rather, on what we say is implicit in these analyses, that is to say, some perceptible adverse impact on the administration of justice, that is, as a matter of practical reality, will tend to prevent the - inhibit the administration of justice from functioning as it should, and that, on the material here, that finding, in our respectful submission is not open.

HIS HONOUR: Does that test of it being a real risk - I don't say this in a pejorative way, because I want to know what the answer to it is - does that mean that the more

apparently sensible or rational a document is, the greater is the risk of it carrying the tendency to affect the administration of justice, or, put another way, if a document was to a sensible reader, informed reader, patent nonsense, would it there follow that there was a less risk of the public confidence in the administration of justice being affected by virtue of the fact that they treated it as rubbish?

MR MAXWELL: In our respectful submission, the essence of Your Honour's question is correct; that it is exactly issues of that kind, that is, what kind of writing is this, which go to the weight to be attached to it by a reader, and then to the question of real risk.

HIS HONOUR: Well, if that is a proper question, what then do you say is the standard that I should find this publication attains?

MR MAXWELL: Well, Your Honour, we say that the fact that this is, on its face, a rational and serious, though highly opinionated, book, differentiates it, plainly, from a flyer being handed out in the forecourt of the Family Court.

HIS HONOUR: So it is more likely to constitute contempt than otherwise.

MR MAXWELL: No, Your Honour; but it can't - it simply has a different analysis applied to it. With respect, as Your Honour put it to me, if something which is blatant nonsense, which is the same as saying no sensible person would take that seriously, suggesting that every Family Court judge is biased in favour of men, it is just an outlandish proposition, apart from anything else. That is

one case. Here, we have one element in common, which is

that the passages complained of, or almost all of them, relate to proceedings in which this person was a defendant. He is making complaints about what happened to him, and the sensible reader in our respectful submission will discount for that factor. That is plain on the face of the book, and we say, in our submissions, 16 - I should point Your Honour to this - 17(a) on page 4, the author makes clear the perspective from which he writes. In other words, you know that he is a disgruntled, aggrieved person who was convicted, he says wrongfully, of perjury. Any sensible reader is going to say well - - -

HIS HONOUR: Actually, I am not sure that I do know that. Do I actually have evidence of that?

MR MAXWELL: You only have what we say there, the work makes clear the perspective from which he writes, which is he describes, he states the facts that he writes from that perspective. Your Honour doesn't of course have evidence from him about that; and because the prosecution haven't troubled to check any of the facts, they weren't able to confirm the accuracy of any of those matters. But in the absence of that, Your Honour should assume in the author's favour that what he says is correct.

HIS HONOUR: But I meant expressly the question of conviction. You say that I should assume that the author is writing from the perspective of someone who has been convicted of perjury. Do I assume any punishment that flowed from that, because I don't know one way or the other? I have not been pointed to anything and there is nothing in the material which I have been referred to so far. It may not be relevant, but you are saying it is relevant - - -

MR MAXWELL: Absolutely, Your Honour, and if I might take

Your Honour, because I was going to do this anyway in answer to question Your Honour asked me yesterday - there is, Your Honour will find, at page xix in book 2, if we can call it that, the one that has got the number 2 on the cover.

HIS HONOUR: Yes.

MR MAXWELL: A chronology - - -

HIS HONOUR: Sorry, xix.

MR MAXWELL: xix, Your Honour, yes. It is said to be an abridged chronology. It is nevertheless very detailed, starting in 1976. If Your Honour would go to page 37, and relevantly, Your Honour, will see 22 August 1995, Chief County Court Judge John Waldron, this is relating to some of the matters complained, refuses Hoser's application for a lawyer to represent him at the upcoming perjury trial. At the same time, he told Hoser he would not win. "4 September 1995: Neesham trial commenced. Hoser 'convicted' of perjury a month later." It is xxvii, Your Honour. I hope - - -

HIS HONOUR: Yes, I have got it. Thank you.

MR MAXWELL: Then, bottom of that page, 3 October 1995, "Hoser 'convicted' of perjury," with the words "convicted" in quotes, making it clear, we would submit, what view the author takes of his conviction. "Tape of Hoser's 28 minutes of evidence in front of Balmford (the crux of the case) was deliberately kept away from the jury by the prosecution and judge". "4 October 1995: Hoser gaoled for a minimum of four months as a result of the above conviction". 11 October, released on bail.

HIS HONOUR: Yes. Thank you.

MR MAXWELL: So we respectfully submit that - and if I might

take Your Honour further on 29, "23 April 1997: Appeal against Neesham conviction dismissed. Hoser gaoled for four months. Chris Dane (QC)" according to the book, "stated the case had been predetermined and he never had a chance. His comment is repeated to" someone else. "High Court appeal lodged". I don't think the chronology takes the matter further, but the perspective of this author is plainly self-evidently a partial interested, aggrieved perspective. He doesn't purport to be writing as a detached commentator. He wants to let it be known that in his view of what went on, and he was unrepresented in the trial - and that appears from the book - a grievous wrong was done to him.
We would respectfully submit that in the same way as Your Honour put to me yesterday about the scope of misunderstanding of references such as "not concerned with the truth" which Your Honour explained, Mr Hoser is in not an unusual position if he has taken a more adverse view of what occurred in a trial than was objectively justified. We say that it is that, in particular, which should lead Your Honour to conclude that there is no risk, no risk as

a matter of practical reality, that any judge or magistrate will or has been, from the date of publication, inhibited in his or her performance of a duty in accordance with law. On the contrary, as we said yesterday, if anything, a publication of this kind would, if drawn to the attention of judicial officers, incline to make them more careful, in precisely the way Your Honour posited; not to say things which might be misunderstood by the lay people and, in particular, by an unrepresented defendant.

HIS HONOUR: I don't think it was by the solicitor on that limb, though. It was put rather on the limb of public confidence in the integrity of judges and magistrates.

MR MAXWELL: Yes, Your Honour. And that, in our submission, is where the other part of our argument becomes relevant, which is the kind of trenchant criticism made in Gilfillan, that the County Court judge in question had behaved as prosecutor and judge, is of a like character. Yes, that would undermine confidence. Somebody reading what a Supreme Court judge said would attach much more weight to that than what they would attach to Mr Hoser's remarks to the same effect. But that judge remains in office. The system continues to function. That judge continues to hear cases, and indeed, as we argue, it is inherent in our system of justice that it is self-critical in the appellate system, but also properly subject to external criticism, and this notion of public confidence is therefore so illusive as to be unhelpful to Your Honour, unfair to prospective defendants, and that that is why the test needs to be sharpened in the way we have sought to do it, that is to say, the object is to make sure that our system of justice is going to work no worse because of this publication, than without it. We want to know that the citizens of this country can depend on their cases being tried in accordance with law, and, secondly, we want to know that orders of the courts of this State will be obeyed. That is exactly how we put it in the outline. In our respectful submission, there is no basis for asserting that these books have a tendency to diminish the efficacy of the administration of justice in either of those respects. On the contrary, we

respectfully submit they are calculated to enhance the administration of justice, in the same way as His Honour's swingeing criticism of the County Court judge is

calculated to improve things, because not only the judge in question, but others who read the criticism, will review their own conduct, and make any adjustments perceived to be necessary. Added to that, and this is where the serious nature of the enterprise which the book evidently assists, rather than impedes, Mr Hoser when he says at the start of the book, as I have drawn Your Honour's attention to page 18, it is not my purpose to - perhaps it is best if I use - - -

HIS HONOUR: I recall the passage.

MR MAXWELL: Again, the reader is going to read that, and there is nothing on the face of this book to suggest that that is a hypocritical statement, or disingenuous, that this is some fiction that he is creating to pretend to be somebody who believes in the system. On the face of it, it would be read literally. He is somebody who thinks "I have been done an injustice for the reasons I have given you and, on the basis of the matters I am spelling out, that is my view of it, and I think it is in the public interest that people know about these things because it shouldn't happen to other people". That is how he puts it.
In our respectful submission, it is in the public interest that people in the position of Mr Hoser be able to say those things. In any event, our system of justice is, in our submission, absolutely robust enough to cope with that kind of criticism, absolutely robust enough; and that is the thread that runs through all those discussions, going back to the start of the century, about

the necessity for and the public interest in criticism of the judicial process.
Now, you wouldn't say there was much public benefit in what the gentleman said outside the Family Court because that was of a degree of extremity and outlandishness that it would be just dismissed, as Your Honour said, as just ravings. Well, this is not to be dismissed as ravings. But nor is it to be said, "Oh, Mr Hoser said that. Maybe we shouldn't obey the next order from the court." It won't have that effect either. We respectfully submit it will be seen for what it is: an expression in, let's accept, tendentious terms, strong language, imbued with his own sense of outrage and injustice. That is the kind of book it is.
But our society depends on people being able to express strong opinions, particularly where they feel that the system which the community relies on has done them a serious injustice, and to say this man should be convicted for saying those things because he is seriously threatening the administration - - -

HIS HONOUR: Well, the question at the moment is not that. The question is whether there is a prima facie case.

MR MAXWELL: No, Your Honour, but we submit that it is so clear when Your Honour has regard to the evidence as it is, that is to say the kind of book it is, the nature of the allegations, and so on, it is so clear that Your Honour would say, "I am satisfied that it is not open to conclude" - let me start that again. That Your Honour would reach a similar conclusion to that which Justice Ellis reached at the end of the trial, even if, for the sake of argument, the words have the tendency to bring

particular judges and magistrates into disrepute, and a description of the judge as dishonest, it is open to find that the words have that tendency.
But Your Honour would then ask the critical question, that notwithstanding, is there a real risk, as a matter of practical reality, of harm to the administration of justice, and that Your Honour would say, "The material could not satisfy me of that. Not only is there no evidence of any harm to the system of justice, I take into account that I am hearing this two years after the matters were published, though the attorney has been aware of it at least since July 2000 when Mr Lee was writing letters to find out how many had been published, and the trial before Judge Neesham is now six years ago, 1995, so these are, relatively speaking, ancient matters."
Your Honour will recall that - and we rely, as I say, Your Honour can infer from the inaction on the part of the officer of the Crown, who is responsible for the administration of justice, that it was not perceived by him or those advising him that there was any serious risk or threat. Otherwise, they wouldn't have been sending out letters last year and bringing it on for trial in the middle of this year. They would have been before this court as soon as they knew this was in distribution, to say "This must be stopped, otherwise there is a serious threat of damage to our justice system".
Your Honour, just to finish on Torney, if Your Honour would go to page 20, paragraph 54 is just really another example of very extreme allegations about planned and systematic removal of children from their fathers, and responsibility for the death or abuse. So, taken

literally, the words have the strongest tendency to impair confidence in the administration of justice. Somebody is

saying that this is a an evil murderous court, effectively. His Honour, in relation to that, in paragraphs 57 and 59, asks the second question, and again is not satisfied that as a matter of practical reality there is the requisite tendency to interfere with the system of justice, and the same analysis proceeds through the case.

Your Honour asked me about paragraph 16, the tendency of the publication, and I answered Your Honour that the proposition in paragraph 16 was our own formulation, drawn from the cases. I have drawn attention to some of the circumstances to which Justice Ellis had regard, and the point Your Honour put to me about blatant nonsense picks up this kind of notion, and C, the purpose of the publication. The defendant in Torney wanted the Family Court shut down because it was corrupt and murderous. This writer says, in terms, "I want to bring about an improvement in this system. I am aggrieved by what it did to me. I want to expose what I say is the impropriety in the system, so that attention will be paid to these defects".

Now, he might be wrong. He might have misinterpreted what went on. He may be completely wrong to infer that there was some bias or there was an alliance between the judge or a magistrate and the prosecutor. But he says why he had those views. He says in the book what things he complains about: the denial of the ability to tape things. He says, "As a layman, well, why can't I have a record of what goes on here so that I can check it later?

I am denied that, I am suspicious about that." There may be a perfectly good explanation as a matter of proceeding. But Your Honour can see, as in relation to the, "We are not concerned with the truth" point, how lay interpretations can create a sense of injustice, which is genuine, albeit not ultimately objectively justified.

We have drawn attention in 17 to the circumstances of the particular case which are relevant. The fact that the work is self-published is consistent with this notion of - that this is a crusading or campaigning work, somebody who is determined to get this out into the public and will publish it himself. All of that, in the relevant sense, detracts from the weight that you would attach to it. It is written by a passionate, enthusiastic, highly partisan person about what happened to him.

Limited circulation, well, that is a matter of degree, of course, but in our respectful submission 5,000 copies in a city of three and a half million people is pretty small circulation; by contrast, the publication in the daily newspapers of Melbourne, with their circulation in the hundreds of thousands, of serious criticisms by Appeal Courts of judges below.

17(c) we have already really adverted to. (d), we make the point that on the evidence before you, accepting that the books on their face - and there is nothing in the prosecution evidence to suggest they shouldn't be accepted on their face, they are tendered in their entirety as evidence in the proceeding - the author has a long-standing demonstrated commitment to investigating and exposing what he perceives to be improprieties in the administration of justice and, it should be added, in the

wildlife administration, being his area of professional interest.
In that regard, Your Honour, I drew attention in the course of the cross-examination to what was said at page 160 and thereabouts of the Hoser Files book, where there is criticism of Magistrate March. Your Honour will recall the Hoser Files is the 1995 book, and we have submitted that it is a book of the same character, that is, that it contains a highly critical review of particular proceedings in the criminal justice system. We draw attention to what the Full Court of this court, the Court of Appeal, said in ordering costs against that magistrate - not in a proceeding that Mr Hoser deals with, but in a proceeding where there is misconduct by that magistrate, so His Honour Mr Justice Brooking said - and that decision is in tab 20 - - -

MR GRAHAM: Before my learned friend deals with this, these events with which that case were concerned long post-dated the Hoser Files publication.

MR MAXWELL: We accept that, Your Honour.

MR GRAHAM: That point should be made.

MR MAXWELL: I accept that. The only point that should be made is that there is simply a connection between a matter which this author, who expresses his concern about inadequacy in the system of justice, a matter has come up more recently in relation to someone identified by him in one of his earlier publications, and it is partiality, it is the kind of conduct of which complaint was made in that book. That is the only point we make: that this is a proper field of inquiry.
Your Honour, we then move to page 5 of the outline,

and I have already referred Your Honour to Mundy's case

and the passages in paragraphs 18 and 19 from the judgment of His Honour Mr Justice Hope, about the appropriateness of trenchant criticism. The critical point we seek to make there is that in paragraph 20 and incorporating by reference what precedes it in 19. We submit that it is where the subject of the charge is criticism, as this is, it does not become contempt unless it is shown to have been made otherwise than in good faith.

HIS HONOUR: Well, that is the relevant issue for the question of satisfaction beyond reasonable doubt. But you keep sliding from the test that the application that you are making to me is one which you accept, as a matter of law, you are bound to take the evidence at its highest from the Crown.

MR MAXWELL: Yes, Your Honour, I accept that.

HIS HONOUR: So in putting forward the proposition that this must be taken at good faith, well, that would be accepting the Crown's case at it its highest. The Crown's case at its highest is that that should not be accepted; that the document doesn't demonstrate that there is no evidence that establishes it, and insofar as there is material there, there is material there which would suggest the contrary.

MR MAXWELL: Well, it is the last bit, Your Honour, that with respect I would take issue with. Plainly, there is no positive evidence from the defendant about that. But we start with the proposition that I think is axiomatic in the criminal sphere, and the Full Court, of which Your Honour was a member, one of whom has said this recently, that in a criminal trial, which this is, the

defendants raise the general issue. Both my clients say, "We are not guilty of contempt of court". The offence which has to be proved against them is that what they published, which was criticism, was not published in good faith. That is a defining element of the offence, because, as is apparent in the quote from Justice Hope and in Nicholls and Dunbabin and the other cases we have referred to - - -

HIS HONOUR: But are you putting it that - I thought we discussed this and you agreed to the proposition that good faith can't overturn contempt; that it wouldn't matter if something was said in good faith if it nonetheless constituted as a matter of law contempt for the various other reasons that are discussed within the authorities, having the tendency to - I gave the examples yesterday which we discussed - of, is the statement said in all good

faith, that the Chief Justice receives $10,000 a week from criminals, as a bribe. It might be entirely in good faith, but you accepted that that couldn't possibly be a justification for what would otherwise be a contempt.

MR MAXWELL: Yes, Your Honour. And I would qualify that response, now, in this sense: that it would be a misuse of language to describe somebody who said, without foundation, the Chief Justice is in the pay of criminals - it is effectively meaningless to say, well, that was said in good faith.

HIS HONOUR: But you see, the question of whether it is without foundation - that is why I say the test for a submission of no case to answer, you have to accept the evidence at its highest against you. If you are putting that there is no evidence at its highest against you on which a tribunal

of fact making the ultimate decision could come to the conclusion that it was not a matter done in good faith, or even if it was a matter done in good faith the basis on which it was done could not justify what was otherwise a contempt within the definitions, then that is a different issue. The distinction between the no case test and the obligation of the Crown to prove its case beyond reasonable doubt, it seems to me to be quite vital - - -

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: And one which you are passing by.

MR MAXWELL: Yes, Your Honour. I am not meaning to, because it is exactly as Your Honour formulated a moment ago. We do put it as high as that: that there is no evidence that these publications were made otherwise than in good faith. Alternatively, as I was submitting earlier, even if that were wrong, and that there was a basis for a finding of fact that this was not done in good faith, Your Honour would - we would say there is no evidence of the requisite tendency as a matter of practical reality to damage the system of justice. So we are accepting the rigour of the no-case test, because we say it was eloquently admitted by Mr Lee. They don't say to Your Honour that the matters in this book are false, or that he has trumped this up. They haven't bothered to check whether it is true or not.
Yet he refers to the transcript and the comments, and - so they have not set about the task of showing that this has been, that this is without foundation, that the facts are quite different from what he has set out and, accordingly, it should be concluded that he was in bad faith, that it was disingenuous, that it is a fiction,

that he is pretending to be or he is claiming to be aggrieved when he is basing it on - so we say they haven't essayed that task. Accordingly, Your Honour, would have to say, "No, there is no evidence of bad faith. All I have before me is the book which, on the face of it, there is no reason to conclude anything other than that it was in good faith, because it is written with care and trouble and detail, and with an express bona fide intent of improving the submission." Anyway, Your Honour, that is the submission.

Now, Your Honour, before moving finally - no, what I need to do on that point is refer Your Honour to the good faith test. I think a question came up yesterday as to whether that was to be found in the authorities or not, and it is. If Your Honour would go to Ambard, which is in tab 1, and at page 335 - and this is again a Privy Council case - Lord Atkin says at point 6 of the page, "But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though

outspoken, comments of ordinary men" and, we would add, women.

Then if Your Honour would go to Brett's case, which is in tab 24, a decision of His Honour Mr Justice O'Bryan of this court, at page 229 His Honour cites Ambard, that passage - I think that is at the top of the page on 229, Your Honour, Lord Atkin and Ambard, I won't read it again, and then there is reference to what Chief Justice Griffiths said in Nicholls in 1911 which we have also referred to, but I do draw attention to the first sentence, "I am not prepared to accede to the proposition that an imputation of want of impartiality to a judge is necessarily a contempt of court". That is a point we have sought to make previously. It may be; it may not be. And

what His Honour said there was approved by the Privy Council in Ahnee in 1999.
If Your Honour would then go on into the next paragraph, "It is clear that an untruthful statement of facts upon which the comment is based may vitiate that which otherwise might be considered 'fair' and justifiable. So, also, the motive of the write is an important element. Malice, and an intention or a tendency to impair the administration of justice are elements in contempt of the kind which scandalises the court or a judge.
In considering whether a publication of this character amounts in law to a contempt, the principal question is whether,'if permitted and repeated it will have a tendency to lower the authority of the court and weaken the spirit of obedience to the law'. In a sense, every criticism of a judge may be said to have a tendency

to lower his dignity and weaken his authority. But it is not every such criticism which is to be regarded as a contempt of court. A criticism should not be repressed which may be made on the court and its doings and the law it administers if that criticism is fair and honest and is not directed at lowering the authority of the court." That is a quote from Dunbabin.
So accepting that the qualification on Lord Atkin is that imputing improper motives is not per se a contempt, the question is: is this an exercise of the ordinary right of criticising in good faith the public act done in the seat of justice? In our respectful submission, there is no conclusion open on the evidence other than that is what this was. We don't have to establish that positively, however. It is for the prosecution to provide evidence on the basis of which Your Honour could conclude that there was a want of good faith, and as we have submitted there is no such evidence.
There is, finally, Your Honour, a decision which is not in the volume but I have got copies of the Court of Appeal of England in The Queen v. Commissioner of Police of the Metropolis, ex parte Blackburn, reported in 1968 Volume 2 of the Queen's Bench Reports at 150. And, Your Honour, it is a short passage in the judgment of Lord Justice Salmon, beginning at the foot of 155 where His Lordship says, "It follows that no criticism of a judgment however vigorous can amount to contempt of court providing it comes within the limits of reasonable courtesy and good faith. The criticism here complained of, however rambunctious, however wide of the mark, whether expressed in good taste or in bad taste seem to me to be well within

those limits". And of course, we rely on what His Honour Justice Hope said, "It doesn't need to be expressed courteously. Robust criticism, often of its nature, be impolite or discourteous." It doesn't make it, less still punishable in our respectful submission.
Your Honour, if I might, before going to the constitutional freedom point, deal at a little more length with the context or the history of the matter. Your Honour asked me which were the paragraphs that related - I beg Your Honour's pardon, the chapters which related in book 2 to Mr Hoser, and, Your Honour, they are chapters 2, 4 to 33, and 37. I think I said it was a substantial part of the book relates to him. Well, it is the majority of the book relates to him. But there are other matters dealt with.

HIS HONOUR: Yes.

MR MAXWELL: Your Honour, I have taken you to the chronology. If I might deal with, if Your Honour has the originating motion, the first of the particulars of contempt on page 1 - Comments re Judge Neesham.

HIS HONOUR: Just hold on a second. There are in effect two counts, is that right?

MR MAXWELL: Well, Your Honour, as I indicated at the commencement, we have never been clear about that. But there is - it is said that the second publication scandalises the court, so we take it to be that is a count in respect of that book; whereas the second, book 1, is said to contain material which scandalises, and we take that to be count 2.

HIS HONOUR: Right.

MR MAXWELL: Your Honour, in relation to 3(a)(i) there is a

reference to page 245 and Neesham making it clear that the matter wasn't being taped. If Your Honour would go, first, to the chronology, and at page xxiv, in Roman numerals, Your Honour will find at the top of that page, "20 July 1993: Magistrate Julian Fitz-Gerald refuses to have his", that is Hoser's "proceedings taped and convicts Hoser on Olsen/Malliaris parking matter." It is important to note what I am going to demonstrate here is that this comment to which the first particular relates is, as Your Honour said, 1993, but is not the perjury trial. This is a quite separate, unrelated matter - well, quite

separate proceeding in any event, which happened to be before Judge Neesham on appeal from the magistrate. If Your Honour would go back to the previous page, and Your Honour will find the date, 24 November - - -

HIS HONOUR: So that paragraph on 245 is referring to this event in 1993.

MR MAXWELL: Yes, Your Honour, which is a parking fine case. In the middle of page xxiii, Your Honour will see, I think it is right in the middle, "24 July 1992: George Olsen and policeman Peter Malliaris improperly book Hoser for a falsely alleged parking infringement at St Kilda." That is the offence; it comes to court in July of 93. Further down that page, Your Honour, xxiv, back over to xxiv, "4 November 1993: County Court Judge Thomas Neesham refuses to have his proceedings taped. In a highly acrimonious hearing he again convicts Hoser," meaning again after the magistrate, "on the Olsen/Malliaris parking matter". If Your Honour then goes to 243 in the book, the account is given, beginning "Before the County Court trial - More Scandals", reference to Olsen and Malliaris.

HIS HONOUR: Hold on. I see. Right.

MR MAXWELL: Starting - - -

HIS HONOUR: Yes.

MR MAXWELL: And reference at the bottom of that page to the proceeding before Magistrate Fitz-Gerald, refusing "to allow me to tape the case", and it is said, but no complaint I think is made about this in the proceeding, "The moment Magistrate Fitz-Gerald" - this is four lines from the bottom of the page - "sided with the police prosecutor... and refused me to tape proceedings, the rest was a foregone conclusion". The reader will recognise that this author has a particular preoccupation with the injustice of not being allowed to tape proceedings to which he is subject.
Now, he may or may not be entitled to be as outraged as he plainly is about not being afforded that opportunity; but Your Honour knows the importance of transcript in criminal proceedings. It may be the fact that, administratively, it is impossible in the Magistrates' Court, or the cost is excessive. But the principle that a defendant have recourse to a record of evidence given by an informant against him is unassailable in our respectful submission. My learned friend, as an aside, says the Full Court has said otherwise. Well, he will no doubt point out that decision to Your Honour. As a matter of justice it is - we make the submission with no

less vigour that an independent record of criminal proceedings is a safeguard for all concerned, and in our respectful submission that proposition is unassailable. And a defendant who - - -

HIS HONOUR: As I recall, in any event, and I will no doubt be

told, the Full Court decision was not that he did not have a right to have a tape recording, but that it was a matter for a magistrate as to whether a person was entitled to tape record or not.

MR MAXWELL: Yes, Your Honour. We would accept that. But it is, with respect, helpful to know that the matter has been passed on by the Full Court. And it wouldn't be for a Full Court as it whether to make an administrative decision that there must be a tape recording. But my expectation, without knowing the case, would be that the Full Court would have accepted the desirability of an independent record.

HIS HONOUR: Well, I understand the point you are making. In a sense, the point you are making with respect to the Full Court doesn't turn on what the Full Court decided. You are putting that whatever the Full Court decided, it was his view that he should have had an automatic right to have done so.

MR MAXWELL: If the fact is he doesn't and he feels aggrieved about that, if I might ask rhetorically, who would blame him? If he feels he has been got at and he may not have any justification for feeling that, the fact that he asks for taping, and the magistrate says, "No," and he is convicted is going to leave him and other members of the community asking a question: "Given that I can be punished for these offences, why can't I have a record so that when we come to an appeal, if I want to make one, I can say to the judges on appeal, 'that is what the prosecutor said'".
The point immediately comes up, on page 245, which is where the offending passage occurs, and it is headed "Deja

vu. I knew the result of the case before any evidence had been given. You see, before I could say a thing, Reynolds was on his feet" - Reynolds was the barrister the main barrister for the DPP according to page 244 - "demanding that I not be allowed to tape the case. He wanted me

strip- searched there and then. Neesham agreed with him. I was then relieved of a micro-cassette recorder and told that no taping of proceedings by any means would be allowed". Leaving out a sentence, "when I asked Neesham what he had to hide by not wanting his proceedings taped, he got extremely aggressive. He didn't change his mind though. Once Neesham had made it clear the matter wasn't being taped my being declared guilty became a mere formality. Perhaps most upsetting about the whole case wasn't Neesham's declaring me guilty at the end of the fiasco, but rather the continued wanton disregard for the truth by Malliaris, Olsen and, in turn, the judge." - and this sentence isn't in the pleading but it should be - "Malliaris only lied about the location of my parked taxi. Olsen lied about almost everything", and then he goes on to refer to contradictions in the evidence of Olsen. And next paragraph, "When I drew to Neesham's attention Olsen's obvious perjury, he expressed no interest. He said 'That's not my problem'. With an attitude like that from the magistrates and judges in Melbourne, is it any wonder that police and other government officials continue to lie in court with impugnity".

Now, the real burden of that complaint, in our respectful submission, is that Hoser was disbelieved, and witnesses who he says forthrightly were lying, were

purging themselves, were believed. He says that there is a disregard for truth by Malliaris and Olsen, the witnesses, and in turn by the judge. Now, that is open to the reading that he is saying no more than that, "Well, a judge who dismisses my appeal from the magistrate on what I say is false evidence is disregarding the truth". It is not saying the judge didn't turn his mind to whether it was true are not, but it is a typical complaint by someone who has been convicted and says "that is outrage, those lying so-and-sos, and the judge believed them. There was a total disregard for the truth, as I endeavoured to demonstrate in my cross-examination".

We say you read that and it is not, and it won't be suggested that these proceedings didn't take place and that there wasn't a denial of tape recording, and that there wasn't a conviction and these aren't the names of the informant. That is all true, or I call on the solicitor to make a submission to the contrary. And the ordinary reader would, of ordinary good sense, say, "Well, I can see what he is saying and, on the basis of what he says, I can understand he is upset about it, and I think, I am the sensible reader. I think there is a real issue here about tape recording".

It wouldn't be the first time, as the ordinary reader knows, that police or other civil informants have

concocted evidence. I am not making those submissions that that was the fact here. Mr Hoser might be quite wrong. They may have been telling the truth, but his firm belief is that he was convicted on false evidence. Such assertions are the stuff which enquiries into wrongful conviction are made, and if we suppress publication of

complaints of that kind, then in our respectful submission we, as a society, run the risk that injustices will not be exposed, and the price of ensuring that injustice will be exposed - and it is perhaps the English examples that are the best, where years after the event, convictions for murder or criminal damage or terrorist related offences have been shown to be based on false evidence, they are the best, as it were, anecdotal support for the notion that someone who says "I have been done over unfairly in the criminal system" should be able to say so and say why, discourteously, even wrong-headedly. Because someone might pick up the book and say, "Well, there is a question here. Let's review whether, as a matter of fairness and justice, we should have tape recordings in the Magistrates' Courts as a matter of course".
Finally, on this, to repeat, the comment about the judge is really ancillary. It is consequential about the point that these were lying witnesses, and yet they were believed. The judge did not see the truth, and if His Honour said on the point about perjury, "That is not my problem", well again, that might create a misunderstanding at least, or a question in the mind of the ordinary lay observer. Why would a judge respond like that to a point taken by a defendant in person about defects in the prosecution evidence?
And page 246, which is 3(a)(ii), is following on from the criticism of that proceeding, the 1993 proceeding, eight years ago, and anticipating the criticisms that are subsequently made of the perjury trial. As the author says, there are - he sets out the details of those matters later in the book. For example, in relation to "knobbled

juries", which I think hasn't got a "k" at the front of it, chapter 32, page 513 - - -

HIS HONOUR: I am sorry, I have lost you, where is - - -

MR MAXWELL: Well, Your Honour, I am in the second particular.

HIS HONOUR: Yes.

MR MAXWELL: "That is perhaps the best way to describe how Thomas Neesham runs his circus at the County Court where he is judge. Knobbled juries." I was just giving Your Honour reference to material in the book which the author - - -

HIS HONOUR: What was that page?

MR MAXWELL: Chapter 32, page 513, "and then the bashing up of independent observers by police," which I think I am right in saying isn't said to have occurred in the court, "But the observer was, at the direction of the judge, so the book says, taken out of the court by police and the author says the observer was then assaulted. Chapter 21, page 363 deals with that matter.
Then, "and perjury by bent police". Well, that has already been adverted to in relation to the parking fine appeal, and the same view is expressed in the perjury appeal.
(iii), page 260, "He was one of the judges who had refused to allow me to have the case tape recorded".
Well, it is has not been said that is false. The prosecution simply doesn't know. The book says it is true. There is no evidence on which Your Honour would disbelieve it.

HIS HONOUR: The reference at 260 is to which court case? Is this the perjury charge? It looks as though it is. From the previous page it appears to be.

MR MAXWELL: If Your Honour could go to the previous page, it - certainly we are leading into the perjury trial.

HIS HONOUR: Well, it starts at the top, "The commencement date for the perjury trial was set".

MR MAXWELL: Yes, Your Honour. That is so. All I wanted to point out was there was a reference in the last paragraph at 259 to the Malliaris/Olsen hearing.

HIS HONOUR: I see, yes.

MR MAXWELL: When he says "One of the judges who had refused to allow me to have the case tape recorded," he is referring back to that case.

HIS HONOUR: Yes. Thank you.

MR MAXWELL: And the inference which this author draws is that it is the judge himself who doesn't want the conduct of his court scrutinised. Well, in our respectful

submission, that is an inference open from the refusal. It may be a wrong-headed inference. It may be unfair on a proper analysis. But for the reasons we have sought to submit already, there is a real question why a bona fide request for taping would be refused.

HIS HONOUR: There is, to make it abundantly clear, no complaint about a recording issue so far as the perjury trial.

MR MAXWELL: Yes, there is, Your Honour.

HIS HONOUR: There is, is there? Well, is that being referred to here or not?

MR MAXWELL: No, Your Honour. We will come to that. But the "had refused" is a reference back to 1993, and that is why Mr Hoser is saying at the bottom of 259 that, "He told McRae that Neesham couldn't hear the case because of his previous adverse finding against me (Olsen/Malliaris) and that he should find another judge, and that he retorted

'tough luck!'".

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

MR MAXWELL: That was the last paragraph on 259, Your Honour.

HIS HONOUR: Yes.

MR MAXWELL: So the passage at the top of the next page is by way of explanation of that. At all events, the complaint is made in respect of both proceedings, there is a refusal to allow taping, and he goes on to say in the passage complained of at the top of 260 "My initial judgments of Neesham as corrupt and dishonest were further proven during the course of the trial and its aftermath, much of which will be explained in the material that follows". But he has indicated on the basis of that earlier judgment: one, the refusal to allow taping; two, what he regarded as the unjustified acceptance of perjured evidence.
Then, Your Honour, 274, which is particular 3(a)(iv), - I am sorry, is at 274. I would ask Your Honour to note, beginning at 272, there is a detailed account of the conduct of this trial, and reference to the conduct of the prosecutor. At 274, at the top, the author says "One of his opening statements" that is Judge Neesham, "that was a major worry was his comment that he expected the trial to last about a week". Top of 274, "This had me worried. Would he do what Hampel", the prosecutor at the committal, "Heffey" the Magistrate "and Keating" the witness, "had done in the earlier committal to hide the truth, in

particular withhold the tape recording of my evidence that was subject of this case; what was said in the Balmford case on 17 February 1994. As soon as the trial proper commenced, Neesham's bias against me commenced in earnest

and his desired result was clearly known. His whole modus operandi was to guide the jury towards a guilty verdict. Furthermore, these actions were separate to others which also appeared to have been taken to ensure the jury's verdict" - - -

HIS HONOUR: Can I just understand the factual matrix. You understand that I don't know it. But the reference there to "withhold the tape recording of my evidence that was the subject of this case", this is a reference to what, the hearing before Judge Balmford, as she was, at that time, and what is "the tape recording of my evidence"? Is this a covert tape or is this a tape that was conducted of the - - -

MR MAXWELL: That was a covert tape.

HIS HONOUR: Right.

MR MAXWELL: Would Your Honour go to 25 in the chronology, xxv, and this will tie it in better.

HIS HONOUR: Yes.

MR MAXWELL: This sequence begins on the left-hand page at "3 November 1993: Magistrate Susan Blashki convicts Hoser over Coburg lights incident on 8 March 1992". Does Your Honour see that?

HIS HONOUR: No, I don't, sorry; whereabouts?

MR MAXWELL: The third entry on xxiv, 3 November 1993.

HIS HONOUR: Yes.

MR MAXWELL: Then to the right-hand side, Your Honour, "17 February 1994: Hoser appeal for traffic light matter in front of Susan Blashki" - I think meaning from Magistrate Blashki - "As usual police side took steps to ensure proceedings not taped." This is a County Court appeal. He says proceedings not taped. "Also as usual

Judge Rosemary Balmford sided with police and didn't want matter taped" - same grievance.

MR GRAHAM: You should read the next sentence, I think.

MR MAXWELL: There was no need for my learned friend to intervene.

HIS HONOUR: No. I would ask you not to do so.

MR MAXWELL: I was of course going to read the next sentence, "As usual, Hoser still had matter taped. Hoser falsely accused by police and VicRoads of forging 1 February fax." So there was a tape. It was an unauthorised covert one, and one of the complaints about the - I withdraw that. He is subsequently charged with having perjured himself before Judge Balmford. "2 March 1994" - does Your Honour see that, further down that page?

HIS HONOUR: Yes.

MR MAXWELL: At the bottom, "15 April 1994: Police brief of evidence against Hoser re Balmford alleged perjury matter. Police brief hinges on 'fact'. There is no recording made of Hoser's evidence in front of Balmford. This is central to their case. Several witnesses to be called solely to confirm no tapes have been made, there by making a simple case of their word against Hoser's, unverifiable by independent means such as a tape". "2 May 1994" - this is just in passing - it is Mr Hoser's position that the policeman Mr Keating said that the perjury matter wouldn't proceed unless Hoser was represented.

HIS HONOUR: Sorry, I don't understand quite how - - -

MR MAXWELL: Only that it comes up, that is mentioned in the book. I think it is relevant to the Heffey complaints that he, at the beginning of the committal, said, "Well, I

was told by the police that they wouldn't proceed against me unless I was represented. I can't get legal aid so I am not represented" - - -

HIS HONOUR: "Therefore the charge will be withdrawn".

MR MAXWELL: It shouldn't proceed, and it did proceed, and the prosecution says no such undertaking was given and the matter went on. So that is another in the - another distinct grievance.
13 October 1994, Your Honour, on the same page, at xxvi, "Magistrate Jacinta Heffey commits Hoser to stand

trial for perjury." She had upheld Keating's request not to play the tape made at Balmford's proceedings at her hearing on the basis that Keating had left it back in his office".
Now, the reader is going to, in our respectful submission, read that and say "Well, on his version, that is pretty rum stuff".

HIS HONOUR: Well, I am suffering from the fact that there is obviously a few dots here that I have not joined. Is it put that the tape, which was described as the covert tape, was seized by police and was returned doctored or something of that sort?

MR MAXWELL: Yes, Your Honour, it is.

HIS HONOUR: Where does that appear in the chronology, just so I can pick it up.

MR MAXWELL: 10th of October. If Your Honour would go back to the previous page - - -

HIS HONOUR: Well, that is not suggesting doctoring. That is suggesting a copy being made of a tape made by Mr Hoser; is that right?

MR MAXWELL: Yes, Your Honour, it is. If we might go back to

18 February 1994, which is the day after the - no, it is the very day of the proceeding before Judge Balmford.

HIS HONOUR: I see, right. Yes.

MR MAXWELL: "Hoser house raided by police. Carloads of material taken, including tapes of Balmford hearing and all relevant documents. Thousands of other tapes", et cetera, "House trashed. ". But the immediate grievance is that the tape which he had made wasn't played at the committal, and he, not surprisingly, would have said, "Well, the best evidence of whether I perjured myself is the tape which I made in the concealed tape recorder, and it should be before the court, and it wasn't." And he says that is unjust. In our respectful submission, that is well within the range of legitimate comment on that course of events, the truth of which is not challenged. And it is from that committal that Mr Hoser comes before Judge Neesham for trial.
That, I hope, Your Honour, explains better than I have done previously what is meant by the first paragraph on 274.

HIS HONOUR: Yes.

MR MAXWELL: That is the reference to "withhold the tape recording of my evidence that was the subject of this case, what was said in the Balmford case on 17 February 1994".
Your Honour, it is important also to note, as my learned junior has just pointed out, on 273 under the heading "Neesham's Opening Remarks", second paragraph, there is reference to His Honour's opening remarks, next paragraph, "In his opening, he directed the jury not to take notes. He made this point very strongly. To back up

his instruction he stated that the entire case was being tape recorded and was also being transcribed. He made it clear that this material, tape and transcript, would be available to the jury. In other court cases this most certainly occurs. To myself, Neesham's opening remarks to the jury appeared to be fairly straight down the line. He said there seemed to be nothing terribly untoward. I make this comment noting his previous adverse form in the Olsen/Malliaris case.".
The last few lines, "To myself, Neesham's opening remarks to the jury appeared to be fairly straight down the line. There seemed to be nothing terribly untoward. I make this comment noting his previous adverse form in the Olsen/Malliaris case. Among the things he told the jury were the following," and then there is reference to the way the jury should conduct themselves.

HIS HONOUR: What do you say I am to make of a statement that the tape and transcript would be made available to the jury? Am I to ignore my own knowledge about the fact that juries are not given transcript and tapes of the evidence in trials? Do I just simply treat that as if it is believed it is an illustration of some sort of misapprehension of what had been said, or do you put it to me that I should treat that as truth?

MR MAXWELL: Would Your Honour excuse me just one moment. Your Honour, it is put on this basis: that exactly as Your Honour put it to me, if it is a misunderstanding, what this writer is putting down is what he observed or recalls observing. Indeed, he goes to the extent of setting out passages from the transcript, reference to every word spoken in the trial being recorded. But it is

notable, given what Your Honour has said, that nothing in

those extracts refers to the jury getting the transcript.

HIS HONOUR: Yes.

MR MAXWELL: So he may have misunderstood what went on. But the reason I drew attention to this passage in the first place is that this is giving credit to the judge - - -

HIS HONOUR: Well, it is relevant to the question you put to me earlier about the good faith, isn't it: that he is quoting passages apparently from transcript.

MR MAXWELL: Yes.

HIS HONOUR: And then, without quoting from transcript, makes a statement of what was apparently said.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: Which would also have been on transcript. I mean, patently, what is being recorded there could not have appeared on transcript.

MR MAXWELL: But Your Honour, the point is that if it is a mistake, it is a mistake - - -

HIS HONOUR: It is a deliberate one.

MR MAXWELL: Favourable to the judges. This is meant to be - -

HIS HONOUR: I am looking at the question of what should I treat the statement as amounting to. If I am to treat it as a statement of fact, then it raises the question that this was in fact what he heard; then it raises a question of good faith, which said I should assume - - -

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: To be in favour of the defendant. The question of good faith it would raise would be if that is what was said and he has quoted from the transcript, why wouldn't he quote that?

MR MAXWELL: Well, with respect, Your Honour's point would be

more adverse to Mr Hoser if what he was misremembering or misunderstanding was critical of the judge. On the contrary, in this passage, he is praising the judge for having made clear that it would all be recorded and the jury would have access to it. He says, "That seemed straight down the line to me."

HIS HONOUR: No, no, he is making that as a statement and then later criticising the fact that it doesn't occur.

MR MAXWELL: Well, it - - -

HIS HONOUR: I mean, this is not one of the passages which is alleged against you. I raise it simply because you had taken me to it, and it does, it seems to me on its face, raise that question.

MR MAXWELL: Would Your Honour excuse me. Well, in my respectful submission, if, as the transcript shows, the judge was saying the transcript would be recorded, and this is in the context of "and you don't therefore need to keep notes", it is no large leap to think, if the judge didn't say it and it is not apparent from the transcript extracts that he did, that "the transcript will supply for you, the members of the jury, what you would otherwise have in the form of your notes". Now, if that was a misunderstanding of the reference to tape recording and transcript, then it was that. But in my respectful submission, particularly because this is included - well, if it is - whether or not it is the foundation for a later criticism, and I will come to that in due course, it is again an understandable or a misunderstanding by a lay person of the tenor of what is said about recording, and that in our respectful submission it is not a basis for inferring want of good faith. Rather, it is consistent

with the inference, the irresistible inference, from the book as a whole that the author is endeavouring to give an account of what occurred, as he remembers it, from his perspective, what whatever errors of judgment, errors of fact, or law I think the cases say - maybe he got that wrong. But that one error, if it is an error, and we would respectfully submit that it is, is at worst a misunderstanding. It is not on its face redolent of bad faith and wouldn't, by itself, turn a publication which is manifestly in good faith in our respectful submission into something else.
Your Honour, the sting of the second paragraph on 274, which is particular 4, is "Bias Against Me" "His whole modus operandi was to guide the jury towards a guilty verdict". Your Honour, that kind of comment is an understandable perspective of an aggrieved, convicted person. It is the kind of - I mean, it is notorious that in the legal system comments of that kind are made, and we drew Your Honour's attention to what Mr Lewis said about Judge Ogden in court in front of the jury, saying pretty much the same, by implication, if not in so many words, and very close to insulting the judge by implying that he had put on a Collingwood jumper and batted, not batted,

kicked with the prosecution. That is the kind of thing that is said. It might be wrong, it may be a misreading of, for example - Your Honour can well imagine the situation, undefended, unrepresented defendant wants to cross-examine at unnecessary length, wants to put in irrelevant evidence which he thinks is relevant, trial judge consistently has to say, "Mr Hoser, that is not going in, it is irrelevant, I don't want to hear any more

of these questions", which is a perfectly proper exercise of the judicial function of managing a trial, but in the eye of the untutored defendant, trying to keep himself out of gaol, it is seen as a one-sided view, because of course the prosecuting counsel is an expert in these matters and knows what the judge will and won't allow and doesn't press hopeless points. Applicants, defendants in person, don't know a good point from a bad point often, and that is why legal representation is so important.
Your Honour will recall the Court of Appeal decision in Phung, where the Full Court overturned a practice in the County Court. At all events, I will give Your Honour the reference in a moment, but the Full Court said that should be a presumption in favour of representation. The practice adopted in the County Court, and in the particular case by the - well, adopted by the Chief Judge, His Honour Judge Waldron and applied, it appears from the case, consistently through the County Court, was that - -

HIS HONOUR: What is the citation of that?

MR MAXWELL: This is the Phung decision of December 1999. It is reported in 1999, 3, Victorian Reports at 313, and there was - it concerned section 360A of the Crimes Act, and a statutory phrase about will the court be unable to ensure that the accused will receive a fair trial unless legally represented in the trial? And the practice that had developed in the County Court was that - I am just trying to find the passage which sets it out, the County Court had postulated that before the defendant could get the benefit of that provision, he or she had to show that there was a "triable issue"; and there is a lengthy passage from a 1993 judgment of Chief Judge Waldron

relevant saying "If an accused in truth has no defence, but nevertheless simply wishes to put the Crown to its proof in the hope, rather than the expectation, that that proof will not prevail, it cannot be said, in my view,

that a lack of representation has caused the accused to lose the chance which was fairly open to him of being acquitted".
The view expressed by Justices Brooking and Charles, in Justice Brooking's, in his - - -

HIS HONOUR: Well, I presume they rejected that and said that the entitlement existed whether they are putting to proof or running a positive defence.

MR MAXWELL: Indeed, they put it even more strongly, Your Honour: that there was a presumption that a fair trial required representation, and that this presumption could be displaced only in a most exceptional case, and that is said by Justice Brooking at 317, and Justice Charles at 320.
Now, this case isn't about that, but it is about an unrepresented defendant in the criminal justice system, and it is the view of this court, for, in our respectful submission, very good reason - that justice is almost always going to be better served by a defendant being represented. When he is not, the scope for this kind of grievance about what is perceived to be one-sided conduct of the trial is considerable; and the same goes for (v), which is page 280.

HIS HONOUR: I think before you go on, that I might just take a short break - - -

MR MAXWELL: If Your Honour pleases.

HIS HONOUR: Before you go to 20, (v).

(Short adjournment).

HIS HONOUR: Yes?

MR MAXWELL: Your Honour, there is an important link which I didn't make between Phung and this book and this author. On the 22nd of August 1995, and I will take Your Honour to the place in the chronology, Mr Hoser made an application under section 360A before Chief Judge Waldron. That application was dismissed and, as a result, he did not have the benefit of court ordered legal representation. That decision occurred, it can be inferred, during the time when the triable issue question, practice was operating in the court, because as Phung demonstrates, that was first enunciated in 1993, and Phung itself is not until 1998 or 1999. I can give Your Honour the date but - this is discussed in the book at - well, let me take Your Honour to the chronology first, if I may. 22nd of August 1995, page xxvii in Roman numerals. Does

Your Honour have that?

HIS HONOUR: Yes.

MR MAXWELL: If we can then go, Your Honour, to page 239, under the heading "A re-run", and reference to lodging another section 360A application immediately, reference to the Chief Judge's Associate - "After a few minor matters it was again my turn in front of Waldron." Next paragraph: "Waldron made his allegiances clear early in the piece. He made a series of hostile remarks towards me. Having said this, Waldron still wouldn't go ahead with the hearing. The reason: Ramage wasn't there. Another adjournment". "What was sought?" "Now all I wanted was just one lonely lawyer to defend me against the trumped up police charges. ... The Legal Aid Commission had a legal

dream team representing their interest. This included two highly paid barristers" - this is the last paragraph on that page.
At the top of the next page - and this is complained of in the section about Judge Waldron - "As the case re-opened at 2:15 Waldron displayed further anger and hostility towards me. I could see that there wouldn't be a fair hearing here". Just pausing there: that, Your Honour, is particular 1 of the comments re Chief Judge Waldron on page 3 of the particulars in the originating motion.

HIS HONOUR: Right.

MR MAXWELL: He says, and there is no suggestion it wasn't open to him to take this view, that the attitude of the Chief Judge was angry and hostile. That is a perception by the person who is before the court. It may have been a misreading, but the conclusion that there wouldn't be a fair hearing is one which, at least in the perception of a lay person, an unrepresented defendant, is open. If you are not experienced in the courts, and you do encounter a judge who is impatient or pre-emptory - and it is notorious that that can happen for all sorts of understandable reasons. But if that occurs, someone in person who is looking to have the court's discretion exercised in his favour will take it amiss or is entitled to. Is that scandalising the court? That is recounting a real life experience in the courts of this State. And it is, as the quote in the pleading makes clear, based only on anger and hostility. It may be a wrong-headed conclusion. But it is plainly made in good faith. "That is what I confronted and that is what I thought about it,

and I wasn't happy about it". And again, the reader is going to discount for the fact that this is not written by a dispassionate observer. This is written by the person himself.
He goes on, Your Honour, to recount at some length, and I won't take Your Honour to it, the conduct of that proceeding, or that application before Judge Waldron.
Then, the second passage complained of, and we can deal with these while Your Honour has it open because they all concern this 360A application, at 241, "Meanwhile I was about to go to trial for perjury," does Your Honour have that?

HIS HONOUR: Yes.

MR MAXWELL: "But no-one could produce a transcript for, because the police side didn't want to. But like I have already said; if the Chief County Court judge doesn't seem too concerned with the truth, then what faith can Victorians have in their legal system? Not only that, but myself and any other concerned citizen have absolutely no power to do anything about the recklessness of judges like Waldron, even then the proof is there for perpetuity in the Government's own transcripts", meaning the transcripts of what went on in that application.
Now, Your Honour, again, that needs to be understood in the context of the paragraph which precedes it, which begins "Waldron's refusal to do this", that is to say adjourn the matter, "wasn't surprising as it was in line with his immediate past form".

HIS HONOUR: What is the reference to "truth" that is referred to there? Which topic or issue is concerned? I am just looking at the top of the page, under the bold quote,

"Chief Judge is not capable of sticking to the truth. For further proof that Waldron hadn't stuck to the truth..." What is the topic? Or is it just truth in a general sense?

MR MAXWELL: It is all explained, Your Honour, by what is said at the top of page 241, "Waldron made it clear that he had no interest in the truth. Although confirming these facts...", meaning the ones set out on 240.

HIS HONOUR: Actually, can I take you to 240. It looks as though it is about whether a new application had been made on the file, or a question about when an application was

made to the Legal Aid Commission. Anyway, don't stop now. I thought - - -

MR MAXWELL: Well I - - -

HIS HONOUR: If it was clear, I would go from any passage you took me to, but I need to read the lot to see what was meant.

MR MAXWELL: With respect, yes, Your Honour. I am sorry I can't be of more succinct assistance, because there is a later reference which more immediately precedes the passage complained of, which I will come to, but this, in our respectful submission, is typical of the book, that is, the passage that Your Honour is referring me to has contained in it the basis for the assertion at the top of the page, "not sticking to the truth". He says in the very first two lines of that page "Although confirming these facts in discussion, he then made a ruling that was contrary to it".

HIS HONOUR: Hold on. Which page?

MR MAXWELL: Top of 241.

HIS HONOUR: I see.

MR MAXWELL: So he says - these were the facts which I have set out at 240 - in discussion, the judge confirmed those facts, but "then made a ruling contrary to it" - so he says. Now, that might or mightn't be right, but this is not something plucked out of the air, this is consistent with giving an account of what occurred as he observed it and recalls it, and saying, "Well, that seems unfair to me. I thought the judge had understood the facts, and then he made a ruling contrary to it," the ruling which is then set out in bold.

Your Honour, having drawn attention to it, that is clearly part of the basis for the statements in the passage complained of, three-quarters of the way down, "Chief County Court doesn't seem too concerned with the truth". But if Your Honour would look at the immediately preceding paragraph, beginning "Waldron's refusal to do this wasn't surprising". The next sentence: "What I found more disturbing was when the DPP barrister, Ms Wallace, made a number of false statements from the Bar table which I brought to Waldron's attention. Like for Ramage's lies" - Ramage was a witness - "Waldron wasn't interested. That's perjury we are talking about, and perjury documented in black and white on the government's own official transcripts".

That, Your Honour will recognise, is of a piece with

the criticism of Judge Neesham in respect of the parking fine matter: the sense of outrage that what the defendant perceives is perjured evidence is accepted by the court. This is ignoring of the truth, so the defendant says, because the truth didn't come out. "I know what happened", and that is a statement which every defendant

will say repeatedly, "I know what happened. It happened as I say it happened, not as the prosecution said. How can it possibly be the case that the falsehoods have been accepted?"
And 243 is the last particular in relation to Chief Judge Waldron. Under the heading "Waldron's Form"; does Your Honour see that?

HIS HONOUR: Yes.

MR MAXWELL: Four lines from the top of 243: "While Waldron was hostile on a known corruption whistleblower like myself and has been similarly harsh on others like me by ensuring we don't get a fair trial, his has simultaneously got a reputation for apparently looking after hardened criminals. One example was" - and then he gives an example of an armed robber, and it goes on to state the basis of the rearresting of the person whose appeal had been reinstated and the granting of bail by the Chief Judge. It is argued by the author that Waldron's judgment had been in error; in other words, he had unreasonably favoured this armed robber, because when it came on for the reinstated appeal the convicted man didn't show up and another judge of the court re-issued a warrant for his arrest.
Now, that is fair comment in our respectful submission. It mightn't be right but, if that is the sequence of events, and it is not suggested by the prosecution that it is not, then that is fair comment. Any journalist, critic, commentator on the courts could say, "Well, there is a question here as to why that favourable exercise of discretion was made by the judge." You would need to know all the circumstances to form a

judgment about it, but there is enough there, in our respectful submission, to demonstrate that this is criticism in good faith, on material put forward for inspection, examination, scrutiny, investigation, and disagreement. It may be that when the Crown or the responsible officers investigated these matters, they

would say, "Oh, this is a misunderstanding by a layman of what went on. Yes, those steps happened, but you need to understand this and that and the other, and the criticism is unfounded."
So that deals with the second part of that particular about apparently looking after hardened criminals. The earlier bit about "hostile on a known corruption whistleblower like myself," well, on what is in the book that is just a statement of fact. He got a hostile reception when he went into that judge's court; those things do happen. It may not have been as hostile as Mr Hoser perceived it to be, but we have already said more than once that he views these things through a particular declared perspective.
If I might then, Your Honour, go back to the matters concerning Judge Neesham. There is a very important concession which I need to withdraw, and it is my fault in not reading closely enough the bits of the transcript at pages 273 and 4. 273, Your Honour - and Honour was asking me, "Well, how could he have said in good faith that the tape and transcript would be made available to the jury if that wasn't in the transcript? And I conceded that it wasn't. But, Your Honour, the first passage in bold type says, as Your Honour can see, "Every word spoken in this trial is recorded and at the end of the day is reduced to

type. The result is that at any time anything that is said can be recalled should it be required". So the basis is there for an understanding that it will be available for the jury if they need it; and the importance which this author attributes to that statement, and it is not suggested this wasn't said by the judge, is apparent from his repetition of it on page 274 at point 9.
In our respectful submission, those words are well open to the reading; indeed, in my respectful submission a lawyer perhaps. In other words, that there is nothing on the face of those words to suggest that it is not a reasonable inference that if there is a matter of evidence which needs to be adverted to, the transcript will be made available. If, as a matter of the knowledge of a criminal practitioner, that would never happen, that is another matter, but - and that is significant, because if Your Honour would go to 352, there is another extract from the transcript, 352, about point 8. Your Honour will note this is 80 pages on in what is a very lengthy treatment of the trial. The extract from the transcript records Mr Hoser saying "Your Honour, there is another matter I wish to raise. I think we all agree the trial has gone longer than we expected and I think the jury may be disadvantaged by not having the transcript of evidence. I now make application that at some stage prior to deliberations, or whatever, the jury is provided with a

complete transcript of proceedings".
The judge then asked the prosecutor: "Do you have anything to say about that Mr Perry?" The prosecutor: "I would be very much opposed to that." "Neesham also didn't want to give the jury a hand at coming to the truth." This

is not a passage complained of, but Your Honour can see the context in which the comment is made. "He was dead against me. It thus came as no surprise when he trumpeted 'I am not going to have the jury provided with a copy of the transcript in this case'".
Now, it would be an act of sophistry, in our submission, for someone to say, "Well, although the court told the jury that the transcript would be available, that couldn't have the whole of it. It would only be if a particular thing, at the request of the foreman of the jury, required confirmation, in which case that page would have been made available." That is the finest of fine distinctions, in our respectful submission, and a very odd one if that is indeed the distinction which operates from in those trials. But in any event, the person in Mr Hoser's position was entitled to feel aggrieved in view of what had been said about it being available, when his application to have it provided to them was refused, and again, Your Honour, it is consistent, there is a consistent concern that he is having his guilt consistently without the independent verbatim record of what has gone on being available to those who were making the decision.
That is what he complains about before Judge Neesham the first time on the parking fine. That is what he complains about fundamentally in the perjury trial, that his own tape of what he said before Judge Balmford wasn't before the magistrate at the committal, and he is now saying, "I want this jury, about to be asked to convict me of perjury, to have a full record of what I said and what the prosecution witnesses said. 'No, Mr Hoser your

application is refused'".
Your Honour, on page 2 of the originating motion we have got I think up to 280, (v) in the particulars. The two paragraphs complained of are the second and third on that page, Your Honour. "Throughout the case he," that is the judge, "gave prosecution witnesses an advantage by asking me, in their presence, what evidence I sought to get from them and what questions I sought to ask". Well, to a lay person, and indeed to a non-criminal lawyer, that

would seem an odd procedure if that was what occurred - to have the witness there, ask the person proposing to cross-examine "What is it you want to get out of these witnesses?"
It is a cardinal rule - I withdraw that. It is of the essence of cross-examination that one has the benefit of surprise. Fairness of the trial depends on it. That, we would respectfully submit, is axiomatic. If that occurred, and it is not suggested that this is false, and Your Honour would infer from the nature of this publication and the detail of it that this is an honest account of what occurred as perceived by the defendant, if that occurred, then it gives rise to a very real question, in our respectful submission, certainly in the mind of the author and probably in the mind of the sensible reader, about whether that is a proper way to conduct a trial. It doesn't mean they are not going to obey, that is to say the members of the community aren't going to obey the next County Court order they are subject to. It is just going to mean that the court is accountable to the community because if that is what went on, in our respectful submission it is not fair.

He goes on to make the comment - and this is part of what is complained of - "From Neesham's and the prosecution's point of view this was designed to allow these witnesses time to think of the best answers they could give knowing in advance the answers I sought". That is, in our respectful submission, a fair comment. If I had been asked yesterday to inform Your Honour what I wanted to ask Mr Lee, what issues I wanted to pursue, then that would have been, with respect, an improper request in the sense of not one which I should have been obliged to answer, because I wasn't entitled and one is never required - I wasn't required and shouldn't be required, to give notice of topics for cross-examination. So the comment, in our respectful submission, is well justified or well within the range of justified comment on the basis that that occurred.
Finally, it is said, "When doing this, Neesham made sure that the jury was hurriedly shifted from the courtroom so that they'd never know how he was actively aiding and abetting the prosecution witnesses". Now, if that's right, the jury was removed when these issues were raised, and one could understand why that would occur, Your Honour, because if there is a debate about whether a line of questioning can be pursued, one would understand that would be conducted in the absence of the jury. If the tendency of the practice was, as Mr Hoser argues, to assist the prosecution witnesses by forewarning, then he draws the inference, maybe wrong-headedly, but not in bad faith, that the judge wanted them out of the way so that

they wouldn't know how unfairly the prosecution witnesses were being assisted by being told in advance of topics.

304, Your Honour, is (vi). And Your Honour, that is at the foot of 304, under the heading "No Concern for the Truth", "Neesham's attitude to the truth, or perhaps more correctly his desire to ignore it, came out throughout Keating's evidence and later in the trial through various uncalled for outbursts." He gives one example from the transcript. "The truth of the allegations I do not propose to have enquired into before this jury!" "And later when I asked about finding out 'the truth' he replied 'That's not going to be followed and enquired into in this court'. He repeatedly stressed the only thing of importance to his side was whether or not the jury would convict me, not the truth or otherwise of police/VicRoads evidence. I suppose that's the only reason why he never let the jury hear the 28 minutes of tape-recorded hearing that was central to the charge!".
So Your Honour, I was wrong before in saying there was a refusal by the judge to have the instant proceeding tape recorded. It was, as Your Honour has seen, tape recorded in the usual way. So that complaint applies only to the matter before November 1993, that separate proceeding. But the grievance is that at the trial, as at the committal, there is a covert tape recording of what he said before Judge Balmford, was not before the jury, and we have already made submissions about how he would be entitled to feel aggrieved about that, as any party in any court would, if a critical piece of evidence on which they wanted to rely was denied to them.
Your Honour has already - we have discussed how statements about not enquiring into the truth of the allegations might come to be made, properly, by a judge,

and how they might well be misunderstood by a defendant who here, as previously, is very aggrieved that lying witnesses, as he perceives them to be, have been believed. If Your Honour would go to 319, this is on my point about lying witnesses. Again, this is not some wild allegation. It is a serious one, that here, as elsewhere, Mr Hoser makes out his case under the heading "The 20 Counts of Perjury", and says "I will here document 20 counts of perjury by him," that is Keating "in the witness box, as identified in this account". "I will then cite the source by which this is proven. In many cases there are multiple sources but I have not cited all. Statements

and other material referred to here was all given on oath". I won't take Your Honour through them all, but there are, as he promises, 20 instances of false statements, and he, in each case, refers to the evidence on which he, Hoser, relies, to say it was false.
Now, Your Honour, I understand, and with respect accept, that the question of whether this proceeding should have been brought is a question for elsewhere. But we made that submission and simply refer to it again now, because when Your Honour has had the chance, which we have been endeavouring to some extent to provide by this analysis, to see the nature of this work, this is so far from the kind of publication which should attract the attention of a contempt prosecution, because it is so obviously written by someone who is passionately aggrieved about what had occurred and is setting out to say why. It is so different from the Family Court case, which was thrown out for its own reasons, and so not calculated to damage the system of justice, that one is disbelieving

that it has been prosecuted, but it is being prosecuted and Your Honour has to try the issue.
But we want to - this is why we make a no-case submission, because we say Your Honour could not conclude, on the basis of seeing how this is done that there was any risk of this having the requisite damaging effect on the system of justice, and that it is squarely within the field of legitimate, stringent, trenchant, discourteous criticism which the cases recognise as being necessary and in the public interest.
Let me ask the question differently. The point we make about no investigation by the prosecution of the facts is this: what if this is all true? What if this was perjured evidence? Has anyone bothered to check whether these 20 allegations of perjury are made out? No indication that they have. What if that's right? What if Judge Neesham, as a matter of practice, does require defendants in person to state in the presence of prosecution witnesses what questions they want to ask? Far from prosecuting this man, you would think there would be a few investigations going on about whether these well documented complaints are in fact well founded, or whether, on analysis, they are misguided misunderstandings and have no reasonable foundation.
Your Honour, the next particular is 329; and the passage complained of is - - -

HIS HONOUR: The top of the page?

MR MAXWELL: The top of page 329, and this is of a piece with the complaint about assisting prosecution witnesses, and again, the author gives the basis for his criticism,

beginning on 328, and again, these words are put before

Your Honour out of their context. The context begins, "Judge telling the witnesses how to answer questions. Neesham then detailed how he wanted me to present the collection of documents to Connell. He then said that if Connell claimed not to have seen them", the documents, "then he (Neesham) wouldn't allow me to take the matter further. Meanwhile, Connell had been sitting in the witness box hearing all this. As he didn't want to help my case, Neesham had now effectively told him how best to answer the questions to stop the truth coming out".
As Your Honour can see, the suggestion is that in Connell's presence the judge says, "Well, if the witness says he hasn't seen them, then I won't let you ask him any more" and the suggestion is, well, that is a hint that an answer to the effect of "I haven't seen them" will stop the cross-examination. "Now it is important here to note that with previous documents put to Connell he'd freely admitted they were his, VicRoads letters, or whatever. Now things suddenly changed. To the first letter he was given, the response was 'Can't recall it'. His very next response, 'I can't recall it'. The Marles report; 'I don't think I've read it', and so on. All were probably false statements, but in the words he'd used, he could never go down for perjury on those answers. 'I can't recall' isn't 'no', even though Connell would probably have hoped that the jury would interpret it that way. Of course Connell had been doing effectively what Neesham had told him. It was a classic case of bent judge improperly helping a prosecution witness".
Well, it is either right or it is wrong as matter of fact, and the comment, as I say, of a piece with the one

we have just immediately dealt with, is open in the sense that if - well, is open, because a witness might well take advantage of exactly that kind of ruling to adopt the easy course of saying, "No, I don't recall seeing them".
Then 350, (viii) in the particulars - and Your Honour has seen that that appears about two-thirds of the way down the page in the paragraph beginning: "Then there was the jury itself". "While I was preoccupied asking questions, listening to the answers and working out my next questions, it had been a totally different ballgame on the other side of the court. The prosecution team lead by Perry had spent most of the day apparently chatting to jurors. I hadn't been aware of the extent of this until

it was brought to my attention. What it probably meant was that while I was systematically destroying the credibility of the police side and various aspects of their case, the jury was being deliberately sidetracked by the prosecution side so none of it really mattered. Of course the judge, Neesham, should have stopped this carrying on by Perry's side, but no, he'd been green-lighting the whole lot".
We make two points about that, Your Honour: it is principally an attack on the conduct of the prosecutor and, as I understand it, it is improper for prosecution counsel, or defence counsel for that matter, to have communication with jurors in an informal way. Obviously they address them - and this is said by the aggrieved, convicted person to have been improper conduct - separately, he criticises the judge for allowing it to go on. Well, that is a distinct criticism. We accept that. But in our respectful submission, if that was going on in

the court, and was observable to a judge managing his courtroom, and it wasn't stopped, then it is a matter of fair comment.

HIS HONOUR: What is being put here? That there was some conversation going on in the courtroom while everyone was present, including the defendant?

MR MAXWELL: Yes, as I understand it, Your Honour, yes. And in that regard, Your Honour will note that the book contains, at page 404, something to which I took Mr Lee yesterday, being a statement of a Professor Sawyer, in which, at point 2, Dr Sawyer says when he was in the County Court on 21 September, during this trial, for one hour - and it can be put no higher than that - he was concerned by two matters: apparent communication between members of the jury, and in particular derisory expressions in regard to Mr Hoser - well, that is irrelevant to what is occurring in this court; two, the apparent communications between the prosecutor Mr Perry and the jury".
Now, it may be said, "Well, that is just a fabricated letter." Well, you would, in our respectful submission - let me put this differently: in our respectful submission this book has a ring of truth about it. But to use another metaphor, because of the person by whom it is written, namely the aggrieved defendant, the reader takes it with a grain of salt. But ring of truth and grain of salt are compatible concepts: it is theoretically possible that Mr Hoser has gone and written a letter attributing it to someone who in fact exists, which happens to suit his purposes. But that is, in our respectful submission, wildly improbable. It would be a very easy way to discredit yourself to embark on such fabrication, so

again, Your Honour would say, "Well, here is someone who is said to have been in the courtroom, independently of and unconnected with Mr Hoser, who observed communications between Mr Perry and the jury.

HIS HONOUR: Well, the statement is that as between the period of 10:30 to 11:30, this person says he observed "apparent communications" - - -

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: "Between the prosecutor Mr Perry and the jury." That then in the text becomes "the prosecution team led by Perry had spent most of the day apparently chatting to jurors".

MR MAXWELL: No, Your Honour it doesn't become that.

HIS HONOUR: Well what is - - -

MR MAXWELL: It is simply that - - -

HIS HONOUR: It is quoting that as support for the statement which appears at 350.

MR MAXWELL: No, Your Honour, I am putting it simply on this basis: that there is in the book what appears to be corroboration of the assertion that in the course of the trial there was inappropriate communication between the prosecution and the jury. I mean, it is only an hour and we can't put it any higher than that. But it is consistent with the presentation of the material and saying, "Well, I wasn't the only one who observed communications between the prosecution and the jury. Someone else who was there for a short time observed it as well". It is no more than that.

HIS HONOUR: Well, what he says is "I hadn't been aware of the extent of this until it was brought to my attention".

MR MAXWELL: Yes, Your Honour. Well, it doesn't say - I don't

think it says by whom it was drawn to his attention, and I am not saying that Your Honour infers that it was Mr Sawyer. He is the - the author is saying, and there is no reason to doubt it, that it was drawn to his attention,

but he was focusing on cross-examining, that these communications had been going on, and Your Honour could understand how that would happen while the defendant is cross-examining, that these communications might occur. Indeed, as my learned junior points out, taking the comment under Professor Sawyer - I am sorry, Dr Sawyer's statement at face value, Mr Hoser was unaware at the time of the lodging of the complaint by Dr Sawyer; though it might equally be assumed that before writing the book he had become aware of it, and that that was at least one of the matters on which he based his statement that apparently these communications were going on.
I notice the time, Your Honour.

HIS HONOUR: Yes, right.

MR MAXWELL: I have almost finished the matters on Judge Neesham, and I will be able to deal more quickly with Judge Balmford and Magistrate Heffey, because they all concern single, short incidents, and Your Honour knows where those episodes fit into the chronology. Then I need to deal finally, and I hope fairly briefly, with the implied freedom, and that will be the conclusion of the submission.

HIS HONOUR: All right. Thank you. 2:15.

LUNCHEON ADJOURNMENT

UPON RESUMING AT 2.15:

HIS HONOUR: Yes, Mr Maxwell?

MR MAXWELL: If Your Honour pleases. Your Honour, we, in what is a laborious process but nevertheless in our respectful submission necessary, and we hope it assists - - -

HIS HONOUR: No, it is very helpful. You are up to number 8.

MR MAXWELL: We were up to number 8 which is at page 350, and the following words were published; and although we have, as my learned junior says, pretty much dealt with that, Your Honour - - -

HIS HONOUR: Yes, yes.

MR MAXWELL: (viii) in the particulars, 350, that is, to say there was a separate but, as it were, ancillary criticism that what was going on in the court was wrong and should have been stopped, and it wasn't. And, Your Honour, we will, in a moment, draw attention, in relation to one of the other particulars, to the consistency of that theme,

that is to say, the criticism of the judge is secondary or ancillary to the primary complaint about the misconduct of someone else, and the logic of the assertion by the author is, well, that was wrong, and it shouldn't have been allowed to go on in the court, and it is the judge's fault that is it was allowed, and so he is therefore to be criticised for allowing the giving of false evidence, in the case of improper contact between the jurors and the prosecution and the jurors.
Your Honour, there is just - I draw attention to the reference to Dr Sawyer at 404. Would Your Honour also note that at 430, Mr Hoser records or attributes to a Keith Potter, former president of the Victorian Branch of Whistleblowers Australia, which is an extant organisation,

outrage when he entered the court, at the time, "and saw DPP barrister Raymond Perry having conversations with jurors as Raymond Hoser was giving evidence from the witness box".
Now, that is a different observation from the one referred to because, as Your Honour will recall, at 350 Hoser is saying "I was focusing my attention on cross-examining witnesses", and meanwhile this was going on. But I am simply drawing attention to, another fragment only - it is a fragment of evidence, but attributed to someone who, if necessary, could be interviewed about it; corroborative of the general assertion that there were, in the course of this trial, improper contacts between the prosecution and the jury.
Your Honour, number 9 is at 353 - and this, again, is in the course of the perjury trial, and an issue was raised in the proceeding about whether Mr Hoser had been strip-searched at Broadmeadows Court after the raid on his house. Page 353, and Your Honour, what follows is - and Your Honour, I was right in saying the reference to "the raid" is the raid on the day of the Judge Balmford hearing, February 1994, when the tapes were seized, and in the course of that, so Mr Hoser alleges, he had been strip-searched. So "Back to the Lies", the section begins. Porteglou denying seizure of tapes - I beg Your Honour's pardon, "had passed seized tapes on to anyone". And there is a reference to evidence in another place at another time, on which Mr Hoser would found his assertion that Porteglou lied. "Porteglou falsely denied I was strip-searched at Broadmeadows Court after the raid. His evidence was contradicted by Brown, whom incidentally

Porteglou said he had been with at all material times. When I raised this inconsistency, Perry jumped up and said 'There is no evidence whatsoever that he was strip-searched, except out of his own mind and own mouth', to which Neesham erroneously replied, 'Yes, quite right'. There is no doubt this was a deliberate ploy by both to mislead the jury. I directed them both to the previous day's transcript where Brown had confirmed the Broadmeadows strip-search. Neesham attempted to write it off saying 'That is another matter altogether'. That Neesham had got it wrong is another matter altogether'. That Neesham had got it wrong didn't matter to him. However, it would be hard to believe that both he and Perry would be that stupid. Neesham had then improperly made sure that the matter was now effectively closed. Another rule of the Bar is not to mislead the court. However, it obviously didn't apply to Perry. It was as Porteglou's lies were being exposed that Perry again got up to his usual tricks of communicating with the jury. This time it included Perry making strange noises and pulling faces at them. Neesham even recorded this incident on the 'official' transcript".

Now, Your Honour, that, again, is the context, the particular context, in the broader context of the book, in which (ix) needs to be viewed. It is, on Mr Hoser's account, a complaint he makes about inconsistency between prosecution evidence being dismissed. He says, "Just a minute. This denial is not consistent with what Mr Brown said yesterday. See the transcript". The prosecutor says "No, the only evidence is what Hoser himself has said about the strip-search". The judge agrees with that.

Once again, the perception in the mind of the defendant is that he can't take a trick in this court.

Now, whether he can in an objective sense, if he were an impartial independent bystander, assert that this was a deliberate ploy by both to mislead the jury may be debated. That may be said to be an extravagant inference to draw. But the fact that it is in the context of a trial where, as spelled out in exhausting and exhaustive detail in the pages starting way back in the 200s, it is in the context of a trial where this defendant perceives that the odds are stacked heavily against him, unfairly against him, liars are being believed, the jury is being spoken to, or signalled to in the form of facial expressions by the prosecutor, and the judge is making adverse findings or ruling adversely on his attempts to bring out the truth.

The next is 367, Your Honour. Your Honour, this part of the book deals with a tape recording of the search, the raid made of his house, when the tapes were seized. "February 1994", and he says at about point 2 of page 367

"Perhaps I should note here that in this case I applied for the tapes played to be transcribed on to the court record. That is, what is said put on to the official transcript. Neesham even formally ordered this. However, for reasons best known to those who made the transcript this never eventuated. On the official transcript, all that is recorded for 53 minutes of police tape is 'Tape played to court'. Before the tape was started, I had also asked that the taped be stopped and started so that I could replay key bits to the jury. Neesham tried to be difficult and insisted that the tape be played

continuously". Once again, can't take a trick. Not an unreasonable request, one would have thought: rejected. "Perhaps I should have asked for the opposite and got what I wanted".

His perception was that his applications were almost not worth making. "This didn't stop Neesham from stopping the tape and making comments himself when it suited him", and we now to the get relevant bit complained of: "During the search of my office, the police retrieved a file marked 'allegations of perjury 1993'. When that part of the tape was played Neesham ordered it to be stopped and said is following, 'Members of the jury, you heard one of the members of the search party refer just a moment ago to hear'" - I am not sure what that means - '"allegations of perjury 1993", reference to the title of the particular file. "You should not think anything but, and it is agreed that, those allegations relate to the very matter you are hearing, not something else'".

In fact, His Honour was in error, and we will come to the part in the book where there was a correction subsequently made. But what is said is that a file which Mr Hoser himself had in his office, marked "allegations of perjury 1993", which had been seized, was a file dealing with allegations against him, Hoser, being the allegations before the court. The fact is the file had no connection whatsoever with the alleged perjury before Judge Balmford, and this book goes on to say, "In fact Neesham was wrong. The file in question referred to a complaint", made by Hoser, "about VicRoads officers Schofield and Olsen committing perjury. Anyway" - and we would interpolate, not unreasonably, the author asks rhetorically - "how

could a file marked allegations of perjury 1993 relate to an alleged perjury in February 1994? And if Neesham had bothered to ask me about it, he would know that I wouldn't

have agreed with him".
He goes on to say - and this is complained of - sorry, Your Honour, I am on the wrong page. And this, I should say, is the only bit complained of on this page - the prosecution, of course, has eschewed contextualising any of these remarks. We don't understand why, but we would have thought it was encumbent on the prosecution to tell Your Honour what we have had to tell you, which is what these proceedings were, how one related to the other, and the context in which each of these remarks was to be led. To view them in isolation is, with respect, to divert the court, has the effect of diverting the court from the task which it, in our respectful submission, must undertake. The words cannot be viewed in isolation.
At all events, we finally get to the bit complained of. "Neesham had probably made a deliberate mistake here because the date 1993 would indicate that I had premeditated and planned the alleged perjury in early 1994. It was part of his not so subtle and deliberate campaign to sew the seeds of doubt in the minds of the jurors". That is the bit complained of.
Well, in our respectful submission, it is not an unreasonable comment to say that it is illogical to have thought that a file referring to 1993 allegations of perjury could have anything to do with something that didn't occur until 1994, on the prosecution case. Whether someone standing outside the position of an aggrieved defendant would say it was probably a deliberate mistake

may be debated; different views would be open. But again, you would only come to that conclusion, in our respectful submission, if you were a defendant who couldn't take a trick. You end up thinking "I just can't win in this court", and it is such an obvious thing to get wrong. "How could it possibly be got wrong that this would be allegations of perjury, that I would have a file in the year before I perjured myself dealing with my future perjury?" So on the material which the book presents - -

HIS HONOUR: Of course, the other explanation which immediately springs to mind is that the trial judge was trying to avoid the jury thinking that there was a prior conviction for perjury.

MR MAXWELL: Well, that is so. But - I accept that; though if any proper account had been given - - -

HIS HONOUR: I understand the point you are making.

MR MAXWELL: But Your Honour - - -

HIS HONOUR: That is how it was perceived by the person who

heard it, and you say, in the context of how he was perceiving everything that occurred in the court, it all took on the character of, as it were, a deliberate campaign to get him convicted. But to read that passage without that - - -

MR MAXWELL: Perspective.

HIS HONOUR: Perspective, there is a pretty obvious explanation for what might be occurring.

MR MAXWELL: I accept the force of that, with one proviso, and that is when we come to page 371 we get an account which would tend to make Your Honour's alternative inference less likely, in our submission. It begins under the heading "Back to the Consored" - presumably censored -

"Tape".

HIS HONOUR: Where are you referring to?

MR MAXWELL: 371, about point 2 on the page. "When I finally got a chance to raise the matter about Neesham's wrong statements about the 'allegations of perjury 1993' with Neesham showing his error, he wasn't remorseful. He instead blamed me for not tipping him off about the matter on the tape earlier! Of course the truth was, if it had in fact occurred to me to try to do that, he would have ruled me out of order anyway. In other words I was damned no matter what I did. Then again, the tape had been in the hands of the prosecution for nearly two years", that is to say, the tape of the raid referring to this 1993 file. "Surely it was incumbent on them to raise the matter with Neesham, particularly as it was a legal one". Well, in our respectful submission, fair enough. If the prosecution knew that what His Honour was - or ought to have known that what His Honour was stating was innocently mistaken, the prosecutor should have been on his feet saying "Well, Your Honour, that is not correct. We have the transcript, and we know that it relates to the seizure of a pre-existing file relating to other persons altogether, and the jury should be told that". For the prosecution not to make that correction, it is inconsistent with what we understand to be the duty of a prosecutor.
He says in, the next paragraph, that he had made an application under Freedom of Information for all documents tapes and other material, but hadn't got them. "I can say unlawfully as there is no provision within the FoI Act that allows police to withhold material on the basis that

it may expose perjury and misconduct". And then he concludes in relation to this 1993 file, "As for the 'allegations of perjury 1993', Neesham did give a half-baked explanation to the jury which in reality probably did more to confuse the issue rather than clarify things. But like I said, that was a hallmark of the way he chose to run the trial". That last sentence picks up the word "perspective" that Your Honour and I were agreeing on a moment ago, that this is all about the perspective of the author. That is why it is so important that, in judging its likely effect or otherwise on the administration of justice, that it be perceived that it be read as such.

Then, Your Honour, this is the last on Judge Neesham, (ii), page 3 of the originating motion, at page 435. Now, Your Honour, there is a - this whole section, beginning at 431, if Your Honour would go to the heading "Lies, Lies, and More Lies", it is dealing at length and in detail once again with the prosecution summing up; so to understand the context in which the remarks complained of are made, the whole of this section would need to be read.

The character of the criticism - this is primarily a criticism of Mr Perry, the prosecutor, for not summing up the evidence as he was supposed to do, but "resorted to a litany of red herrings, lies and irrelevancies in order to ensure that the jury was confused". This is the top of 431. "By rights Neesham should have restrained him, but this wasn't to be. However by this stage none of this surprised me" - same point.

Then reference in the fourth paragraph to the "next pack of lies from Perry", and Your Honour will see,

without my going through it, that this is a trenchant attack on Mr Perry. Next page, 432 - and this is important as a sign of good faith on the part of this author - the short second paragraph beginning "As this was too much to stomach. I stood up and complained along the lines of above", about something that Mr Perry was doing. "In a rare sign of support Neesham actually sided with me on this one. Perhaps part of the reason was that on this day there were about 20 independent observers in the court and Neesham perhaps feared that one or more may have been with the media. In any event by that stage the result was known to all. When upholding the complaint, Perry still remorselessly tried his best to keep the jury confused".

Then there is an extract from the transcript in which His Honour upholds the point made by Mr Hoser, saying "The point is well made. Yes. Confine yourself to the

evidence, Mr Perry", and Perry saying, "Well, I keep getting interrupted". Neesham: "Yes, well the point was well made. Go on". Then I think it is Hoser who - no, I am sorry, "Mr Perry. There is no evidence that Mr Hoser enquired", and so forth, and then - so this is an exchange which the writer puts in, which doesn't support his thesis that the judge - he can't take a trick. This is a trick which he did take, and he, in good faith, sets it out, albeit with a cynical remark about why, in the setting, the judge was with him. The fact is he sets it out. If this was in bad faith then he could easily have left that out. And then the complaint is that Perry disregarded the ruling, and kept going with the same falsehood.
Your Honour will see over the page at 434, it is all about Perry with - the top of 434 - "a cock-and-bull

theory that I hadn't forged the fax". He deals with that. "The fraudulent thing here", it is said in the second paragraph on 434, "was that it had been Neesham himself who had prohibited me from calling Brygel", who might be have been a witness, "after Perry", the prosecutor, "had asked him to ban him as 'irrelevant'".
So there is a useful cross-reference to, again, the foundation for the complaint.
"Again Perry was using the tactical move that he knew I was unlikely to interrupt, and if I did then he could make further mileage out of my allegedly constant interruptions. But more importantly, it should have been Neesham who stopped him in his tracks", which, as we have submitted, was the theme of this part of the remarks. No complaint about that statement: "It should have been Neesham who stopped him in his tracks". Why not? Well, because it is a perfectly reasonable comment about what the defendant perceived as inappropriate latitude allowed to the prosecution, and is of the same type as that which is complained of on 435, which begins - after the transcript extract Your Honour will see it says: "Neesham again should have stepped in, stopped Perry's lies. The fact that they had themselves prevented the letter from going to the jury was significant. Furthermore, both knew that the letter was addressed to Martin Smith, my then lawyer, not myself. Both knew it never went to the crown thus both knew that Perry was lying to the jury".

HIS HONOUR: What is the letter from the Attorney-General to lawyer Martin Smith? It is put that this all arose from statements made in the address - - -

MR MAXWELL: Yes.

HIS HONOUR: That he falsely told the jury he had never received it. What is that about?

MR MAXWELL: Your Honour, I don't know. I will inform Your Honour in a moment or two about that. But what is important is that, whatever the materiality of the material, the relevant sequence of events is self-contained on the page. That is to say, there is false evidence - well, there is a false statement given by the prosecutor - knowingly false, it is said - that the defendant had never received the Dowd letter, and Mr Hoser, he says, had sought to tender the document but Perry objected and Neesham had disallowed, that is - I am paraphrasing, or I am interpreting the statement Neesham and Perry had refused to allow to go through. The significance here is having declared this letter as irrelevant Perry had no right to raise it in his summary; particularly when, knowing he was making a false statement about it.
So, as we would understand the sequence, Hoser seeks to tender the letter; Perry objects that it is irrelevant; the objection is upheld by the judge; letter doesn't go in, and then Perry, having made the objection, raises it in the course of his address saying, according to Hoser falsely, that Hoser had never received the letter. And, in our respectful submission not unreasonably, he says "Well, that is a bit rough. He stood up and prevented me getting it into evidence and is now standing up and saying, about a supposedly irrelevant letter, that I never got it, and I did". If that's right it wouldn't be an over-statement to say that is outrageous conduct.

HIS HONOUR: Just so I am picking this up, where is this

reference to the letter being received was stopped from being used by Crown objection? I just missed it in the passages you took me to.

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

HIS HONOUR: It is not in that particular section, is it?

MR MAXWELL: It is what I have read in the first paragraph on 435, and the second paragraph.

HIS HONOUR: Yes, I hadn't seen the sense. You see, that being one of the documents he had sought to tender - - -

MR MAXWELL: That Neesham and Perry had refused to allow to go

through, and that is reinforced by the first sentence of the next paragraph, "The significance...

HIS HONOUR: That is presumably dealt with somewhere earlier on.

MR MAXWELL: Yes, Your Honour. We will try and find that letter. But he says having declared the letter as irrelevant Perry had no right to raise it as, we infer, Perry's objection to the tender by Hoser was that it is irrelevant to the proceedings. The judge upholds the objection. In that sense Neesham and Perry refused to allow it to go through, and then the prosecutor turns around, having successfully objected to its tender, and seeks to make a point against Mr Hoser that he didn't receive it. And the transcript shows that.

HIS HONOUR: But do I read into that that the objection then, from the prosecutor, that the letter was irrelevant must have been overruled and the letter did go in.

MR MAXWELL: No, Your Honour. You would read that it was upheld and the letter didn't go in.

HIS HONOUR: And so, in his address, he referred to a document which wasn't evidence.

MR MAXWELL: Correct. Which wasn't evidence because of an

objection he, the prosecutor, had successfully made to its going in. In our respectful submission, that is the correct reading of those passages. If the actual event in the course of the trial is dealt with in more detail we will draw Your Honour's attention to that.
Then the transcript quotes what Perry allegedly said to the jury, "Who might you suspect would have a letter from the Attorney-General of New South Wales? Mr Hoser or the Crown? It is his sneaky way" - meaning sneaky of Hoser to suggest that he got it rather than the Crown having got it - "I had to stop him", and then this transcript extract records the objection made. And Hoser wants to say "That particular letter is in the files here". "Mr Hoser, you will get your opportunity". Hoser" "He has lied, his whole story". And then the judge allows the prosecutor to go on. Perry: "Thank you. If you're going to put me off, he's not. What I am putting to you is quite plainly that the Attorney-General's letter that contained his prior history is not likely to be in his hand. Mr Dowd, or his Honour Mr Down is not going to send that down to Mr Hoser and say 'hello, Mr Hoser I want you to have this letter'". So there is the assertion that Hoser never got the letter. And, on the face of it, that would at least be characterised as unfairness in the

conduct of a criminal trial, in our respectful submission, and accordingly, for the unrepresented defendant to have a strong sense of grievance about that episode is not surprising.
It is in that context in which Your Honour would read the start of the passage complained of: "Neesham again should have stepped in and stopped Perry lies". Well, if

it is right that His Honour had ruled the document out as being irrelevant and not admissible, then one would have thought, with respect to His Honour, that he would have said to the prosecutor "But you wouldn't let that get in, Mr Prosecutor. How can you now be making submissions about it in your summing up to the jury? There is no evidence; you are meant to be summing up the evidence".
It goes on - and this is part of the passage complained of, which is the whole of the, this bottom half of the page, "Significant again" - the fact which Hoser asserts is at the end of the paragraph under the transcript extract. "Both knew", meaning the judge and Perry - and we assume that both had seen it in order for there to be a ruling that it not be admissible - "knew that the letter was addressed to Martin Smith, my then lawyer, not myself. Both knew it never went to the Crown" because it was addressed to him, not to the Victorian Crown, "and thus both knew that Perry was lying to the jury. Significant again was that Perry was flagrantly lying and violating all his rules of conduct in order to gain an improper conviction. Neesham's so-called management of his court was similarly tainted", and that is the proposition that we foreshadowed before and which recurs, that if one of the participants, in this case the key participant, being the prosecutor, is misbehaving in the ways alleged, then it is a failing on the judge's part not to intervene and prevent that occurring, and a defendant would look to the judge for protection if what he perceived - if he raised objections about unfairness, and lying, he would expect protection from the judge.
Whether it is a reasonable expectation in the particular

instant is a matter which requires investigation.
This is still part of the matters complained of in the brackets: "(Oh and by the way, when I raised the letter in my reply address, Neesham jumped in at once and said I couldn't talk about it or introduce the letter - yet more double standards)". Again, fair comment, in our respectful submission, on the account which Perry gives -

I beg your pardon, Hoser gives. The prosecutor can refer to the letter, it having been ruled out of court on grounds of relevance. The defendant tries to deal with it and, on the account he gives, isn't allowed to talk about it let alone introduce it. "This was deliberate", he says, "as Neesham and Perry were evidently trying to ensure that the jury's imagination ran wild as to what the contents of this now mysterious letter were. Furthermore the Dowd letter didn't contain my 'prior history' as Perry had falsely asserted. But like he said himself, he wasn't interest in the truth".
Now, we would respectfully submit that the last statement is properly to be read as a statement about Perry. In context, it follows immediately on from the previous sentence: "The Dowd letter didn't contain my 'prior history' as Perry had falsely asserted. But like he said himself, he wasn't interested in the truth". In our respectful submissions, that is not open to a reading that that is a comment about the judge at all.

HIS HONOUR: Well, where was it that Perry said himself he wasn't interested in the truth? I mean, I understand the broad thrust of what you are saying as to that, but that particular sentence seems to be identical with the ones which have been previously quoted, which unambiguously

refer to the judge.

MR MAXWELL: I accept that, Your Honour, and that - we are seeking to find a reference to that being said by Perry, Your Honour. I accept the force of what Your Honour says about that echoed statements made by the judge in other setting, mostly based on - let me start this again - based initially on the refusal to let the parking fine appeal be tape recorded, as Your Honour will recall, and secondly, on the statements to which reference has been made about not being concerned with the truth.
Would Your Honour note that in addition to 304 to 5, which are the statements about "we are not enquiring into the truth of those allegations", there is the statement at 445 in respect of which Your Honour took me to task yesterday. That is one about criminal trials not being concerned with getting to the truth. We have no need to recap the discussion about that.

HIS HONOUR: All right.

MR MAXWELL: Then that is all on Judge Neesham.

HIS HONOUR: Did you deal with all of Judge Waldron's - - -

MR MAXWELL: We did, Your Honour, yes. Then, comments re Judge

Balmford, as she then was. If Your Honour would go to 140, just so we - before we leave the Neesham matters, would Your Honour go to 418? This is the reference to Perry not being concerned with the truth.

HIS HONOUR: Just one second. Sorry, what page?

MR MAXWELL: 418: in the middle of the page. This is when Hoser is being cross-examined, and says "I am telling you the facts and these are acknowledged by VicRoads in writing. Perry: I am not interested in the facts". And then there is a further assertion at the foot of the page by Hoser in

evidence. "I wasn't licenced to drive on that day, I might add, so had I been driving a car I would have been breaking the law, which I try to avoid doing. Perry: I am not concerned about that". But the first one is sufficient as a foundation for the later reference at 435. We invite Your Honour to find, as a matter of fact, that the "he" at the end of the last Neesham particular is a reference to Perry, in its context.

HIS HONOUR: Yes.

MR MAXWELL: Your Honour, I was going to take you to the Balmford matters. At 140, the first matter complained of comes under the heading "No Taping. Judge's Mind Already Made Up". That is the fact and conclusion in Mr Hoser's mind, and we have already debated whether that is a reasonable inference or not. But it is plain on the face of it that he draws the conclusion, and it is clear from the sentence in the passage complained of. "After Balmford had stated that she would not allow the case to be tape recorded, it was obvious that I would be losing this one. Like the case in front of Blashki" - that was the traffic lights matter - "the only question was the penalty". Then Keating was the deponent, and this goes on to deal at length with the proceeding before Judge Balmford. The next particular is to the same effect, at 142, Your Honour.

HIS HONOUR: I see at the bottom of that page there is reference to the letter from the New South Wales Attorney, which we were discussing before.

MR MAXWELL: Yes, Your Honour. I am indebted to the court. At the foot of 141, as Your Honour points out, "Ellwood accused me of forging three documents. Namely the two

incoming faxes from Vic-Roads relating to traffic lights, along with a letter sent from the former New South Wales Attorney-General John Dowd to Martin Smith, solicitor at Herbert Geer and Rundle. This letter was allegedly a forgery, because I was unable to produce an original. I reminded Ellwood that the letter had been about me but not addressed to me" - which is consistent with what he says later at the trial - "rather, having been sent to the lawyer and that as matter of course, I had only been given a photocopy. It has always amazed me how an innocuous activity by myself is always deliberately misinterpreted by the prosecution as part of some major criminal plot". He says in this case "a photocopied letter innocuously passed on to me becomes some major criminal conspiracy involving forgery".

Then the next matter complained of - this is (ii) under Judge Balmford, on page 4 of the pleading, under the heading "A 'Lost' Witness": "Brygel", who was going to be a witness for Mr Hoser, "was late to court, and he was nowhere to be seen at 10:30. He is the sort of bloke who would probably be late to his funeral if it were possible. Balmford refused to stand down proceedings while I attempted to locate him. Of course, had the police side had trouble finding a witness, it is probably been a different story. Like I have noted, Balmford wanted to convict me and get the whole thing over with as soon as possible. After all she had obviously made up her mind before the case even started. Recall, she had refused to allow the matters to be tape recorded". So it is the same stream of - it is the same logical sequence in the writer's mind, and the foundation for the imputation

of predetermination is the refusal to allow taping.

Your Honour will see that in this proceeding the judge went on to announce "that she had found the policemen, Keating and Daffy, as 'credible witnesses' and that she didn't believe a word I said. She further accepted Ellwood's" - that is the prosecutor - "assertion that the contents of the VicRoads letter was doubtful, even if it wasn't forged".

It is worth noting in that context, Your Honour, an exchange with the judge at point 3 of the page, 142: "In terms of my alleged forgeries", says Hoser, "Ellwood was wrong on all counts. When I complained to Balmford, she retorted that I had to expect such dirty tricks in the course of court case, and that 'it's all part of the game'". Well, that is the account he gives of what occurred and what was said to him.

Now, Your Honour is not asked to investigate the status of the Dowd letter, and whether the photocopy

should have been, whether there should have been any doubt as to its authenticity or not; but there is a thread of consistency - I am indebted to Your Honour for drawing attention to the reference to it - from the County Court appeal in respect of which ultimately he was charged with perjury, to the trial of perjury, when the Dowd letter, and whether it was or wasn't a falsehood, was raised against him.
It was, it would appear, a matter would which he relied on for evidentiary support in defence to the charge before Judge Balmford. He was challenged that he had forged it. He said, "No, I just had a photocopy from my solicitor". Then he tries to bring it up at the trial for

the same reason, to say, "Well, I wasn't lying before Judge Balmford. I had these letters, including one from Mr Dowd, and here it is". "Objection, Your Honour", from the prosecution. "Not relevant". "Objection upheld. Yes, Mr Hoser?" And then in the address, "Would you seriously think that somebody like Mr Hoser would get a letter from Mr Dowd?" - a very rum sequence of events, in our respectful submission, assuming it to be accurately described, and it has not been suggested, because the prosecution haven't investigated it, that anything said is false.
Your Honour, (iii) under Judge Balmford, on page 4, 144 at about point 8 of the page. I would like just to read to Your Honour what is under the other side before we come to the matter complained of, because this, again, emphasises the good faith in which this book has been written. On the other side, "There is no doubt that after this book is published both Blashki and Balmford will deny any impropriety or wrongdoing. They will probably assert that they are perfect and claim what I have written (above) to be false. However readers should bear in mind that the proceedings in front of both were taped by myself (from where this account can be corroborated) and the police (read Leo Keating) have by their own admission confirmed that they copied the tapes". So the police have copies of the tapes which Hoser made of those proceedings. "This note here can be taken as written authorisation (permission) from myself to anyone to access these tapes (uncensored) under FoI legislation". So he is prepared to stand behind his allegations and say "Well, I made a tape. I wasn't allowed professional tape but I

have made one. They have got it. Listen to it". Someone

who has trumped things up isn't going to expose himself in that way, in our respectful submission.
"However," he goes on, "in the event these are withheld to those who seek them, there is just one simple question that needs to be asked of both Blashki and Balmford. That is, why didn't you allow your cases to be taped when asked. For that question, neither have a credible answer".
And then we come to the passage, the last passage complained of, under the heading "Another Balls-up".
"Balmford's bias in favour of police and the DPP isn't just something I've noted. In fact, three Supreme Court judges have noted it as well".
Now, we object to the fact that the prosecution did not include, in the particulars, the next paragraph. It is self-evident that the next paragraph refers to the three judges mentioned. It puts things in a different light when this is not just a throw-away line about bias, but there is actually a Court of Appeal decision to which reference is made, where the Court of Appeal overturned the conviction saying that Her Honour had "misdirected the jury in a way that helped guide it to a guilty verdict". That ought to have been included in the pleading, and we draw Your Honour's attention to the fact that there is a decision of the Crown and De Marco. On our research it is unreported Court of Appeal, 26 June 1997. The book says 27 June. My note is 26; but at all events we will - I have actually got it here, Your Honour, in an unreported form. It is 26 June, and I think in those days there wasn't a VSC number. The catchwords or the description

says "Trial Judge directing jury that an omission by the applicant to tell police certain facts could be used by jury to demonstrate a consciousness of guilt. Held to be misdirection which in the circumstances could not be cured by the application of the proviso".

HIS HONOUR: The use of the word "guide" couple with the word "bias" would plainly suggest a deliberate exercise rather than an error made by the trial judge, would it not?

MR MAXWELL: Your Honour, we wouldn't concede that it is, it goes as far as that. It is - - -

HIS HONOUR: Well, is it open to be read that that is what the two passages are in fact doing?

MR MAXWELL: No, Your Honour. We would draw the distinction there between - - -

HIS HONOUR: I mean, bearing in mind that the passage which has the word "guide" is not one relied on by the Crown.

MR MAXWELL: No, indeed. But if it was taken as you suggest, it puts it in context. If it was added to the passage before, you have got the combination of "Balmford's bias" and "guiding it to a guilty verdict", being the finding of the Court of Appeal. Given, again, the test of an application made at this stage, that there is no case to answer, the question would be whether it was open to read that as saying "not merely got it wrong", but "deliberately got it wrong" - - -

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: And that the Court of Appeal agreed that it was a deliberate exercise in securing a conviction.

MR MAXWELL: Yes, Your Honour. And the Court of Appeal doesn't say that, as Your Honour will see in examining the judgment.

Our answer would be in two parts, Your Honour. We would say that, at worst, this is an allegation about apprehended rather than actual bias. That is to say, it is not asserting that Her Honour was actually improperly biased in favour of, but that in the conduct of her court she favours police and the DPP - the kind of comment that is made elsewhere in the book: the prosecution get a dream run or that is my phrase but, or as we will come to it, immediately, "Magistrate Heffey, a police Magistrate", someone in front of whom the police get an easier time than they do elsewhere. And again, in our respectful submission, it is a matter of notoriety that the same case can be dealt with differently by Judge A as compared to Judge B, Magistrate A Magistrate B, without suggesting that either of them is doing anything other than his or her duty; but that the assertion is, prosecutors get a better run in front of Judge A than they do in front of Judge B, who tends to be more rigorous in putting them to their proof - something along those lines. That is a comment which is not suggesting either of them is actually biased and is making a decision otherwise than in accordance with the facts, but rather, that there is an impression in the eye of the fair-minded observer in court that there is favouritism. So it is in that sense, we would say only in that sense, that the word "bias" could be read. The word "guide", is certainly open to the meaning that there is active intent involved. I concede that, as a matter of the ordinary use of the word, it could. We respectfully submit that it doesn't here, but carries the connotation that there is guidance going on from the Bench. A neutral word would be "lead" - "lead"

or "cause" - "lead the jury to a guilty verdict" or "cause the jury to reach a guilty verdict". But "guide" - I don't submit, Your Honour, it is not capable of that more serious imputation which is that there was a conscious guidance going on.

HIS HONOUR: How do you say I should treat that paragraph, because you have put it that it was wrong of the Crown to leave that paragraph out, and it should be expressly taken into account in considering the two lines which the Crown did rely on? I mean, on one view it might be said that - - -

MR MAXWELL: It gets worse.

HIS HONOUR: The Crown weakenss its own case by leaving that paragraph out. It would have strengthened it, had it added it.

MR MAXWELL: Yes, Your Honour. But we don't shrink from reference to the following paragraph, because we have endeavoured to make clear from the outset none of these words can be taken in isolation; and if it is an admission against my clients it is one that has to be made, that it is perfectly clear that what is referred to in the sentence complained of is what is explained by what follows, and no sense of reading could leave any other conclusion. We are stuck with that, because that is the way this book is written. He doesn't make unsupported allegations. He supports them.
Now, Your Honour or an informed reader might say "Well, I don't think the Court of Appeal went quite that far. Yes, they set aside the conviction. Yes, they said that it was such a miscarriage of justice that a retrial wasn't possible" - and Your Honour knows better than I do

about what that says the quality of the direction in the particular circumstances. But at least is he saying what he relies on in vindication of himself, and he says - though the Court of Appeal would not say it, except in the clearest case - "Well, there you are. She pointed the jury in a particular direction by making an anti-defendant ruling, that being the inevitable effect of the ruling, if not its intent; and the Full Court was persuaded that the conviction could not stand.
So I accept what Your Honour puts to me. If the word "guide" makes it worse, well, so be it, because we say

that this is - this is that kind of book, where the foundation, in every instance, is provided for the reader to see and to check.
Your Honour, we move finally, second but finally, to Magistrate Heffey, particular (i) on page 4. If Your Honour will go to 205.

MR MAXWELL: Your Honour, it is convenient to start at the beginning of the section, where - and this is, as Your Honour will recall, the committal on the perjury charge, and it begins "His criticism of the Magistrate" in the third paragraph. "She is perhaps best described as an extremely rude and stroppy old thing". Those are offensive things to say; that is accepted.

HIS HONOUR: Your client doesn't seem to think so. It seems to be a matter of great mirth. Yes, go on.

MR MAXWELL: But it is not, and it is not said to be, scandalising the court. Your Honour would have appeared before judges or magistrates to whom the description "extremely rude" would be applicable. Those things happen in the course of the administration of justice for

all sorts of different reasons.
He goes on to say, "She also seems to have an innate ability to bend and break rules as she sees fit" - that is not complained of - "But sometimes this seems to occur because she doesn't seem to know what she's up to and she instead appears to muddle her way through things. Her muddled up nature was evident early in the piece when she made it clear she had no idea about the court's own procedures and protocols of taping proceedings. When I raised the issue of the non-provision of the earlier transcript, she said that the tape recording was a 'private' matter between me and private company and 'it's up to you, Mr Hoser, to pursue that and pay for it.' When I explained to her that it wasn't and that the government paid for it and had through Coate" - who was then a Magistrate, now a County Court judge -"ordered I get a copy, Heffey wrote it off saying 'That doesn't matter' and 'I'm not going to hear you further on it'. With her callous attitude to the truth when it came to the simple matter of the earlier tape proceedings" - I think I am right in saying none of this is complained of - "and the similar way she ruled against me, I could see that anything resembling a fair trial/committal in front of her was effectively impossible. Whenever she got her knickers in a knot over the facts, which was quite often, she would try to get over it by moving proceedings along with comments like 'OK, now move on'. You could describe it best as the 'wipe your shortcomings under the carpet

mentality'. Another of her bad habits was misquoting, or quoting out of context, although this habit seemed deliberate on her part". And then we come to the part

complained of: "Although at the time the committal started I didn't know of Heffey, I was quickly told by Ben Piper and others that she had a long-standing reputation as 'a strongly pro police Magistrate'".
We say, of that, exactly what we said before, Your Honour, about the perception which does, as a matter of notoriety, develop about particular judicial officers, that they appear to favour, that is to say, give an easier time to prosecutors and prosecution witnesses than defence counsel and defence witnesses. "In hearings in front of her, it can come out" - and he is here relating what he has been told - "that police have committed the most serious of crimes and it seems she would still not do anything about it. Readers may also seek to refer to the police shootings section of Victorian Police Corruption" which is book 1, and the relevant part is chapter 23, at pages 395 to 438. In other words, he draws attention in that other book to the conduct of Magistrate Heffey in dealing with investigations into police shootings.
Another example of calling in aid evidence which the author says supports the assertion that he makes. "Complaints about Heffey's running of courts and her decisions have also appeared in the mainstream media. These usually follow her routine siding with police after shootings, or death in custody matters", and the submission about routine siding with police is just the same as before; that is, a perception which lay people in particular, but lawyers as well, can and do sometimes form about certain judicial officers, based on observation of them over a period of time.
If it is right, in our respectful submission, for all

the reasons that the courts of this country apprehended, bias is examined so carefully, if it is right that certain judicial officers behave in a pro-police way, it should stop, as a matter of public policy. And if someone has been a defendant before such an officer, says that that is what his perception was and for reasons which he gives, that is a matter for investigation, not prosecution.
Further, by way of further substantiation, Mr Hoser deals at the top of 206 with - sets out two examples of matters where he says the magistrate went badly wrong, one concerning a death in custody, and what the author says in

the second half is "In spite of overwhelming evidence at the inquest to show that correctional services and human services department staff were implicated in the death, Heffey as coroner dismissed this possibility...". "Then there is a reference to the death of a 16-year-old girl that died as a result of a high speed police chase", and the mother condemned Magistrate Heffey "after she handed down her coronial finding that cleared police of any blame for causing her daughter's death.

Your Honour, against that background, will then see at the foot of 20 the second paragraph complained of - this is (ii) at the top of page 5. We have already dealt with the notion of a policeman's magistrate; indeed that is the heading of the whole section. And then the confused and scatterbrained, and the questioning of the selection criterion, we have already referred to the introductory section in which Mr Hoser says what is for him the basis of that assertion, that she seemed muddled, she doesn't seem to know the rules and rather than deal with matters of difficulty she says, "Well, let's move

on". Again, that is not scandalising the court. That is a comment on observed behaviour of a judicial officer, and if it were true, as it is asserted, that she - let me start that again. If she appeared to a defendant in court not to know the rules, not to be in control of the proceeding in her court, that would be a matter of legitimate concern to that defendant. If in truth she didn't mow the rules, that would be a matter of legitimate concern to the system. Again, it is a matter proper for investigation, not prosecution.

Page 208, and this concerns the last paragraph, yes - again, before I deal with that, Your Honour, we might make this point: these are little bits in a continuous narrative, as Your Honour has now seen at great length. Indeed, for the readers of this book it is a somewhat awesome task even to find those passages, that is to say, this is so long and so dense, and detailed as only a person narrating his own grievances can do, that it is calculated not, we would say, to - or those features reduce or minimise any tendency to affect the administration of justice, because you have got to be patient enough to get to page 470 or whatever it is to find - you have got to wade through enormous detail, which is of great interest to Mr Hoser, and he hopes of great interest to readers, in order to get to the bit which will enable you to understand why it is said, ten pages later, that this was a wrong ruling.

This is needle in a haystack stuff. This is not a big banner saying "Corrupt judges. Sack them". This is a book which says "Victoria Police Corruption", on the cover. To find out about the criticism of the judges you

have got to read the whole exhausting narrative of these various proceedings and work out, as Your Honour is having to do, which bit of this drama, the particular concerns, and how it relates to other bits of the drama, and exactly who the players in the drama are.
So at 208 we are looking at a passage at the foot of the page, but dealing with, once again, a series of events which is described earlier on the page. I am not sure that I am quite correct about that, Your Honour. There is an issue discussed on those pages about the bag of tapes and would Mr Hoser sign an indemnity in respect of them; and he ended up with the tapes and no indemnity was signed, so it is not correct that what follows relates to that. As I would understand it, the ruling to which reference is made in quotes at the foot is a ruling that there would be no adjournment to enable Mr Hoser to seek legal aid; and the magistrate, according to this account, said "She was going ahead because I had failed to notify the other side of my intention to seek an adjournment pending legal aid. That her statement was an obvious lie was demonstrated by the multiple letters in Hampel's files" - she was the prosecutor - "and Heffey's own court records. Then again, I suppose it was a case of not letting the truth get in the way of a predetermined outcome".
Your Honour will - - -

HIS HONOUR: So the lie was what proposition?

MR MAXWELL: The lie was that he had not notified the other side of his intention to seek an adjournment. He had sprung this adjournment application on the prosecution then and there, and the magistrate said "Well, I am not going to

adjourn it. You didn't give notice of this." Your Honour, this is dealt with not on 208 as I suggested, but 206, under the heading "No Lawyer".

HIS HONOUR: Yes, I see.

MR MAXWELL: "I opened by seeking the matter be dropped or adjourned until the Legal Aid Commission came up the goods in terms of funding a lawyer for me. You see, they still refused to fund a lawyer. And then, "I referred to Keating's words to me on 2 May 1994 and quoted from the transcript of the taped phone call." That is, as we have

seen elsewhere, the alleged assurance by Keating. It was mentioned in the chronology that the committal wouldn't go ahead if he wasn't represented. Then, through his counsel, Ms Hampel, "Keating denied having made such an undertaking and argued that the case go to committal (and trial) there and then. In violation of accepted procedure, Heffey accepted Hampel's word from the Bar table that Keating had not made such statements" - his point being that, at the bottom of the page, "Heffey took Hampel's word and dictated that the committal proceed. I asked for Keating to go into the witness box to state that he had never made such an undertaking (re me being represented). Heffey refused".
Then he makes a point earlier on 208: "Heffey insistence that the committal go ahead in spite of my non-representation also flew in the face of accepted protocol, particularly as I had made it known I sought it" meaning legal aid. "For example on 12 June 1987 another man facing a committal at the same court fronted" a different magistrate. "Like in my case, the LAC had, without a reasonable explanation, withdrew legal aid

funding for the defendant. Cotteral stated that should could not imagine how the upcoming case ... 'could proceed without legal aid'". And it didn't proceed. So he is saying, "Well, I was told it wouldn't go ahead if I didn't have a lawyer; now they are denying that undertaking. Then in any event, undertaking or not, it shouldn't have gone ahead because it is a serious charge and I should have legal aid, and look what happened in another court," where someone was treated as, he would say, fairly.
Then thirdly, is the point that there was no prior notification, and, as I put to Mr Lee yesterday, Your Honour, it would have been an easy matter to check whether there were letters in the prosecution file giving notice of an application, or in the court records.
Mr Hoser asserts that he did give notice, or his solicitor did, and if that's right, Your Honour would understand his disbelief at it being said that he hadn't given notice. But as you know, Mr Lee said that that matter hadn't been investigated.
If it is right, as asserted, and it is not said that it is false, then there was evidence which meant that the learned magistrate's ruling was simply wrong on the facts. He had given notice, but the magistrate concluded that he hadn't. And his comment is, "Well, don't let the truth get in the way of a predetermined outcome." That is a strong statement to make, that one who feels, in our respectful submission, not unreasonably aggrieved about being required to go on unrepresented in a committal on a very serious charge.
Then the last matter about Magistrate Heffey is at

212. Again, it is the line at about point 7 of the page,

beginning, "Oh, and just in case you haven't worked it out, my committal to stand trial had clearly been well determined before a word of evidence was given". That needs to be read in the light of everything that has gone before, starting at 205, but in particular, specifically, what appears up the page under "One Charge Down", where there is a reference to one of the charges being falsely swearing "that a set of lights were stuck on red. Keating's admission in the witness box, reported in perpetuity on an official transcript, effectively cleared me of that charge". And there is a criticism of the Magistrate, last sentence in that section, "But perhaps I should make known that while myself and the DPP side were aware of this, Heffey, by her improper refusal to demand to hear the tape wasn't, and like for the other charges, she eventually committed me to stand trial on the lot". Then he goes on: "Minor Obstacles" "In terms of ordering of witnesses, it is usual for the informant (in this case Keating) to go first. That wasn't to be. Instead it was a DPP clerk ... When I objected to this improper ordering of witnesses, Heffey sided with the police. They could do as they pleased", and that is an example of the apprehension that I was referring to before: I, the defendant, take what I think is a reasonable point, that is, the informant should go first. The informant says no. The prosecutor says no. Someone from the DPP will go first, and the Magistrate "sides with the police" or rules in favour of the police. If that happens repeatedly, then the perception can be created that there is an undue favouring or undue latitude given to the prosecution. It is only in that context that the matter complained of then appears

about "my committal to stand trial had clearly been predetermined". In other words, that is a conclusion based on a series of matters about which complaint is made in the course of this section on that Magistrate.
We lastly come to Magistrate Adams, and there are two matters - - -

HIS HONOUR: Madam, I will ask you to leave the court if you wish to continue making a joke. I will ask you to control yourself then, please. Yes, go on.

MR MAXWELL: Your Honour, Magistrate Adams: there is the photograph and the comment on the back cover of book 2,

and this is the last particular of book 2, on page 5 of the pleading. It is the whole of the passage underneath the photograph -the photograph is complained of - "The Magistrate that the Cop said he Paid Off". "Following the 1995 publication of policeman Ross Bingley's confession that he had paid off Hugh Francis Patrick Adams to fix a case, some of his other rulings that seemingly flew in the face of the truth or logic have come under renewed scrutiny. This includes the bungled inquest into the murder of Jennifer Tanner, which police falsely alleged was suicide." Now, the reference there to the 1995 publication is to the book, the Hoser Files, and Your Honour will find the relevant discussion at pages 70 and 71 in the transcript of what Mr Bingley said. Does Your Honour see the transcript?

HIS HONOUR: Yes.

MR MAXWELL: And Hoser asks a question - - -

HIS HONOUR: Sorry, what is this that is being quoted?

MR MAXWELL: Well, this is - - -

HIS HONOUR: This is not a transcript. This is a conversation,

is it?

MR MAXWELL: I beg Your Honour's pardon. It is a conversation, yes. It is not - but as I am instructed, it is this, this is the 1995 publication - - -

HIS HONOUR: And is this a conversation between - - -

MR MAXWELL: Hoser and Bingley.

HIS HONOUR: Hoser and Bingley, yes.

MR MAXWELL: And Bingley says, Hoser, at point 2 of 71, asks Bingley, "Did you know I'd get found guilty from the word go?" Bingley: "Well, I paid him off, didn't I, so of course I did." Hoser: "The penalty was a bit severe." Bingley: "We worked it out before. Three months, six months, nah, bit too much. We settled for one." "Bingley repeatedly asserted that he had paid off the magistrate".

HIS HONOUR: Sorry, you are on page?

MR MAXWELL: 71, it is towards the end of the conversation. Now, as Your Honour knows, and I don't think I have emphasised this in the course of submissions, no charge was ever laid in respect of the Hoser Files. It records a

conversation, as Your Honour has just seen, in which a person purportedly says "I paid the magistrate to reach a certain result". It is hard to imagine a more serious allegation of corruption than that. Your Honour, just to fit this matter into the already complicated chronology, would Your Honour go to page xx.

HIS HONOUR: Of?

MR MAXWELL: Book 2. Your Honour will see in the middle of xx, "21 December 1988" - so this is a long time ago - "Hoser convicted and gaoled for six weeks on charges of assault and theft over the Bingley/O'Shannessy matters. Policeman Ross Bingley admits to paying off Magistrate Hugh Francis

Adams to fix a case. Court transcripts and associated documents corroborate Bingley's confession. Conviction overturned on 27 February 1990."
Would Your Honour note at the top of that page, "7 March 1988: , "Policeman Ross Bingley tells Hoser he is falsifying charges ..."

HIS HONOUR: Sorry, you have lost me again. On what page - - -

MR MAXWELL: xx.

HIS HONOUR: In fact, there is a reference to it on page xx. Yes, xx, which - - -

MR MAXWELL: Right in the middle, Your Honour. "21 December 1988, "Hoser convicted and gaoled ... Policeman Ross Bingley admits to paying off Magistrate Hugh Francis Adams to fix case. Court transcript and associated documents corroborate Bingley's confession. Conviction overturned on 27 February 1990", and that is mentioned in its place in the chronology on xxii, and I was just going to draw Your Honour's attention to the entry at the top of page xx, "7 March 1988: Policeman Ross Bingley tells Hoser he is falsifying charges of assault and theft against Hoser. Key witness to be a police protected criminal named Phillipa O'Shannessy as well as two other police protected criminals". Hence the name, hence the description, Bingley/O'Shannessy matters."
As far as the solicitor having conduct of this proceeding was aware, Mr Adams took no defamation action in respect of that publication.
Then, Your Honour, at the top of page 6 of the pleading is the last particular, and the only one arising out of book 1 - - -

HIS HONOUR: That particular passage on the back of the page?

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: In stating "Following the publication of Bingley's confession", the statement being read is not that there was a document which constituted a confession, which was published somewhere in 1995; rather than being read as "it is my own publication in which I assert that I have had a conversation with him in which he made the confession", it would be open to that interpretation. Indeed, that would probably be the more natural interpretation of it, would it not?

MR MAXWELL: In our respectful submission, is this page were viewed in isolation, possibly. But read where it should be read, as the last page of the book, the reader would know, having started with the chronology - - -

HIS HONOUR: But unlike all the other passages you have referred me to, it is deliberately not put in a context. It is highlighted as the very last item on the document, given a page to itself.

MR MAXWELL: I accept that, Your Honour. It doesn't, by itself, direct you to anything. But in our respectful submission, it has to be assumed, or it ought, in fairness, be approached on the basis that the book is read from cover to cover, and that the reader gets to the comments about the magistrate being informed by everything that has gone before, including the references in volume 1 to the same matter, being that which we are about to come to.

HIS HONOUR: I would have thought the fact that it was the inside cover, front or rear, of a publication, would mean it was a document, a particular passage, which would be highly likely to be read by people who may well not read the contents in the text; and so it would be then seen to

be a conclusion which is reached which may well be capable of being read by the casual glancer, as it were, in the way that I have suggested.

MR MAXWELL: Yes, Your Honour. I don't dissent from that proposition, with respect. What I do say is that, accepting that it might be read as such by the casual observer, because it is not apparent on the face of it to what confession reference is being made, no inference would be drawn, or that is to say it would be a matter of

- it invites inquiry, is what I am trying to say. What confession? In what context?

HIS HONOUR: Well, does that help you, because if it invites speculation as to what it means, it might well lead the reader to the conclusion that there has been some sort of official document in which the statement by the police officer constituted a confession, which had some sort of official status in declaring the magistrate had in fact been paid off.

MR MAXWELL: Yes, Your Honour. I understand exactly how that is put, with respect. Our submission, however, is that there is no reason for, or no basis for drawing any conclusion about the status or character of the confession. When I said "invites inquiry", it means that you would not know, without looking in the book or books, where the reader would naturally go, to find out what kind of confession it was, and that you wouldn't, on the face of it, assume that it was an official tape recorded confession. But this is a bald assertion by the author, and it is calculated to excite the reader's interest because of the seriousness of the allegation and its implications, and the reader wouldn't be able to jump to any conclusion about what kind

of confession it was, but would rather, if interest is attracted in the first place, go to the book to find out - in other words, it is a trailer; it is something that is intended to, on this view, catch the eye, but only for the purpose of getting the reader into the book. Once in the book, the chronology will make clear the people involved, and then the careful reader, who is trying to find out what sort of confession this was in order to make some judgment about it, will find that it is a confession mentioned in an earlier book of Hoser's consisting of a conversation.

HIS HONOUR: Does that not make it calculatedly misleading?

MR MAXWELL: No, Your Honour, in our respectful submission, no, because it is a proper use of words to say of the conversation recorded in the Hoser Files that Bingley confessed that he had paid the magistrate and that the Hoser Files was a 1995 publication on that confession. In my respectful submission, the word "confession" may be regarded more as a term of art to lawyers; but to ordinary people it means that someone has "fessed up", admitted, which is exactly what the earlier book records. That is exactly what he did do. He told Hoser, according to Hoser's version "Yes, I paid him. We worked it out between us". That is not, in our respectful submission misleading. It is accurate.

Your Honour, then the final particular concerns page 57 of book 1. It is the same picture of the Magistrate, and reliance is placed on the first three sentences of the passage. Again, that appears, in our respectful submission, to be unaccountable given that, for reasons we have already said, this must be read in context. It is

plain that the author is referring to a number of matters which, in his view, throw into question the performance of that Magistrate. The first of those is described as a controversial decision. That could hardly be scandalising the court. "In a controversial decision he let corrupt policeman Paul John Strang walk free from court after he pleaded guilty to charges relating to planting explosives on an innocent man. He then puts an suppression order on the penalty". If the words don't have the requisite tendency, Your Honour wouldn't get to the question whether there was any practical, as a matter of practical reality, any likelihood of damage to the system. It is just, on the material there, said it is open for someone to describe it as a controversial decision.
There is plenty of comment, every day, in the press about what are perceived to be lenient decisions about those convicted of serious crimes.

HIS HONOUR: When it says "in a separate matter" that rather suggests a separate case, does it not?

MR MAXWELL: Yes, Your Honour, and it was a separate case.

HIS HONOUR: Well, did the policeman admit to paying a bribe to Adams in the case?

MR MAXWELL: That is the same matter.

HIS HONOUR: Yes, I know. But that is not an accurate statement, is it, of what is asserted in the passage to which you took me, namely, that a conversation which was not part of the proceedings occurred between the two of them in which an admission was made by Hoskins? On that passage, as it reads at page 57, would it not be open to a reader to conclude, it having just referred to a controversial decision, that "in a separate" matter refers

to another court matter?

MR MAXWELL: Your Honour, again, we would respectfully rely on

and ask Your Honour to discount the lawyer's familiarity with the term "matter"; that is to say, to Your Honour and to me, if someone says "in a matter", that is a term of art and means "in a proceeding". "I am in that matter". "I had a matter before Judge so-and-so". But in ordinary parlance, and in the pen of a lay person, it just means a topic, subject matter. It doesn't mean, as you, Your Honour, and I would understand it to mean - "in the course of a separate proceeding a policeman admitted". In our respectful submission it just means "I am going to refer to a separate matter".
That is a proper use of English, in our respectful submission, and it means no more than that "I am going to refer to something else, a separate matter, not connected with what I have just talked about". "A policeman admitted to paying a bribe to Adams to have an innocent man sentenced to gaol". But, with respect, even if that were capable of the interpretation, the sting is that there was an admission. He has published that four years earlier. He hasn't been prosecuted for it, hasn't been served for defamation on it. He is just referring back, he is republishing the same matter. If it wasn't calculated to damage the administration of justice in 1995 how can it be calculated, in 1999, prosecuted in 2001, to damage the administration of justice?

HIS HONOUR: Well, it would have been put in part of the way beyond doubt as to what it was in fact saying if it says "A policeman admitted to me ..."

MR MAXWELL: I accept that, Your Honour, and it may be a fair

criticism of this book that there is a want of precision of language.

HIS HONOUR: Well, that might also go to the bona fides, mightn't it?

MR MAXWELL: It might.

HIS HONOUR: If it is drawn in a way so as to give an impression which you say is quite wrong.

MR MAXWELL: Yes, Your Honour. Well, I can't put it any differently than to say in our respectful submission it isn't to be read in that way, and accordingly, it is not to be read as having disingenuously been intended to create an impression of a different setting for the admission from that which is in fact deposed to in the book. What is important, in our respectful submission, on the good faith point, is that the book, where the admission or confession is set out, doesn't overstate it.

As Your Honour pointed out to me, it is just recorded as a conversation, and that is on the public record. It is on sale. It is available.

HIS HONOUR: But it is not in this book.

MR MAXWELL: I think Your Honour is correct, that that is not repeated verbatim in this book. But in our respectful submission it would be imposing a high burden on an amateur author to require that things he has previously said, and have not been challenged, have to be rehearsed in another book dealing with subsequent events already at great length; that it is a proper - it is just an academic referring back to something that he or she had written in an earlier article.
He refers at length in his introductory pages to these other books, and in our respectful submission there

can be no criticism of, as it were, incorporating by reference what has been said fairly, that is to say not in an overstated way, in the place where it is; and that is made more, even clearer, on the back cover where there is the reference to the 1995 publication. In other words, he is expressly directing the reader to something written in 1995 and the reader will want to find out what that was and where it is, and accordingly, there is no basis, in our submission, for an inference of bad faith or trying to make this more than deliberately overstating things.
Your Honour, the balance of the discussion of Magistrate Adams deals with separate matters; one concerning the Jennifer Tanner inquest, and his finding in that matter having been quashed and overturned. That is a proper matter for comment. Those Tanner proceedings have been matters of extensive public discussion.

HIS HONOUR: Well, those matters are not alleged as part of the Crown - - -

MR MAXWELL: That is so. They are not. But it is to be seen that this is part of a sincere endeavour to identify those persons, which in the view of the author should be called into question for their discharge of their duties.
And then finally, a reference to criticism of the same Magistrate for his handling of other cases. In our respectful submission, as we have said on other points, if there is credible evidence of a policeman having paid off a Magistrate, that is a matter of great seriousness and worthy of investigation. It is, in our respectful submission, paradoxical that, it not having been investigated, as we understand it, equally not prosecuted at the time when the substantive allegation is made, there

is now, effectively six years after the original publication of the Hoser Files, a prosecution for the re-publication of that serious allegation.
Your Honour, those are all the submissions on the context.

MR GRAHAM: Your Honour, if Your Honour pleases, before my learned friend turns to his submissions based upon the decision of the High Court in Lange and the Australian Broadcasting Corporation, I would seek to put to Your Honour a submission that this is not the time for that matter to be dealt with by Your Honour.
I say that for two reasons: one is the very nature of the argument. It is not a suitable matter to be dealt with by Your Honour in this context of a no-case submission. Secondly, it is a matter going to a defence to the charges, which should be dealt with by Your Honour in the context of the whole case, and not at this stage.

HIS HONOUR: If I was persuaded, though, that Lange meant that criticisms of courts and the judiciary in these contexts were covered by a constitutional protection, then it would follow that there could not be a case to answer on that basis, wouldn't it?

MR GRAHAM: Well, Your Honour, I take you back to my first point, that Your Honour should look at the question of the applicability of the Lange principle in the context of the whole case, not in the context of half of it. If Your Honour pleases.

HIS HONOUR: Yes. What do you say, Mr Maxwell?

MR MAXWELL: Your Honour, we respectfully adopt what just fell from Your Honour. There is no basis in logic or principle for the distinction my learned friend seeks to draw about

the whole of the case. With respect, Your Honour has absolutely understood how we put the Lange point, which is that it goes to the scope of this offence, and we have put the case in two ways. Properly defined, contempt is only committed if there is a real likelihood of damage to the administration of justice - - -

HIS HONOUR: Can I just interrupt to say this: it seems to me that the answer to it is that what we are concerned with, at the moment, is the Crown case at its highest.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: If you have to accept the Crown case at its highest in determining the Lange test, then it must follow that on any proposition that the Crown would want to argue, insofar as Lange is concerned, and whether it should or should not apply, this would be a time when the Crown case was most likely to demonstrate that there could be no immunity by virtue of Lange.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: Yes. I will hear you on it. It may well be that, depending on what occurred in the case, it was an issue that might well re-emerge. I don't say that - - -

MR MAXWELL: No, Your Honour. I accept that.

HIS HONOUR: It follows that it could only be relevant at the time of a no-case submission.

MR MAXWELL: Yes, Your Honour. Well, Your Honour, if I might then start the submission. It wasn't intended to be lengthy. I will try and finish this afternoon on the point.
As I was saying a moment ago, our primary submission, as set out in the summary at the start, is that the offence is narrowly defined at common law, and it is only

committed if there is a real risk of actual damage to the system of justice. If we are wrong about that, and the common law definition is broader and would allow - sorry, and we say on the first limb, this publication or these publications don't meet that requirement so the charge should be dismissed - if the test is broader, and something less than a real and definite, or an imminent danger, to use the American language, of actual damage to the legal system is too strong - I beg Your Honour's pardon - if the common law offence is not as stringent as that, but you can commit it by conduct which falls short of that, then we say Lange requires that it be limited to that because that, in the words of the High Court, is the extent to which the law is "appropriate and adapted", to the legitimate object, which is to protect the administration of justice, and that you would only intrude on the freedom to the extent necessary to prevent actual damage about to occur.
In that way, applying what Lange said about defamation, to contempt, the law of contempt pro tanto is invalid because it offends the freedom and is not appropriate and adapted to the object that the particular

law is designed to serve.
If I might, in that regard, take Your Honour immediately to Lange, which is in the folder at tab 17, and at tab 17, Your Honour, if I might shortly Your Honour refer to the headnote - this was a matter which had gone to the High Court. It was removed from the court of first instance under the Judiciary Act, and then a question was stated. The question was, the case was reserved for the Full Court about the defence made by the Corporation, and

Your Honour will see on the right hand page, 521, about point 6 of the page, "By paragraph 10 of the its amended defence, the Corporation pleaded the matter complained of was published pursuant to a freedom guarantee", et cetera, and the question was is that a good defence in law? "Held" - as Your Honour can see from the headnote, "The constitution protects that freedom of communication". I won't read that in order to save time. "That freedom is not confined to election periods". And then 2 - and this is really the critical point - that "the freedom does not invalidate a law whose object is compatible with the maintenance of the constitutionally prescribed system of representative government, so long as the law is reasonably appropriate and adapted to achieving that legitimate object".
If Your Honour would then go to 561, in the joint judgment, and Their Honours say at the beginning of the last paragraph on the page "The freedom of communication which the constitution protects is not absolute", referring to Nationwide News which is in Your Honour's volume at tab 22, and also to Theofanous which is not. "It is limited to what is necessary for the effective ... (reads)... by the constitution". The last two lines: "The freedom ... (reads)... if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of government or the procedure" - leave that out. "The second is that the law is reasonably appropriate and adapted to achieving that legitimate object and end".
To respond to what Their Honours say, we respectfully

submit as follows: on the first condition, the law of contempt is, to the extent that its object is the protection of the administration of justice, compatible with the maintenance of the system of government. So the law survives the first test. There might be something

which was just incompatible with that system and would be wholly invalid. We accept that the object of the law of contempt, in this instance to protect the administration of justice against damage, is compatible with the system of government. Indeed, given that the judicial system - and we have in mind here, of course, the State Judges exercising federal jurisdiction - that is the judicial arm of government. It is essential to the system of government that the administration of justice be protected.

The second condition is that the law is reasonably appropriate and adapted. In our respectful submission, the law of contempt is only reasonably appropriate and adapted to that end to the extent that it does that, and no more; that is to say, it operates to punish or deter publication, the effect of which would be to damage the system of justice in the way we identify in paragraph 25 of our outline, that is, preventing judges and magistrates doing their job because they won't be able to decide cases fairly and free of external pressure; or (b), having the result that members of the community won't obey orders of court.

Those are the critical matters in the integrity of the justice system, and the law of contempt by scandalising is valid only to the extent that it applies to publications which have that tendency as a matter of

practical reality.

If the common law, as I submitted earlier, goes beyond that, such that my clients would otherwise be liable to conviction for scandalising the court in respect of these publications, then in its application to them, or to conduct of this kind, the law is invalid because it is not appropriate and adapted to the legitimate end; that is, it is not an application of the law which is necessary to prevent that damage, because we say, in 26, the conduct in question here has no such tendency.

The words may have a tendency to bring individual persons into disrepute, but our case, throughout, has been that the conduct has no tendency, as a matter of practical reality, to cause either of the effects referred to in 26, and the justice system functions as well today, as perfectly or imperfectly today, as it did in 1995 when the first book was written, and in 1999 when the relevant books were written.

Now that Your Honour knows what kind of book it is, and the way it is written, put together, justified, and the perspective from which it is written, we invite Your Honour to hold that it is not open, as a matter of fact, to find that it has any such tendency to cause damage as a matter of practical reality. And that conclusion means either that no offence is committed

because the offence is properly defined narrowly; or, if it would otherwise be committed, the offence has to be read more narrowly because of Lange.
I should draw Your Honour's attention, in Colina v. Torney, to the judgment of Justice Ellis. At paragraph 33 this argument was made and - - -

HIS HONOUR: Does the statement of law in Lange really, though, add anything to what is already the law with respect to contempt, and the balancing of the two factors? I mean, if you inserted the principles stated in Lange into some of the early judgments which referred to the dichotomy between freedom of speech on the one hand and maintaining the court's administration, you don't really need to be referring to Lange at all, do you? It is just part and parcel of the same principle.

MR MAXWELL: With respect, Your Honour is absolutely correct. But what Lange has done is to give added force and legal status to the freedom of speech part of the - it is easy enough to say, well, there are competing interests here. The courts have said that. Indeed, they have gone further and, as we have pointed out, emphasised the freedom. In that respect what Your Honour puts to me is right. What they have really done is they have said the law should deal with this, but it should than trespass into the area of debate. As Your Honour says, Lange says that. We only make the Lange argument against the possibility that the common law, taken by itself, would apply no conduct, whereas we say, applying a stricter Lange test, it wouldn't.

HIS HONOUR: I say that without considering the question of whether the reference to government and political matters should be extended to include legal matters - - -

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: Or the operation of the courts, and that may well be a separate issue. But if you are right that government and political matters should be taken to extend, then in a sense Lange is saying nothing else. If it doesn't extend

to that, then you fall back to the original statements which were made in the courts without a constitutional basis.

MR MAXWELL: Absolutely so, Your Honour, with respect. And the House of Lords or the Privy Council in Ahnee said as much.

HIS HONOUR: They agreed.

MR MAXWELL: We don't need to worry about what the Constitution says about freedom of speech because that is taken into account in defining the offence. So this is an alternative submission and, Your Honour, the conclusion reached by Justice Ellis is very much to the effect of what Your Honour just put to me.
I will just give Your Honour the reference - paragraph 33 in Torney, tab 6. It doesn't affect His Honour's dealing with the matter, and he concludes that the law of scandalising doesn't infringe the freedom of communication within the Constitution.

HIS HONOUR: Paragraph 33.

MR MAXWELL: 33, bottom of page 12.

HIS HONOUR: Right.

MR MAXWELL: We say that you don't ask the question about the law of scandalising in general. You test it, more accurately, by saying the law of scandalising in its application to this conduct. But the answer, in all probability - well I withdraw that.
On our first submission, it is unnecessary to get to Lange because the offence, properly characterised, is defined as narrowly as Lange would have it and, for that reason, the offence has not been committed.
There should be a reference, for completeness, to Hammersley, which is in tab 12 - not a case we put in, but

there is a discussion in the context of contempt of court about the implied freedom, a decision of the Full Court of Western Australia, and - - -

HIS HONOUR: Sorry, what tab is that? Or don't I - - -

MR MAXWELL: That is tab 12 and, Your Honour, that concerns a contempt of a quite different kind, being breach of the implied undertaking with respect to discovered documents. So Your Honour should know that it is there.
The last matter I wanted to give Your Honour, before the adjournment, is a copy of the extract from Pennekamp, which is footnoted. It is only an extract about the clear and present danger notion, which we say is a useful guide in trying to define what is critical about the vice of scandalising publications, and I want to give Your Honour copies of the Crown and Kopyto, which is in the list but

not in - - -

HIS HONOUR: What is the name of that case?

MR MAXWELL: Kopyto, K-o-p-y-t-o, a decision of the Ontario Court of Appeal. It is referred to in tab 29, and I will hand both of those up to Your Honour, that is, Pennekamp and Kopyto. If Your Honour what permit me, because this will be the end of my submissions - - -

HIS HONOUR: Yes.

MR MAXWELL: To refer Your Honour just to two parts of Kopyto. Your Honour, at 52 - and this is relevant to our - might I mention, first, what Justice of Appeal Corey says at 14 to 15. There is a discussion similar to those to which - - -

HIS HONOUR: Sorry, pages 14 to 15?

MR MAXWELL: 14 to 15, "The importance of freedom of expression and hyperbole" - this is point 7 on page - - -

HIS HONOUR: Don't take me through it at this stage; just

identify the passages.

MR MAXWELL: Thank you. There is a reference at page 52, in the middle of the page, to surrounding circumstances. As we say in paragraph 16 of other outline - does Your Honour see the paragraph - "The social, economic and political conditions existing ..."?

HIS HONOUR: Yes.

MR MAXWELL: All of that paragraph. Then there is discussion, finally, in the minority at 78, the first full paragraph, about the need to show, for the offence, serious, real or substantial risk or prejudice to the administration of justice. 78, in the first paragraph on the left-hand side "It was essential for the Crown ..." - that paragraph.

HIS HONOUR: Yes.

MR MAXWELL: Your Honour, for those reasons, in our respectful submission, Your Honour should be satisfied that there is no case to answer.

HIS HONOUR: Mr Graham, this was originally, I noticed, listed as five days. It was then changed to two days. What is the likely timetable?

MR GRAHAM: I would have thought this case would go into next

week, Your Honour. But I had not expected there to be a submission of no-case that lasted for over a day on one side, which will take me a day to respond to, followed by such evidence or further evidence, evidence as may be led by the respondents, followed by final addresses, which perhaps will more shortly cover a good deal of the ground covered in relation to this submission.

HIS HONOUR: Well, the first issue was the no-case submission. You would expect to take the better part of tomorrow in responding to that?

MR GRAHAM: Yes, Your Honour.

HIS HONOUR: All right. The question of the timetable after that, I will obviously - matters of substance have been raised. I will obviously have to rule on that. The question of how long I would take to rule on that is a matter which I will turn my mind to when I am closer to the end of the submissions on the no-case. But it may well be that we will all need to come along armed with diaries as to where we go from here.
I should just mention that, tomorrow morning, there is a Council of Judges meeting which I don't expect will go beyond 10:30; but for the convenience of parties, I advise that it is possible that it might go a bit past 10:30, in which case I will start just as quickly as I can. There may be a ten minute delay, or something of that sort, but I will try to avoid that.

MR GRAHAM: Thank you, Your Honour.

HIS HONOUR: All right. We will adjourn now until 10:30 tomorrow morning.
ADJOURNED UNTIL 10:30 A.M., THURSDAY, 25 OCTOBER 2001.

HIS HONOUR: Yes, Mr Maxwell.
MR MAXWELL: Your Honour, I have finished, but with Your Honour's leave, I want to mention two matters that occurred to me overnight I hadn't mentioned - they are quite short.
HIS HONOUR: Yes, go on.
MR MAXWELL: Your Honour, the first is that Your Honour raised in the discussion about the implied freedom the question whether discussion of the courts would be regarded as a, within the genus of communication regarding political and government matter.

HIS HONOUR: Sorry, discussion of the courts - - -
MR MAXWELL: That is to say, this kind of communication, whether it, as I understood was saying, well, it is a question to be considered whether, if the implied freedom would otherwise be relevant, whether - and Lange was about a politician; here, this is about the administration of justice plainly enough - we simply want to make it plain that it is, in our respectful submission, a discussion about the judicial branch of government, and that reason, that is to say as a matter of definition, a discussion about a government matter.

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

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

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

remarks probably relate to the matter with which I should deal with last, I propose to deal with them first, whilst

they are fresh in Your Honour's mind.

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

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

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

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

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

of the presence of the affidavit verifying the intent to plead justification.

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

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

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

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

My learned friend complained on many occasions that the applicant should have included further passages from the books in the originating motion in order to provide the context in which the passages complained of appear. We accept that we could have included many other passages in the book by way of particulars of the offences and context. However, the allegation in paragraph 3 and paragraph 4 is that the contempt was committed by the publication of each of the two books in order to keep the case in manageable proportions, particulars were supplied, and the passages which we contend represent the most clear

transgressions, that is to say, the clearest occasions when the line was being crossed, were relied upon. To have included the context would have made the particulars misleading and no doubt would have attracted criticism of a different kind.

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

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

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

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

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

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

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

legal meaning of that word and those expressions.

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

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

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

published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every other subject of the Queen".

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

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

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

Each of those would come close to describing what

lawyers would take to mean by "scandalising". If we are going to use more modern dictionaries, my instructing

solicitor has provided me with the CCH Macquarie Concise Dictionary of Modern Law, which shows a publication date - it says it was first printed in 1988, reprinted in 1990. On the last page of the bundle: "Scandalising the court: Particular type of contempt of court involving the making of derogatory remarks about judges or of court so as to undermine a court's authority".

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

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

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

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

to the law; but I think that point is more likely to be taken at the outset, or that the particulars which have been provided by the prosecution do not support the commission of the offence as developed by the introduction of evidence.

HIS HONOUR: Can I just, whilst I think of it - it is probably a statement of the obvious, but I just want to be absolutely sure about it - do I take it, there are two counts that are brought here of contempt: in one instance with one particular being identified; in the other instance with whatever number of particulars that are there, and it is put that insofar as any of those particulars are made out they would, individually, be capable of constituting a single contempt, or collectively presumably they constitute a contempt; but the way it is put by the Crown is that some of those particulars might be deemed to be not capable of, themselves, supporting a conviction for contempt, but the balance, or if it came to

one, one would be sufficient to constitute the contempt? Is that - - -
MR GRAHAM: That's right, Your Honour. Perhaps if I could just develop that in a couple of sentences. We say that contempt by the first respondent was the writing of the book and causing it to be published, and particulars are given as to why that is so. And likewise in the case of the second book, contempt; and in the case of the second respondent, contempt consists of printing and publishing each of the two books.

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

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

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

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

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

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

Over on page 238 starting at line 45: "That is what Mr Justice Fullagar did in Union Bank of Australasia and Puddy. When that course is followed the judge will know, before he commits himself to rule, whether the no-case submission is (a) that there is no evidence at all in

support of the respondent party's case, that is, accepting all the evidence at face value, no case has been established: Hannah and Stott. And as was submitted, (unsuccessfully as it turned out) in - and the plaintiff in my copy has disappeared through the punch hole, Your Honour - "Laurie and Raglan Building Company Limited; or (b), that, although there is some evidence in support of the respondent party's case, the judge should not act on it because, for example, it was so unsatisfactory or inherently unreliable or equivocal that he should find that the burden of proof resting on the respondent party has not been discharged".

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

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

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

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

although it was a fraud case in the Home Insurance matter - in criminal cases, strictly speaking, as I take this to be, it is, unless I am told to the contrary, it seems to me the principles in those two cases in particular, and as adopted by the Full Court here in 1983, I take it to be unaltered, and that they really do constitute the sort of propositions which I put and I think which counsel accepted - - -
MR GRAHAM: Yes.
HIS HONOUR: Is the statement of the test required for a no case.
MR GRAHAM: If Your Honour pleases. We don't contend otherwise. As I have indicated, there are some difficulties in approaching and responding to my learned friend's submissions. As I have already indicated, my learned friend took the court to the three books in evidence, including that of the Hoser Files; and as I have said in substance he invited the court to treat some of the assertions of fact contained in them as being evidence before the court - at least evidence of events which had occurred concerning Mr Hoser, and events which would have affected Mr Hoser's approach to judicial proceedings.

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

In this connection, Your Honour, we consider that

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

There are, however, grounds relating to the manner in

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

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

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

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

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

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

Further, Your Honour, we submit that at this stage alternative approaches to the publications need not be considered unless Your Honour takes the view that they are the only approaches which are available on the material. If Your Honour were of the view, for example, that the

publications were merely wrong-headed and misinformed, that would not mean that there was no case to answer

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

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

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

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

contents of the book and, in particular, the passages in the particulars in the originating motion.
HIS HONOUR: Just on that proposition, I know that in a prosecution for criminal libel there is no obligation on the Crown to prove the falsity of what had been said. Is that the same position, so far as a charge of contempt?
MR GRAHAM: Yes, Your Honour.
HIS HONOUR: Is there authority directly on that? I didn't find any.

MR GRAHAM: I believe it emerges from the authorities rather than by reason of a direct statement.
HIS HONOUR: I mean, it would make some logical sense that, just as in criminal libel, that if a defendant sought to answer it by proving the truth of what was said because it is a libel action, that plea of justification in defence would plainly be relevant for the defence to take. But this is not a libel action, although elements of libel plainly come into the question of contempt, or can come into the question of contempt.
MR GRAHAM: Yes. Your Honour. I may want to come back to that proposition. If somebody published, as I say a newspaper, published a statement that Judge X received bribes, and those bribes were delivered to him in brown envelopes which regularly arrived on his desk in chambers, and that was true, then I don't believe I could possibly suggest that that would be a contempt of court.
HIS HONOUR: Yes.
MR GRAHAM: If it was false, I certainly could. But there may be many grey areas in between and the grey areas may be made slightly greyer by reason of the particular language chosen; and it may be important to know what the facts

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

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

I might say at this stage, I am reluctant as matters stand to go very far into the last proposition, because it would occupy me quite happily for a day, as it did in the High Court.
HIS HONOUR: Can I raise the question, which is, it seems to me, to be an important threshold question, and that is the status of the balance of the book. And you have touched on it in what you have already said, and indeed, I think I said in the course of argument to Mr Maxwell that I did not have before me evidence of the truth of that which is in it; but the documents, however, or the books being the documents in which the Crown alleges the contempts appear, are tendered by the Crown for the purpose of identifying

those contempts.

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

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

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

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

respect, that that should be ignored as a statement at all.
MR GRAHAM: Well, Your Honour, all that can be taken to be is evidence of the fact that Mr Hoser so asserts that it is written in good faith. It can't be evidence of the fact, objectively established by evidence, for example, from the witness box, that it was written in good faith. It is only evidence that that was what he said.
HIS HONOUR: Well, let's assume a jury: if a jury was to have the books tendered in the way that they have been tendered here, would there not be - and the judge making an assessment of whether there is no case to answer or not - if the question was: was it written in good faith, would there not be some evidence before the jury that it was, albeit not supported on oath, and albeit self-serving as a statement, but nonetheless, some evidence on which a reasonable jury might conclude that the assertion of good faith is made out?
MR GRAHAM: Your Honour, we wouldn't go so far as Your Honour has put it. But I think I am repeating myself: certainly there would be evidence that Mr Hoser so stated and wrote that. It would be for a reader looking at the whole publication to make a judgment whether that assertion was

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

Could I take Your Honour to paragraph 6 of my learned friend's outline. He there draws attention in a footnote to the case, McLeod and St Alban in 1899, and reference to the speech - I think it may have been of Lord Morris, at page 561, one only of a House of Lords comprising five put forward that proposition. It is interesting to note the sequence of events between The Queen and Gray, followed a year later, showing that the statement in McLeod and St

Alban was plainly wrong and the offence of contempt by scandalising the court was alive and well, and Mr Gray was fined a hundred pounds, an enormous sum of money in those days, and he would pay the costs. As my learned friend

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

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

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

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

number of judicial officers scandalising the court. My learned friend's comment concerning an urgent need to protect the courts, really relates more readily to the first category. Cases falling within that category are numerous, and it is only necessary to remind Your Honour of the case of John Fairfax and McRae, which is tab 13, 1954, 93 Commonwealth Law Reports 351, which is the locus

classicus in Australia of this branch of the law, particularly in relation to the contempt by interference with the course of justice by publication.

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

When I say examples, Your Honour, that, I think, was in fact an example of contempt of the first character, but it contains a useful statement in the judgment of Mr Justice Hope who was sitting at first instance, at pages 910 to 911. I think my learned friend may have read that case.
HIS HONOUR: Yes he did, yes.
MR GRAHAM: I will simply refer to it and rely upon it. It goes over to the end of the first paragraph on page 11, to 911. The other recent case was Gallagher and Durack under tab 9, 1983, 152 Commonwealth Law Reports 238.
Your Honour will recall the facts of that case, where Mr Gallagher was moved to say publicly that the actions of himself and the members of his union had in fact brought

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

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

My learned friend referred to the case of Lewis and Ogden, which is tab 19, 1984, 153 Commonwealth Law Reports, 682; but it is ultimately, Your Honour, a case which turned upon its own facts. I may say, tentatively, it was a finely run thing, and the matter was concerned

with the statutory offence under section 54A(1) of the County Court Act of wilfully insulting a judge. Whether that is the exact equivalent of scandalising a court is an open question, and we submit this case really shouldn't be called upon in the present discourse.

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

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

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

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

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

HIS HONOUR: That is B.

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

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

If I can turn to paragraph 16. My learned friend

said at paragraph 16 that he understood the statements there made were uncontentious - I heard my learned friend

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

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

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

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

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

Then it is said the author is writing not as an expert on law or criminal justice but as someone who has been subjected to its processes; and one can only get that out of the book itself. But we wouldn't contest the fact, because it is not in contest at all in these proceedings, that Mr Hoser has been subject to the process of criminal justice. Paragraph (d) - - -
HIS HONOUR: I can understand how that point was put by Mr Maxwell, and I didn't make this point with him when he said it: it seems to me that there is some ambiguity in how the proposition is put, because it seemed to me that it was being put that the reader, picking up the book, should regard the author as being expert in matters of criminal justice; because the claim that is made for it, within its own terms, is in broad terms by the author of the important books on corruption which are then listed,

and the author of previous books.

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

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

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

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

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

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

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

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

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

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

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

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

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

was a contempt had been committed.

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

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

but we submit it is not something which the prosecution must prove, just like intention need not be proved.

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

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

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

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

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

elements.

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

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

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

It is worth observing that at least an inference is

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

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

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

What we say, Your Honour, is that - I should add something, Your Honour, to what I said about the books being read by more than one person. Of course, people talk about what they read as well; so that it is not just

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

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

Your Honour, I might add that, going back to The Queen and Gray, and going on to - well, firstly there was no suggestion that there need be evidence that the authority of the Queen's Bench Division, of which Mr Justice Darling was a member, had been reduced either generally or in the circuit area where he was sitting, and no comment was made about the absence of such evidence. Perhaps more importantly in Gallagher and Durack, where the conduct of Mr Gallagher, as I understand the report, was widely reported.

HIS HONOUR: That is the difference, isn't it? That is publication of a major player in the industrial field, in the political field, published in mass newspapers, must have got huge circulation - - -
MR GRAHAM: Yes.

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

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

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

My learned friend seemed to say in his discussion

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

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

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

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

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

If Your Honour goes to the headnote of the case, which I will read so as to get the facts; "An information alleging an offence against the Vocations with Pay Act was sworn before a Magistrate who then issued a summons against the accused who was a Minister of Transport in the Province of Manitoba. After an application to quash the information was heard and dismissed by the same Magistrate, the Minister was interviewed in his office and the news story and a portion of the taped interview were

broadcast over a radio station. The Minister criticised the Magistrate, stated that the fact that the Magistrate was a loyal Conservative Party member and had been appointed by the Conservative Party could not be overlooked, and stated that his decision was so judicially improper that one could only conclude that it was based on political considerations. The Minister further stated that, 'If that bastard hears the case I will see to it

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

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

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

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

there is no evidence apparently before the learned trial Judge, either as to the extent of publication in the sense of how large the radio audience was, or whether the wheels

of justice in Manitoba ground to a halt as a result of this broadcast. There is no suggestion that any such evidence was required.

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

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

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

required". In any event, Your Honour, it doesn't seem to matter very much, because there is nothing, there is no indication in the book at least that the transcript was ever needed to be read over, or was asked for by the jury, either for them to see it, or asked by, or the jury asked for passages to be read over.

HIS HONOUR: No, but it has been put as an illustration of the perspective of the defendant, how - I think it was put "can't take a trick" - that, in effect, he starts with an assumption as to the odds being stacked by virtue of the prior association with Judge Neesham in the case.

MR GRAHAM: Yes.

HIS HONOUR: From that point on, you start with the assumption that everything that occurs is going to be loaded against you and that you can only protect yourself by having a record because you can't trust the officials. That is the context of it. As Mr Maxwell pointed out, my comment didn't really place sufficient weight on - indeed I am not sure that I really appreciated that - to that quote which is there from Judge Neesham, that "it can be recalled any

time should it be required".

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

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

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

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

He took Your Honour then to page 350, where there is a passage complained of, and the particular passage, so far as we are concerned, is the last bit "Of course the Judge, Neesham should have stopped this carrying on by Perry's side, but, no, he had been green lighting the whole lot". Now, that word "green lighting" carries a very strong meaning in our submission. It indicates that the learned Judge was aware that Mr Perry had been engaging in improper conduct in talking to jury members. One can hardly think of a worse thing on the part of the

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

Then my learned friend referred to page 430. I am trying to keep this in the order that my learned friend - - -
HIS HONOUR: As I understand how that was put, and I think I am understanding it correctly from the various passages which were shown to me, it appears that what is being said there is that a member of the gallery, possibly others, commented to Mr Hoser that whilst he was in the court and the case was being conducted, either by him giving evidence or by him cross-examining witnesses, that there was exchanges taking place between the prosecutor and the jurors. It is not, as I apprehend it, being put that either he was aware of that fact, or for that matter that the judge was aware of that fact.

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

can be applied is that it is a deliberate exercise, the Judge did know, was giving the nod and the wink to the prosecutor: 'You can go ahead and talk to the jury" et cetera", in which case it would be suggesting by "green lighting", that he was consciously permitting a quite improper interchange between the jury and the prosecutor. But that is an interpretation which the "green lighting", would put the "green lighting" in a rather lesser light, wouldn't it, the alternative interpretation?
MR GRAHAM: Well, Your Honour, yes, but in my submission that is a matter for my learned friend's final address. We say the word is, the sentence containing the word has one obvious meaning. It is borne out by my learned friend's reference that you are entitled to read other parts of the book to explain one part - page 430, where we have a picture of "Mr Keith Potter, former President of the Victorian Branch of Whistle Blowers Australia was outraged

when he entered Thomas Neesham's Kangaroo Court in September 1995 and saw DPP barrister Raymond Perry having conversations with the jurors as Raymond Hoser was giving evidence from the witness box. He was even more outraged when he saw that Judge Thomas Neesham was aware of and tacitly approving of Perry's illegal behaviour".
HIS HONOUR: What page was that you are reading?
MR GRAHAM: 430. My learned friend took Your Honour to it. It is one where one was allowed the use the book as internal corroboration or providing aids to meaning. It couldn't be much clearer indication of a suggested meaning of green lighting than that.

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

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

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

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

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

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

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

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

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

Whilst on this topic, Your Honour, if Your Honour goes to page 434, Your Honour sees another quotation, "Hoser - 'Excuse me, Your Honour, he's doing it again'". "Perry: "I didn't" question mark. "Neesham - (grudgingly): 'Fair enough Mr Hoser'". I would suggest,

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

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

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

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

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

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

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

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

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

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

of being a crooked cop. So one must wonder about the reliability of anything Mr Bingley said, if one is to follow this trail through to a conclusion.

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

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

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

UPON RESUMING AT 2.15:
HIS HONOUR: Yes. Thank you.
MR GRAHAM: If Your Honour pleases, turning to, what I will call the Lange argument, which my learned friends deal with in paragraphs 22 to 26 of their outline - - -
HIS HONOUR: I must say, although I rejected your contention in this regard earlier on, as to whether the Lange principle can be relevant to the question of whether it is capable of making out a prima facie case, the more I think about it, the more I think that and the balancing exercise between the two considerations, free speech on the one hand and protection of the court on the other, are unlikely to be considerations relevant to whether evidence is capable of constituting contempt of court, rather than

to the question of whether evidence is capable of amounting to either proof beyond reasonable doubt or is relevant to the question of penalty. But having heard submissions on it, by all means proceed. I haven't come to any definite view about that, but I - - -
MR GRAHAM: Well, if Your Honour pleases, since it is a subject pretty close to my own heart, which Your Honour will see in a moment when you go to the cases, I don't resist the opportunity to say something about these decisions.

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

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

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

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

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

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

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

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

And that, the court did. And it is fair to say in

summary that the court closely confined and reduced the scope of decisions in Theophanous and Stephens.

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

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

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

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

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

exercise of legislative or executive power".

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

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

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

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

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

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

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

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

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

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

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

There is just one passage in the judgment of the Chief Justice, Mr Justice Spigelman, at pages 709 to 710. His Honour, in paragraph 82, summarised an argument put by the claimant, and the claimant was John Fairfax. His

Honour said: "First, the claimant suggested that judges and courts are within the sphere of public officials and bodies about whom the freedom could be exercised. Mr Rares, SC, who appeared for the claimant submitted that the conduct of the judiciary was itself a legitimate matter of public interest". He referred to The King and Nicholls. " (To similar effect are the references to judges by Mr Justice Deane in Theophanous). Counsel also relied on certain observations of Justice McHugh in Stephens, which were quoted in the joint judgment in

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

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

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

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

are able effectively to discharge the functions, duties

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

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

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

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

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

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

appears from the letter B down to the next heading on page 306.

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

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

parte Bread Manufacturers; re Truth and Sportsman. And this is tab 8, 1937, 37 State Reports New South Wales, 242. And the oft-cited passage of the judgment of Sir Frederick Jordan is to be found at pages 249 to 250; and that countervailing consideration in the law of contempt has been applied many times. I don't know whether Your Honour wants the further citation, but Your Honour is probably familiar - Hinch's case is an example.

HIS HONOUR: Yes.

MR GRAHAM: And there are many others. There is obviously room for overlap between the public interest and securing a proper administration of justice, and the freedom of discussion which the law already allows, and which the High Court decisions suggest flow from the constitutional implication.

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

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

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

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

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

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

In dealing with that aspect of the case, at pages 323, His Honour - I might say with whom the presiding member of the court, Mr Justice Pidgeon, agreed, starting on 323 at letter F - indicated the limits which he

perceived upon arguments based upon implied limitation in the context of curial proceedings.

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

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

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

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

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

But lastly, in relation to Lange's case what Your Honour is here dealing with is a common law offence. The cases concerning freedom of speech, Theophanous, Stephens, Levy, Lange, indicate that the common law, mainly in relation to defamation, must conform to the Constitution. That is a proposition which is very easy to advance. But obviously, where one is concerned to strike

a balance in a case such as this between the court's protection against interference with their own processes and an ability to speak freely, we would say that none of

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

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

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

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

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

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

which the plaintiff complained was a Victorian regulation, he chose to base his argument principally upon the freedom of communication which is protected by the Commonwealth Constitution, being content to say that the Constitution Act 1975 (Victoria) affords freedom of communication of the same kind and to the same extent. That being so, it

is unnecessary to enter upon any examination of the provisions of the Constitution Act" - which His Honour had defined that term to mean the Victorian Constitution Act - "for the result which they produced could, upon the plaintiff's argument, be no different from the result under the Commonwealth Constitution".

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

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

Page 617 in the judgment of Justice Gaudron, starting

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

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

Finally, Mr Justice Kirby, page 644, the top of the page, His Honour said: "For the purposes of the demurrer, I am prepared to assume that the powers of the Victorian

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

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

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

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

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

Kirby at pages 1333 to 1336.

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

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

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

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

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

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

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

MR MAXWELL: If Your Honour pleases.

(Short adjournment).

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

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

But if I might, before going to the document - would it be more convenient for Your Honour to read it?

HIS HONOUR: Yes. That's all right. Go on.

MR MAXWELL: I was going to jump ahead one point, but I won't. If I might be permitted to begin, as each of us began,

with reference to the dictionary - and this is really only said en passant. My learned friend took you to the Oxford English Dictionary, to which I made reference.
Your Honour will see, to the extent that you go back to the dictionary definitions at all, that every one of the definitions, other than the one we have relied on, is said to be "rare, relatively rare or obsolete". That is why, in the Australian dictionary, the only one that appears is "horrify or shock by some supposed violation of morality or propriety".

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

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

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

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

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

practical reality.

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

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

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

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

That seems to me to be the way in which the court is there dealing with it in that passage.
MR MAXWELL: Well, in our respectful submission, Your Honour, the notion of a technical contempt is a difficult one;

that is to say, if that means anything other than that, yes, the words are abusive and make serious imputations against the person, if that is all it means, then we would still respectfully submit that there is no contempt. The offence has not been committed. It is described as technical in the sense that, well, on some of the language in some of the older cases I would say this imputes an improper motive to a judge. So it does.
HIS HONOUR: Yes.
MR MAXWELL: But no contempt, because as a matter of practical reality, it will not interfere with the administration of justice. And in our respectful submission that is a logically and analytically satisfying way to view the case law because, of course, the purpose of this law is to protect the administration of justice, and the argument goes, in Fairfax and elsewhere, you invoke the summary jurisdiction, as the Attorney-General has in this case, only with great caution, and only where, as matter of practical reality, the requisite tendency is demonstrated.

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

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

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

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

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

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

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

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

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

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

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

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

In most of the instances referred to His Honour concluded that the words had the requisite tendency, but in each case dismissed the charge on the ground that there was insufficient evidence of any real risk of damage to the system of justice. And we have referred to
Your Honour, there were five informations, and those are the relevant discussions in respect of each of them.
HIS HONOUR: Well, of course, again, he wasn't dealing with a no-case submission.
MR MAXWELL: That is so. He wasn't. But he is dealing with whether the charge is made out, and he is asking the question which Your Honour would ask at the end of a trial: Has the prosecution proved the elements of the case? His Honour said, "No, they haven't". And we are saying, by direct analogy, one of the elements is that element. There is no evidence and no argument to suggest

that, as a matter of practical reality, these publications would have that effect.
HIS HONOUR: But there never is any evidence. What case has ever had evidence called about practical reality? That has only ever been a question for the tribunal of fact to

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

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

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

not right, with respect to our learned friends, to suggest that all the other elements of the offence had been made out. The critical element was not made out.

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

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

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

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

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

Likewise in Borowski, on which our learned friends rely, where the remarks were made by a Minister of the Crown to media representatives - and we point out, Your Honour, included an actual threat of dismissal. The Minister had said "Oh" - my learned friend read it - "I will have him defrocked if he sits on that case", as if to

say, "If he goes within a mile of that case I will sack him". And the judge says, as Your Honour will see, we don't need to enquire as to whether the defendant actually had the power to do that. The fact that he could only have done so in his capacity as a Minister, and that he made this threat publicly to media representatives, means that it was evident, manifest, that there was a threat to the administration of justice because there, as in our

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

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

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

But we make the point in the last sentence in paragraph 11, the court is in a better position than usual because of the lapse of time to make that judgment, to say, "Well, there is nothing before me, and after two years I would

expect there would be if these publications had in any real or practical way had the alleged tendency".

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

HIS HONOUR: Well, I don't regard myself as having evidence about that, so you don't need to concern yourself as to that.

MR MAXWELL: But we are only rebutting the submission that this is how, an explanation of the - - -

HIS HONOUR: I appreciate that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20: In response to a formulation by the court this

morning, the Crown did not dispute that context is a matter to which the court should have regard.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The second specific point is the reader of ordinary

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

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

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

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

Your Honour, as I said previously, before my learned

friend began this morning, we assert that the category of communication with respect to government and political

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

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

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

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

Your Honour, apart from making a reference to the discussion in Torney about real risk - this is important Your Honour, because, as is evident, we place considerable weight on the approach His Honour adopted in this case.

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

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

practical reality, or real risk.

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

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

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

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

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

to answer, in whole or in part, then it seems to me it is appropriate and in everybody's interests that that be determined as quickly as possible so - - -
MR MAXWELL: Yes, Your Honour.
HIS HONOUR: So that the parties can then deal with whether any evidence is going to be called subsequent, or what submissions are then going to be made as to proof beyond reasonable doubt. So the question arises, really, as to timing. If I was to adjourn this until 10:30 on Monday morning, would both counsel be available?
MR MAXWELL: Yes, Your Honour.
HIS HONOUR: I should say, if I was to come to the conclusion that there was, in whole or in part, a case to answer, I would be anticipating that we would then immediately go into the question of whether there was going to be evidence called, or the case was going to close at that point.

MR MAXWELL: Yes. We would come along prepared to - - -
HIS HONOUR: Yes. You would be available if that was the case?
MR MAXWELL: Yes, Your Honour.
HIS HONOUR: Mr Graham?
MR GRAHAM: Your Honour, I would be available tomorrow, on which occasion Your Honour would indicate whether or not there was a case to answer. If there was, then there would, no doubt, be indications of what course was intended to be followed thereafter. I am not certain whether Your Honour intended, then, to go straight on with the case, or whether to, as it were, allow the parties to - - -
HIS HONOUR: If I reach that conclusion, I have got a fair bit of work to do. Even without the requirement of there

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

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

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

.AL:LB IRS 25/10/01 P-327 MR MAXWELL QC
Hoser

(RULING FOLLOWS - next page)

(Unrevised)
(Eames J)
R U L I N G
HIS HONOUR: The defendants are charged on two counts of criminal contempt by scandalizing the court. The offences being alleged to be constituted by published statements in two books written by the first defendant and published by the second defendant. The first book is titled, "Victoria Police Corruption" and the second is titled, "Victoria Police Corruption 2". Both books were published in 1999.

On the first count there are 23 separate particulars, being passages in the second book, "Victoria Police Corruption 2" to which the count relates. Eleven particulars relate to His Honour Judge Neesham, three to His Honour Chief Judge Waldron, three to Her Honour Judge Balmford as she then was, four to Magistrate Ms J Heffey and one to Magistrate Mr H.F. Adams.

The second count relates to one passage only in the book, "Victoria Police Corruption". That passage referring to Magistrate Mr H.F. Adams.

The Crown puts its case that on the first count, the charges made out, whether the particulars are taken individually or collectively and whether or not all of the particulars are held to be capable of constituting contempt.

The Crown has closed its case having tendered evidence by Affidavit, including exhibits and with one deponent having been cross examined.

Counsel for the defendants have now submitted that there is no case to answer on either count. In the course of his submissions, Mr Maxwell QC, senior counsel for the defendants addressed each particular and contended that each was of itself, incapable of constituting the offence and also submitted that collectively the publications particularised in the first count, were incapable of supporting that charge.

On a no case submission the evidence must be taken by the defendants at its highest, in favour of the prosecution. The court must, on that evidentiary basis, determine whether as a matter of law, the evidence taken at its highest, is capable of supporting a conviction. In taking the evidence at its highest, that includes drawing in favour of the Crown, any adverse inferences which may

reasonably be drawn from the evidence. Even if alternative inferences, which would favour the defendants, might also be open to be drawn.
In other words, the question which I must now decide is not whether I should be satisfied beyond reasonable doubt that either offence has been proved. The question is whether on this evidence, the defendant could be convicted, not whether they should be convicted.
A no case submission raises a question of law. Thus the weight of the evidence is not the relevant issue. It is not appropriate therefore, for me to engage in an assessment of the weight of evidence at this stage, nor of the strength of inferences which may be drawn.
The propositions, which I have just stated, as to the principles governing a no case submission, were accepted by counsel on both sides to be the appropriate principles to be applied. See May v. O'Sullivan 1955, 92 Commonwealth Law Report 654 at 658. Attorney General's reference, no. 1 of 1983 to Victorian Reports 410 at 414 to 616. To restate the overriding principle in terms used by Justice Kitto in Zanetti v. Hill, 1962 108 Commonwealth Law Reports 433 at 442, the question is whether, with respect to every element of the offence, there is some evidence which you have accepted would either prove the element or enable its existence to be inferred.
Both Mr Maxwell and the Solicitor-General Mr Graham QC, made comprehensive and very helpful submissions on questions of fact and law on the no case application. There was substantive agreement as to the principles of fact and law on the no case application.
There was substantive agreement as to the principles of law which governed the question of what constitutes the offence, contempt by comments which scandalize the court. Although there were some differences both in substance and in emphasis as to the elements of the offence.
On area on which there was substantial disagreement related to the question whether the implied constitutional freedom, discussed in Lange v. Australian Broadcasting Commission 1997, 189 Commonwealth Law Reports 520, had application to the present case. I have concluded that it is unnecessary that I deal with that question for the purpose of this application but it will be appropriate at a later date, that I analyse the case law in some detail as to that and other issues. It is unnecessary that I prolong this ruling for that purpose however.
The offence of contempt which scandalizes the court, was described in the following terms by Justice Rich in R v.Dunbabin, ex parte Williams 1935, 53 Commonwealth Law Reports, 434 at 442. When speaking of interference's with the course of Justice, His Honour said, "But such interference's may also arise from publications which tend to detract from the authority and influence of judicial determinations. Publications calculated to influence the confidence of the people in the court's judgments because the matter published aims at lower the authority of the court as a whole or that of its judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office. The jurisdiction is not given for the purpose of protecting judges personally from imputations to which they may be exposed as individuals. It is not given for the purpose of restricting honest criticism base on rational grounds, of the manner in which the court performs its functions. The law permits in respect of courts, as of other institutions, the fullest discussion of their doings so long as that discussion is fairly conducted and is honestly directed to some definite public purpose. The jurisdiction exists in order that the authority of the law, as administered in the courts, may be established and maintained."
That general principle is being discussed and developed in many decided cases. In identifying the relevant question as it would apply to a no case submission, I apply the principle stated in the joint judgment of the high court in Gallagher v. Durack, 1983, 152 Commonwealth Law Reports, 238 at 243.

Thus the question now is whether the evidence taken at its highest is capable of being regarded as scandalizing the court. By virtue of the statements constituting a baseless attack on the integrity or impartiality of the judges and magistrates against whom the comments are directed.

There are generally recognised to be two categories of publications which scandalize the court, although they tend to overlap, see Borrie and Lowe, The Law of Contempt, third edition at 340.

In the first place there are those which impugn the impartiality of the court, that being the category primarily identified by the Crown with respect to the paragraphs in the particulars.

The second category relates to scurrilous abuse. As to scurrilous abuse of a judge or magistrate constituting contempt by scandalizing the court, see R v. Gray, 1900, to Queens Bench, 36. "Abuse or attacks on the personal character of a judge or magistrate which reflect upon the capacity of the person to act as a judge or magistrate, for example calling the judge or magistrate a liar, would be capable of constituting scurrilous abuse.", see Borrie and Lowe at 343.

The exercise of the jurisdiction to punish for statements which scandalize the court is undertaken, not to assuage the personal feelings of the judge or magistrate, but to prevent undue interference with the administration of justice, by undermining the confidence in and respect held by the community for the judicial system.

The learned authors, Borrie and Lowe at 343 summarise the principle as being, "that abuse of a judge or magistrate, amounts to contempt if it reflects upon his or her capacity as a judge or magistrate. But criticism of a judge's conduct so long as no aspersions are cast on the judge's character, do not amount to scurrilous abuse."

In Attorney General of NSW v. Mundey, 1972, to NSW Law Reports 887 at 910 - 911, Justice of Appeal Hope, held that it may and generally will constitute contempt to make unjustified allegations that a judge had been affected by some personal bias against a party or had acted mala fide or had failed to act with the impartiality required of the judicial office.

In Ahnee & Ors v. Director of Public Prosecutions, 1999, to appeal cases 294 at 3045, Lord Steen held that the imputation of improper motives to a judge, could not be regarded as always and absolutely constituting contempt and gave as an example of a possible exception, an instance where a judge engaged in patently biased conduct in a criminal trial.

For the purpose of the no case application, the issue as I've said, is whether there is any evidence which is capable of proving those elements of the offence which have to be proved by the Crown. It was not contended before me that there was an absence of evidence as to formal matters such as the fact that the first defendant was the author of the two books and that the second defendant was the publisher.

Mr Maxwell, senior counsel for defendants, advanced his no case submission on broader grounds. In effect that when taken in proper context, none of the particular published statements, either alone or together, were capable of constituting contempt as it was characterised by decided authority.

The submissions of Mr Maxwell, helpful as they were, ranged at times beyond the question which is at issue on a no case submission and addressed the factual and legal considerations which would be appropriate to a submission at the close of both prosecution and defence cases and which was directed to the question, whether the offences had been proved beyond reasonable doubt.

The distinction is important and must be kept in mind at all times when dealing with the no case submission. I will not therefore, in dealing with this application, be addressing all of the matters raised by Mr Maxwell. There were however, particular factors which he submitted were essential elements of the offence of contempt and which had not been proved.

It is those matters to which I turn my attention. Mr Maxwell submitted that it is an element of the offence and one on which the Crown must have educed some evidence for there to be a case to answer, that the published material had, as a matter of practical reality, a tendency to interfere with the due administration of justice. He cited John Fairfax & Sons Pty Ltd v. McRae 1955, 93 Commonwealth Law Reports, 351 at 370 in the joint judgment of the High Court. A closely related proposition, if it is not in fact merely an alternative way of stating the same proposition, which counsel also identified as an element of the offence was, he submitted, that there must be a real risk of prejudice to the due administration of justice rather than a remote possibility, if contempt was to be made out.

As to that latter proposition, see the opinion of Lord Steen, giving the judgment of the Judicial Committee of the Privy Council in Ahnee & Ors. v. D.P.P. at 304 -5.

In the passage of the John Fairfax v. McRae case in which the court discussed the requirement of a practical reality in the tendency to interfere with the administration of justice, a distinction is drawn between technical contempts, which the court chooses not to punish and instances of contempt where punishment is appropriate. That case was not concerned with an allegation of contempt by scandalizing the court, but with the newspaper publication which was held by the trial judge, to constitute contempt by having a tendency to interfere with a pending proceeding in a court.

The tendency to interfere with justice, with which the court was concerned, related to the risk that the fair trial of the defendant in the other court proceedings would have been compromised by the offending publication. That is a significant difference from the present case and so too is the fact that the John Fairfax v. McRae case, was not concerned with the submission of no case to answer but with determining whether contempt had been proved beyond reasonable doubt.

The case of Ahnee did however, involve an allegation of contempt by scandalizing the court but once again, the case did not concern a no case submission but instead, was concerned with the question whether the case had been proved beyond reasonable doubt. Likewise the decision of Mr Justice Ellis in Colina v. Torney, unreported decision of the Family Court, delivered on 2 March 2000 on which counsel for the defendant placed considerable weight, was once again not a case concerning a no case submission but concerned the question whether the charge had been proved beyond reasonable doubt.

The analysis of conduct, alleged to constitute contempt, requires a balancing of the competing considerations of the right of free speech and in particular, the right to comment in good faith, on matters of public importance, including the administration of justice on the one hand, against the necessity for the purpose of maintaining public confidence in the administration of justice, of ensuring that the institutions be protected against baseless attacks on the integrity and impartiality of judges and magistrates at against scandalous disparagement of both judges and magistrates, see Gallagher v. Durack at 243. It is that balancing process which must be undertaken when considering whether to exercise the jurisdiction to punish for contempt. That is an exercise which arises after it has been held in the first place that there is a case to answer.

Although the concept of technical contempts has been doubted to be now relevant, see Borrie and Lowe at 77-78, that debate has been conducted in the context where a publication had already been held to be capable of constituting contempt. See for example the discussion in Gallagher at 243 and in John Fairfax v. McRae at 370. Thus what was under discussion as a technical contempt was a published statement which established or constituted a case to answer.

In Attorney General of NSW against John Fairfax & Sons v. Bacon 1985 six NSW Law Reports 695 at 708, Justice of Appeal McHugh with whom Justices of Appeal Glass and Samuels agreed, held that the distinction between punishable contempts and those which would not be punished should no longer be applied and contempts which were not worthy of being punished should be regarded as not being contempts at all.

The court held that the test is to whether a publication did constitute contempt should be that stated in John Fairfax v. McRae, mainly whether as a matter of practical reality it had a tendency to interfere with the course of justice. Once again I note the decision of the NSW Court of Appeal as was the case for the decision of the High Court in McRae was concerned with the publication which dealt with pending court proceedings and the issue was whether the publication had a tendency to interfere with the due conduct of those proceedings. It was not a case where the offence of scandalising the court was alleged.

In both cases passages in the judgment make it clear the fact that the contempt related to pending court proceedings was the focus for the discussion about the need to demonstrate that the interference with justice was a practical reality. Furthermore the NSW case once again was not one where the question was whether a case to answer had been established.

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

The question however, on a no case submission is whether as to each of these particulars separately or together, it is open on the evidence taken at its highest and including all adverse inferences reasonably open to be drawn to conclude that the particular is capable of constituting contempt. If it is open to so conclude as a matter of practical reality that there was a real risk, then there is a case to answer.

If as to any particular, even if it was taken in combination with others it was not so open, then as to that particular the defendant would have no case to answer. Whether it should later be concluded that a particular which had been held to constitute a prima facie case of contempt was sufficient to prove contempt beyond reasonable doubt, would be the question which would fall to be answered at the conclusion of the case for the defence.

Mr Maxwell submitted that the Crown had failed to prove that the statements made in the publications were not true. No authority was cited to me which suggested that the Crown was obliged as part of its case to prove that the published assertions were untrue. As I have said the essence of the offence is that the published statement has an inherent tendency to scandalise the court and it is consistent with that principle that it is not a requirement that the Crown prove the allegations to be false.

For the purpose of establishing a case to answer, the Crown need only establish a prima facie case that it is open to the tribunal of fact to conclude that the published statement does have an inherent tendency to undermine public confidence in the administration of justice. Likewise it is not an essential element for the Crown to produce evidence to prove that the public reputation or authority of the courts has been impaired by the publications. The court is required to decide for itself whether the published material has a tendency to that outcome or as it is sometimes put, is calculated to produce that outcome, see Gallagher and Durack at 243.

Mr Maxwell submitted that for there to be a case to answer for contempt, there must be an urgent danger of the administration of justice being undermined, and that delay in bringing these proceedings after publication of

the books of which complaint is made, demonstrates that there is no such urgency. Furthermore so counsel submitted, the statements must be regarded as being made in good faith, and by an author who was aggrieved by the outcome of criminal proceedings in which he was unsuccessfully involved as an unrepresented accused.

In that context there could be no urgent apprehension that the administration of justice will be, or has been undermined by publication being submitted. I am not persuaded that the question of urgency is one which constitutes a prerequisite for conduct to constitute contempt. Counsel referred to a passage in the joint judgment in Gallagher v. Durack at 242, but that does not in my opinion indicate that as one element of the offence the Crown must prove an urgent need for action.

The court in that case was merely addressing the importance of there being an ability to take immediate action when required to protect the administration of justice. The court was discussing the continued relevance of there being a summary jurisdiction to punish such contempt. As their Honours made clear, they were there addressing what would be without urgent action, a continuing risk to the reputation of the courts. They were not discussing whether the continuing contempt might cease to be such by the passage of time.

In the passages of the joint judgments in both Gallagher and Durack and John Fairfax v. McRae to which I have referred, it's quite clear in the arguments of counsel in the former case were directed to the exercise of the summary power to punish, that the existence of a prima facie case of contempt was not in dispute. I accept that there could be instances where the passage of time between publication of the statements and the hearing of the charge was so great that of itself or in combination with other factors, it rendered the publication incapable of impairing public confidence in the courts. This is not such a case where the passage of time would mean that a prima facie case could not be established.

I accept however, that the question of delay may be a relevant factor when considering whether the charge has been proved beyond reasonable doubt and also when considering what, if any punishment should be imposed for proven contempt, but those are not the questions I am now addressing.

I am also not persuaded that proof of good faith would mean the conduct which otherwise would have

constituted contempt could not do so. See the Attorney General of NSW against Fairfax v. Bacon at 709. In any event whilst the question of good faith is a relevant consideration in determining whether a charge of contempt had been proved beyond reasonable doubt, see Fairfax v. McRae at 371, when taken at its highest, the evidence relied on by the Crown would not demonstrate good faith and even if it did that factor would not be decisive in determining whether the offence had been proved.

The question of the intention or purpose for publication is a relevant consideration in determining whether a case had been proved beyond reasonable doubt but absence of good faith is not an essential element for the Crown to prove. The issue is whether there is an inherent tendency in the publication to interfere with public confidence in the administration of justice, not whether it was intended to do so. But even if that intention is a prerequisite, then it is open to conclude that the intention of the first defendant was in fact, to lower public confidence in the administration of justice.

Insofar as I determine that there was a case to answer with respect to any publication identified in the particulars, I would then have to turn to the question whether, having regard to all of the evidence, including any evidence which might be called in the defence case, I was satisfied beyond reasonable doubt that the particular publication did constitute contempt. Either of itself or in combination with other particulars which I had ruled were

capable of constituting contempt. When regard is had to the difference between the legal question which is raised at the time of the no case submission, and the question which is raised at the conclusion of all evidence, it may be seen that there would be nothing inconsistent with a judge or magistrate when sitting alone to find that there was a case to answer and yet not ultimately be satisfied beyond reasonable doubt. The charge had been proved as to any particular or as to some of the particulars.

Mr Maxwell dealt with each passage relied on by the Crown for the purpose of demonstrating that in context the passage constituted no more than a disappointed litigant railing against the decisions of the courts and against what he perceived to be the unfairness of decisions, both procedural and substantive which went against him. He stressed that the passages related to criminal proceedings, which the defendant was unrepresented before the court and that that was not by choice. Having regard to the principles of law that I have discussed, I am persuaded that in context many of the passages, however insulting or offensive towards the court, are not capable being viewed as scandalising the court and of thus constituting contempt. There are, however, passages, which in my opinion, having regard to those principles of law concerning contempt, are capable of constituting contempt.

I turn then to the particulars so as to identify those which I hold are capable of constituting the offence of contempt. Given that it will be my later task to decide whether those passages have been proved beyond reasonable doubt to constitute contempt and that I must have regard to the evidence as it then stands and after considering further submissions and given that I must then publish my reasons for decision, it is inappropriate that I do more now than broadly state why I am satisfied that there is a case to answer in those instances. Lest there be any doubt, I make it clear that in deciding that there is no case to answer as to any of the following passages, I am not thereby accepting that there is any justification for or validity in the statements made in the passages. In most if not all instances, the passages are arguably defamatory and constitute offensive and extravagant abuse, but they do not cross the line into the category of criminal contempt, in my opinion. But in reaching the decision as to whether there is a case to answer, far from concluding that the statements made in these passages are true, or they are complaints justified, I have proceeded on the basis that they are false and unjustified, but that nonetheless they could not constitute the criminal offence of scandalising the court as it is recognised in the authorities to which I have referred.

As to those passages on which I rule that there is not a case to answer, I have concluded that assuming that the readers exercise some common sense and do not abandon all critical faculties, that those passages would be incapable of impairing public confidence in the authority of the courts. I will not delay this ruling by reading out the passages to which I will now refer. When I later revise my ruling for the purpose of publication, I may then insert some or all of the passages at that time.

Firstly, as to the particulars relating
Judge Neesham, I have concluded that as to the following passages, there is no case to answer. Particulars 1 at p.245, particular 2 at 246, particular 5 at 280, particular 6 at 304, particular 8 at 350, particular 9 at 353, particular 10 at 367, particular 11 at 435. The passages on which I find that there is a case to answer are particulars 3 at 260, 4 at 274, 7 at 329. In those passages it is open to conclude the judge is accused of bias, corruption and of improperly seeking a conviction. As to Chief Judge Waldron, in my view there is no case to answer as to any of the three particulars. As to
Judge Balmford, firstly as to item 1 at p.140, I find there is no case to answer. As to particulars 2 at 142, and 3 at 144, I find there is a case to answer. In those passages it is open to conclude that the judge is accused of

deciding the case without regard to the evidence and of bias. These are capable of constituting contempt.

In the second passage, not only does it assert bias, but it states that three judges have held the judge to be biased in favour of the Director of Public Prosecution and police. It is open to conclude that that misrepresents the decision of the Court of Appeal. As to Magistrate Heffey, there is no case to answer as to particulars 1 at 205 and 2 at 207. As to particulars 3 at 208 and 4 at 212, there is a case to answer. The accusation that the magistrate had lied and or deliberately disregarded evidence is capable of constituting contempt. As to the second passage, the suggestion that a magistrate had decided to commit for trial without regard for any evidence called is capable of constituting contempt.

As to Magistrate Mr H F Adams, the back cover of the second book is in my view capable of constituting contempt. One relevant factor in that conclusion is the reference to a confession, which might be regarded as carrying an implication that there was a formal confession in some official way than court proceedings which implicated the magistrate in corruption. As to count 2, which relates to book one and refers to p.57 and concerns Magistrate Adams again. The reference to a separate quote matter is capable of conveying and to be taken to do so deliberately, that an admission was made in the course of court proceedings whereby the magistrate was implicated in corruption. There is a case to answer on this count.

I conclude therefore that there is a case to answer as to both counts and as against both defendants, but only with respect to those particular which I have just identified and I so rule.

Mr Maxwell, do you want an opportunity to consider that before moving to the defence case.

MR MAXWELL: Your Honour, I do, but only a short opportunity if Your Honour please. Would it be convenient for Your Honour to stand the matter down till 11.30, that would give me sufficient time and then I'll proceed with the defence case.

HIS HONOUR: All right. We'll stand down until 11.30

MR MAXWELL: The court pleases.

(Short adjournment)

- - -

HIS HONOUR: Yes Mr Maxwell.

MR MAXWELL: If the court pleases, I call Raymond Hoser.

<RAYMOND TERRENCE HOSER, sworn and examined:

Mr Hoser, what's your full name?---Raymond Terrence Hoser.

Your address?---It was - my current address is 488 Park Road, Park Orchards and I have only been there for two weeks.

Your occupation?---I call myself investigative author and a zoologist.

Have you prepared for the purposes of this proceeding and sworn before court commenced this morning an affidavit?---Yes.

Would you look at that please, and we have a copy for court, a copy for our learned friends, Mr Hoser has the original at the moment, is that the affidavit?---Yes the affidavit is correct.

Are those the exhibits to it. It might be convenient Your Honour if we handed the copy to Your Honour while Mr Hoser is looking at the original, and then - - -?

---There is another - I have just torn off two pages, I haven't seen these two pages, can I just pass them back to you, my legal counsel. I don't know those two pages, I haven't seen them before.

It maybe Your Honour that in Exhibit B there are some pages at the back of the photocopy, Exhibit A I'm sorry, which is a list of publications, two pages which

don't form part of that. If Your Honour would remove the last two pages headed the Hoser books, they are not part of the list of publications.
HIS HONOUR: This is on which exhibits?
MR MAXWELL: Exhibit A Your Honour which is a list of publications, and it's the back two pages beginning the Hoser books, they have been copied inadvertently?---Those last two pages aren't my documents but the rest - that other thing is, of Exhibit A is taken from my web site, yes.
Mr Hoser, are the contents of that affidavit true and correct?
---I believe so yes.
I want to ask you one matter, additional to the affidavit, you mention in paragraph 3, the book, the Hoser Files?---Yes.
You've been in court and you are aware that that book is in evidence, you make certain statements in paragraphs 7,8,9 and 10 relating to the writing of the relevant books, that is Police Corruption and Police Corruption 2, the books that are the subject of these proceedings, I want to ask you about the Hoser Files and whether the statements made in those paragraphs are applicable to your approach to and the content of the Hoser Files or whether you would say something different?---Your Honour, when I write all my books, and this isn't just books on corruption, it's also stuff to do with reptiles and frogs and endangered animals, the whole box and dice, I do my best to ascertain all facts to be true and correct within my ability. I take all reasonable steps and invariably, particularly with the corruption books, publication is quite often delayed by a substantial period so that the facts can be checked and double checked and persons adversely named can be sent relevant manuscripts so that if they believe I've got something wrong, they have the opportunity to correct the whole thing.
HIS HONOUR: I think the point you were being asked though, was whether those particular paragraphs which appeared to be referring only to the two books should be taken as
      including - - -?---The Hoser Files.
- - - equally applicable to the Hoser Files?---Essentially yes.
MR MAXWELL: Your Honour please I have no further questions.
HIS HONOUR: Mr Langmead.
MR LANGMEAD: I haven't read this, so could I just have a moment to read it.
HIS HONOUR: Of course.
MR LANGMEAD: Yes I've read that thank you.
MR MAXWELL: Your Honour please.
HIS HONOUR: Yes Mr Langmead.
MR LANGMEAD: Mr Hoser the trial before Judge Neesham, which has been mentioned to date at this trial. It's a trial for perjury by you and you are convicted of it, is that correct?---In those words, I suppose yes.
Yes and you served a gaol sentence pursuant to that conviction?---As documented in the book, yes.
I think you were sentenced to six months and you served a lesser period?---Four months.
Now when you, through using counsel, sought to appeal that conviction, initially I think there were 26 grounds of appeal, which you had generated, is that correct?---I - about that number. It might have been 23, but if you say 26, I'll go along with it.
HIS HONOUR: The question had another part to it. You were being asked whether you generated - were they grounds that you had actually drafted yourself?---Your Honour in the perjury appeal I sought legal representation, I was denied it by Judge Waldron and I took out the relevant - I went everywhere for legal representation, but didn't get it.
But if it's possible to just answer that particular question? Were they your grounds or were
they argued by counsel?---I did them myself, yes I did them myself.

Fine that was the question that he was asking.
MR LANGMEAD: You were represented by Mr Deane of senior counsel at the appeal, were you?---At the appeal
Chris Deane represented me, that's correct.
Is it fair to say and I'll just paraphrase some of the grounds that you were the author of, or the draft grounds, that if - what I can refer to as interference with the jury, or jury tampering, just to give it a global description that featured, expressed in a number of different ways in the 26 grounds which you drafted?---Yes. I believe they're reproduced in the book as well, the exhibit.
It's correct, isn't it, that the appeal proceeded on grounds that did not include jury tampering, or interference with the jury?---Mr Deane ran the appeal.
HIS HONOUR: Mr Hoser. Just to make it clear and this applies to everyone, when the questions are asked, you have to address the questions which are put to you?---I'm sorry.
If you want to explain - just a second?---Yes.
If you want to explain them your counsel has got a right of re-examination to expand - - -?---Right, I know what you're saying.
But counsel who is asking you questions is entitled to ask you to direct you to particular questions and to seek your answer to those questions?---All right. I'm trying to help. Mr Deane - - -
Yes, just listen carefully to the questions and wait for it to be asked?---Sorry. Mr Deane the barrister only argued three grounds, which my understanding is did not include any of the grounds that I had generated myself. You don't ask this question - - -
MR LANGMEAD: (Indistinct) to terminate his services on that basis, did you?---I certainly considered it, but I was between a rock and a hard place and we couldn't get an adjournment so he proceeded.
HIS HONOUR: Do I take it you were present in court were you?
---I was present in court, yes.
MR LANGMEAD: When you say you considered it, you were obviously aware before Mr Deane conducted the appeal on your behalf that you would have had a right to terminate his services had you so chosen?---It's a bridge I hadn't crossed, but it would be a fair assumption, yes.
Could the witness be handed Exhibits A and B please Your Honour. Your Honour I think has a copy of these don't you?
HIS HONOUR: Yes?---I've got a pair in my bag if you want to keep your copies. I've got my copies, two books?---No not those ones.
MR LANGMEAD: Yes, well the top two are?---No, no, he hasn't got the Victoria Police Corruption ones.
I see, Exhibits A and B in any event. To the affidavit.
MR MAXWELL: I have no objection to the respondent using his own copies.
HIS HONOUR: If you have some spare copies?---I was thinking of it easy to make it easier. They're inside a airlines plastic container. Thank you.
MR LANGMEAD: Before I come to these publications Mr Hoser, it's fair to say that both in those exhibits and indeed in your affidavit sworn today, that you present yourself as a zoologist, amongst other things?---Yes.
And you do so in expressed terms, not just by inference you do it expressly don't you? I am a zoologist in effect?
---Yes.
That's a branch of science as you would understand it?---Yes.
Do you consider yourself a scientist and do you agree that in your publications, Exhibits A and B, that you have at various stages presented yourself as a scientist in effect?---No argument there.
Do you have any formal qualifications as a zoologist?---I do. I've done two thirds of a science degree and I've also done an applied - I've got an applied herpetology certificate from the Sydney Institute - no sorry, Sydney Technical

College I think it's known as and that's completed and that was completed some - about 1981 or thereabouts. So I've been in the field of herpetology for basically all my life.
If you just have a look at p.613 of Exhibit B please?---That's book two?
Yes it is?---Page?
Six hundred and thirteen. See there under the heading, "A forgery". "Twenty seven February, saw myself and a large contingent of observers from Whistleblowers, with a capital W, Lawatch, with a capital L, and elsewhere from the Magistrate's Court"?---Sorry?
This is under the heading, "A forgery"?---Yes, yes.
Do you have that passage?---Yes.
The reference to Whistleblowers there, with the capital letter, is that an organisation?---Yes.
Indeed, is Lawatch an organisation?---Yes.
Are you a member of one or both of those organisations?---At the time I believe I was a paid up member of both. Currently I'm a paid up member of Whistleblowers and they're known generally as Whistleblowers Australia, I think is what they're known as.
You may not know the answer to this but is it an incorporated association or a loose collection of people, how would you describe the organisation?---My understanding is they are both incorporated. I would stand corrected if you were to produce evidence to the contrary, but my understanding is they are incorporated.
I don't propose to contradict you on this, I was just seeing what you know about them. And is Whistleblowers a large organisation? What knowledge do you have of that?
MR MAXWELL: I object to this on the grounds of relevance. I don't see how this can possibly be on anything before the court.
HIS HONOUR: How is it put as to relevance?
MR LANGMEAD: Your Honour it's put that the status of the author of the publication alleged to constitute contempt by scandalising the court, is relevant to whether or not it poses a real risk or the practical reality tested as being talked about. I intend to take Your Honour later to a Canadian authority where it was highly relevant that they minister the Crown made a particular statement and his status for example was said to bear, and indeed we don't need to go to other jurisdictions, we can look at the Trade Union cases in this State.
HIS HONOUR: Well put expressly by Mr Maxwell that status was important for the purpose of the defence case to establish that there was a minimal risk of prejudice to the administration of justice and it was written by someone with serious intent et cetera and with a
reputation for such. I don't think that issue is in dispute, but a particular challenge to the question though is how does the membership of Whistleblowers, or what it does, bear upon the question of the status insofar as that issue was conceded to be a relevant one.
MR LANGMEAD: Without flagging every issue I wish to put to the witness, it will ultimately be put that rather than being a disgruntled litigant with an obsessive tendency to publicise his own perception of what occurred in the criminal justice system and that accordingly as
Mr Maxwell, I think, put it, although not necessarily in these terms, that that diminishes the real - the practical reality of the impact of the published statements, we would seek to lead evidence to the effect that, indeed, Mr Hoser, without putting too fine a point on it, is a campaigner. That he presents himself in his book as a focal point for those concerned with issues of official corruption and that's the relevance of it, it's squarely to rebut the point that my friend in submissions has - - -

HIS HONOUR: I'm not sure that you're rebutting a point that was put by your opponents, I think it's the point that they were accepting and I'm not sure that there's in fact any dispute by Mr Hoser but it seems to me that might emerge fairly promptly. I'll let you ask the questions for the moment, but it seems to me it's only got that limited relevance.
MR LANGMEAD: As Your Honour pleases and in terms of these organisations have you publicised your book or published it to them, distributed amongst the members of these organisations?---Yes and elsewhere for that matter.
And would you accept that you have presented yourself in Exhibit B, Victoria Police Corruption 2, as a person to whom people who are members of Whistleblowers of Lawatch and people who share similar concerns about the judicial and legal system, that you presented yourself as a focal point, that they have asked you questions about how to protect themselves for example?---I think I'm going to answer your question. It's a bit long winded. Whether that was my aim or not, I don't know, I write the books to document - there is a whole complexity of reasons as to why one writes a book and after you've written a book when somebody actually - 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. So much so that in the final chapter of the second book there is actually a chapter detailing advice which I believe is useful for people in similar situations, so yes, the consequence has emerged I think along the lines of your question and within the best of my abilities, I have presented what I believe is the best way to protect peoples' rights on the assumption that they are doing the right thing.
And the chapter you refer you contains detailed advice for example, on how to tape covertly, doesn't it?---Yes.
You see Exhibit B, at least in that chapter, as expressly advising those who are concerned about corruption in the general sense in the legal system?---I can't answer that question, but I will say that that chapter speaks for itself, if that helps in any way. My recollection of the exact wording in the book, I think you're trying to ask me about, I can't recall, it was written some years ago and as you can see, they're vast, and I've done other publications since then.
But whether one wanted to tape a conversation in the street or court proceedings covertly, you accept that the final chapter in Exhibit B would be of considerable use to somebody wishing to do either of those things?---The chapter was written with a view to establishing the truth in all circumstances.
HIS HONOUR: That question is capable of being answered I think Mr Hoser?---Sorry, I - - -
HIS HONOUR: Listen to the question - - -?---I apologise Your Honour.
MR LANGMEAD: Whether a person wished to tape a conversation with someone in the street or court proceedings and to tape it covertly, do you agree that the final chapter in Exhibit B would be of use to such a person?---Yes.
And would you agree that you directed it at such people?---It is offered as advice which must be taken on a case by case basis as stated at the beginning of that chapter I think.
Exhibit A certainly relates in many parts to proceedings other than ones in which you've been involved, doesn't it Mr Hoser?---Mainly, yes.
Yes if you could go to p.57 of it which is - - -?---Exhibit A?
Yes of Exhibit A. Just bear with me for one moment. I do recall that that was one of the passages on which Your Honour certainly ruled, but and an originating motion that I marked up?---Yes it is.

Unlike Exhibit B, the reference here to Magistrate H.F. Adams and the allegation of a bribe and a confession by a policeman, there is no related reference to Bingley in any obvious place in this book, is there. You recall in Exhibit B how on the front cover there is a - on the back cover you talk about Magistrate Adams and on the front cover there's a photo too and a reference to Mr Bingley? ---In number 2, yes.
Well in the first book, there's no such similar reference is there to Mr Bingley?---My understanding is there would be, but not on that page, but if you want to do - my counsel doesn't have a computer, but if you did a word search you would almost certainly find a reference to Bingley there - - -
Are you able to point the court to any related text other than that which appears under the photo on p.57?---If you would allow me access to the word for windows file for the book, I could tell you straight away.
MR MAXWELL: Your Honour in my respectful submission that - assuming that to be proper question, it's a submission that can be made on the face of the book. I will seek instructions about whether there is or there isn't. It's either there or it's not.
HIS HONOUR: Yes, I, I - - -
MR MAXWELL: And I don't think the witness can be expected to have a photographic memory for the first of two volumes totalling 1400 pages.
MR LANGMEAD: He might well in fact.
MR MAXWELL: He might?---I found it already. I've already found it. I under estimated my (indistinct). There is one reference on - it says p.54, second last paragraph. This is just, there's probably others, but I've just found one and I'll read it, it says, "Adams is well known for doing deals with prosecution to pre-determine a trial. Refer to the Hoser Files, p.71". Now that's on p.54 and the photo is p.57, so one would assume that one would see the photo with that reference - refer - rel-, on the understanding it's referred to in the Hoser Files and if one refers back to the Hoser Files you'll find the - - -
MR LANGMEAD: Thank you Mr Hoser are you able to say where the words appear, "In a separate matter a policeman admitted to paying a bribe to Adams" and it goes on. The reference to a separate matter, can you point to anything in the book which identifies what that separate matter was?---Yes back, p.54. We've just been there.
So it's just a reference again to the - - -?---Page 54 - - -
Bribe issue?---It says, "Adams is well known for doing deals with prosecution to pre-determine trials. Refer to the Hoser Files, p.71". Now - - -
The reference on p.57 if I can interrupt you there is, "In a separate matter a policeman admitted". What is the separate matter in which the policeman made the relevant admission?---The Bingley Hoser matter.
Isn't it your position as revealed through the books that Mr Bingley made the admission in a conversation with you which you covertly taped?---That's correct.
So that's not in a separate matter, that's privately in a conversation between you and Mr Bingley?---No, it's a - well my, my context is separate legal matter. I heard the argument the other day but it went over my head, I've got to admit, but it was a different court case, there
was the - my understanding is this. In the first paragraph it refers to the case involving Higgins, Gerring and Strang, the three policemen who were involved with Geoff Lamb and the separate paragraph refers to a separate matter, as in a separate legal matter, referring to the matter involving myself. Then it goes on and it talks about Adams who presided over the Jennifer Tanner inquest and then it goes on about Adams and the Wagnig and Walsh Street matters. And they're all described in the same way as matters and my, my layman's perspective, I'm trying to put a layman's - well non-legal person's perspective, is each matter is a separate case.

You Describe Mr Bingley do you not, on the inside of the cover of Exhibit B, as a "crooked cop, one who has been involved in falsifying charges, perjury." Is that correct?---Most certainly, yes.
Is there any other basis for the allegations you make against Magistrate Adams, of which you are aware, other than the covertly taped conversation with Mr Bingley, who you describe as one involved in "falsifying charges and perjury"?---The only evidence I have in relation to Adams, which is documented in the Hoser Files, and I don't go any further and I don't go any less, is twofold.

Firstly there is the, well I suppose referred to as the tape recorded conversation.

Secondly there is the case itself which was in fact transcribed at my cost and the result of the - my view and the view of others who have read the transcript is that based on the evidence that was led, particularly when cross referencing it with other material such as the various statements tendered by Bingley, as in a record of interview and sworn statements and so forth, it would be impossible for a reasonable judge to have convicted me. I was convicted and I was sentenced and there could be a whole host of reasons.

I am not privy to reading Mr Magistrate's mind but the policeman then offered an explanation for it, which was covertly taped recorded, which inasmuch as the decision itself didn't seem to make sense, it did offer an explanation.
So the case was lost, you have the covert tape and you are happy to move from there to a full page photo of Magistrate Adams in which he is squarely accused of accepting a bribe, is that the basis? Is there any more to it?---Well, there's - in terms of Adams, he's come under criticism for a load of other cases including the Wakeneek matters, the Tanner matter and a whole host of things and what I - what the aim of the exercise was, was basically to flag an area of possible further investigation, if that makes sense.
I'm not asking you about what knowledge you have of whether or not Magistrate Adams has come under criticism, I'm asking you if there's any basis other than the fact that the case you referred to was lost, that Mr Bingley, in a conversation with you, alleged that there was a bribe taken by Mr Adams, is there any other basis for this allegation?
MR MAXWELL: Your Honour there's no basis for re-asking that question. It was answered lucidly about two minutes ago and Mr Hoser said there were two bases and I won't repeat them.
HIS HONOUR: No, I thought the question was appropriately put.
MR MAXWELL: If Your Honour pleases.
WITNESS: Just to - the question is, on what basis have I made the accusation against Bingley, is that right?
HIS HONOUR: You've given two bases.
MR LANGMEAD: The question was, whether there was any other basis, apart from the outcome of the case and the statement that you said you taped - - -?---Most certainly there was. The other basis is the fact that the outcome was determined on evidence overwhelmingly and I mean overwhelmingly to the contrary. It wasn't just a case where one person said one word, another person said another and the Magistrate said, "Well I accept this witness over that witness", because the Hoser files deals with cases like that and that's the, the Adams, Bingley case is detailed at length, it occupies several chapters of the Hoser Files.
Now the Adams decision wasn't just one of these cases where, in the view of myself and others who were present at the case, including the lawyer, that you know, in the face of the facts there was no option but to acquit and yet it appears - well the fact is I was convicted and it was overturned on Appeal, but I was convicted in the first round and it is on the basis of the overwhelming evidence of my innocence that I was convicted and the only explanation that has

been presented to date is the explanation, by Bingley, which was covertly tape recorded, and I don't - I have never, ever said point blank that is definitely what happened, I am not in a position, but I do make the point that in the Hoser Files, I talk about what the likely scenario's are and what - and I do expand on that quite extensively and I think that - you've tendered it, it speaks for itself.
Would you direct your mind to Exhibit B, that the title of the book indicates, a lot of it is about police corruption, but the issue of police corruption as you present it in Exhibit B is necessarily intertwined with judicial corruption on some occasions, as you allege, isn't it?
---Yes, you could put it that way.
It is fair to say, without going to specific passages, that you link police corruption in some instances, with improper relationships with judicial officers.
MR MAXWELL: Your Honour, with respect that question is not clear. The word link is capable of half a dozen different meanings and - - -
MR LANGMEAD: I'll re-ask the question.
MR MAXWELL: - - - is it factually or whatever?
MR LANGMEAD: One example of police corruption that you give in Exhibit B, is of improper relations with judicial officers, is it not?---If you can identify the page and it's there, I'll accept it on - I'll accept the book as it is but if I can just help you Your Honour.
HIS HONOUR: I'm not sure actually that I understand how the question's being put, improper relations?
MR LANGMEAD: With judicial officers.
HIS HONOUR: I'm not sure what you mean by that.
MR LANGMEAD: I'll withdraw the question. Could you look at p.693 please?---693? Exhibit B?
Exhibit B yes. Just below the middle of the page, there is a paragraph that reads, "However, as one who has made a study of police corruption Australia wide, I can assure readers that the problems are general." Now do you agree that in this book, in that passage in particular that you have presented, that you have indeed not only made a study but made out that you have a sound basis for some of the things you've said?---Your Honour, the sentence speaks for itself but there are qualifying sentences immediately underneath. For example, "Now I'm not saying that all police do this, far from it." You know, and the point is made early in both books that the vast majority of judges and magistrates and police and so forth, are doing a very difficult job, very well and I think in the context of the books, what I'm worried about Your Honour, is that a perception is being put across that I have some sort of bent or vendetta against all judges and magistrates which is very far from the case. I make it patently clear, repeatedly in both books that the majority of these people are in fact, doing a difficult job, very well and I'm just worried that these paragraphs quoted out of context are in fact putting the wrong slant on the books as a whole.
Mr Hoser, your answer indicates that my question was unclear and I apologise for that. I want you to focus not on the police corruption part of that sentence but on the study part?---Yes, yes.
You represent yourself as a zoologist, scientist and one who has turned his skills to a study of police corruption?
---Most certainly, yes.
Has that study involved anything beyond accounts of different people who've been just as involved with police action and court action?---Yes, yes, yes.
So what does the study involve?---Basically, it's hard to explain to someone on the outside, but my whole modus operandi is gathering information for books, long before I actually intend - before I actually write them so at any give

time, I'm gathering information for about six books which may or may not eventually be printed.
In the case of the Victoria Police Corruption books, which are subject to this case, they took me about two and a half years, full time, to write. Now different sections of the information came from different areas.
Now basically, what usually happens is I get a lead, whether it's by the mainstream tabloid media, whether it's by a disgruntled litigant ringing me or whether it's by a policeman or ex policeman ringing me, equally to point out something that they believe is wrong that I should write a book about and I get people - and my wife will tell you the same thing - I get people coming to me daily, wanting me to write their books about corruption.
Now, by way of example, in the exhibit, this book, Victoria Police Corruption 1, there's a chapter about the police shootings. Now besides what was in the tabloid media, I spent several weeks at the Coroners' Court going through all the different files for all the different shootings so that I could, as best as possible, establish what actually happened in every case and I have presented that and then, where I deemed appropriate, put my own slant on it or my own opinions, which is quite outlined and I also chased up witnesses who were involved in these various Coroners' Court hearings, to try to get further and better information that may or may not have been excluded because of legal privilege or whatever.
Different areas came from different areas. Different information came from different areas but it
came from all over but probably, in answer to your question, how I went about the study, is explained if you look at the list of the sources which has been published for the very reason that, if I have got something wrong, which is always a possibility, I don't - I'm not God, I get things wrong.
Others can view all the sources and independently decide whether I've got it right, whether I've got it wrong, whether I've quoted in context, whether I've quoted out of context and the list of sources - I have a print out in my bag, but it runs about a hundred and something pages in the similar font to what you're looking at there and that explains where all the information came from.
These are the so called facts that you base your opinions on?
---Well, no evidence to the contrary at this stage.
Would you accept that your book, Exhibit B, considering the context there are specific passages I will take you to, but considering the book as a whole, would you accept that it aims several blows at the judicial system as a whole, in other words it goes well beyond your case?
MR MAXWELL: I object again to the formulation of the press, it is not helpful in my respectful submission to Your Honour and certainly not to the witness, for metaphors like, "aim several blows" to be used, if there is a question of fact to be investigated, the question should be asked and to add that kind of colourful language means that it is not possible for the witness to know what he is answering.
MR LANGMEAD: I am happy to rephrase it Your Honour.
HIS HONOUR: Yes Mr Langmead, there is no problem about general questions can have application, but I think that counsel is right, that to be helpful they need to be precise.
MR LANGMEAD: All right. Could you go to p.17 of Exhibit B please. It has been presented through your counsel, Mr Hoser that the majority of this book in fact relates to matters to do with your case. The proposition that I want to take you to several passages in the book and put to you the final proposition that it is also aimed at very general criticisms of the judicial system as a whole beyond your case, do you understand that proposition?---I understand your question, I don't know if I can answer it.
HIS HONOUR: Just wait for the question.

MR LANGMEAD: I am asking if you understood it at this point, where we are heading. So I will take you to the particular aspects, at p.17 beside the definitions that appear in black there, do you have that page?---Yes.
It says, "This book delves beyond the police force and into the equally corrupt legal system, that includes judges, magistrates, their support staff, bent lawyers and again the bent police". Nos in terms of evidence you have given about if you did indeed conduct a study of police corruption, are you able to tell the court what study you undertook and indeed what are the bases for that statement?---Again, they are outlined in all the sources, but essentially the subject matter we are dealing with Your Honour, is so vast that it is impossible for one person to comprehensively look at it all, so it is by its very nature a piecemeal account, and there is no hiding that. And again I say, it's not because all police are corrupt, but assuming say a one per cent corruption rate, that would give you such a vast amount of corruption to deal with, no one person could cover that in their lifetime and I think justice would have said much the same thing.

But the information in terms of the legal system I think, was the question I was asked, came from people who had their own cases in grievances, and they presented me with whatever information they had, and I also went to the various legal data bases of which there is a great one on the Internet now, called Auslit, which gives you case judgments, and also various litigants present to me with transcripts. I even spoke to some judges at different times and former judges and many lawyers, and the information came from everywhere. A lot of the evidence was hearsay, a lot of it was backed up with documents, which I might say I didn't forensically test which could have been my downfall in the past. But as best as was possible within my limited means and resources, I did try to verify and corroborate everything as best as is possible, and yes information came from all over the place.
Mr Hoser I put to you, that what you have done repeatedly in this book, and I will take you to the specific passages, is, because of your experience with the court system and perceptions you have of what occurred to you, and you have given detailed accounts of those, but I put to you that the device you have repeatedly used is to then engage in a highly exaggerated generalisation about the system, with no more foundation than your disgruntlement with your case, what do you say to that proposition?---I think you've got it wrong, you are Mr Langmead aren't you?
MR LANGMEAD: Yes that's right?---I think you have got it wrong. Do I address you as Mr Langmead or just sir or counsel.
HIS HONOUR: I think just address your answers to His Honour?
---Sorry. I think he's got it wrong there and if I can just elaborate, I don't believe that disgruntled is really a complete accurate portrayal of myself. Anyone who is robbed of something that they believe they are entitled to of course will have a sense of disgruntlement. When I've written the books a couple of aims I have tried to do is to as best as I can, present it unbiasedly, the other thing I've tried to present is to show, and that's why there are other cases involving other people, that the sorts of thing that happened to Raymond Hoser as an entity are not unique and there are other people that do suffer the same fate and of course it also has to be put in the perspective that there are thousands of court cases every week in this country, and not all of them are miscarriages of justice, and in this particular book, Exhibit 2, which is I think the one they have taken the strongest umbrage to, there is a chapter about the prisons and my term in prison, and I make a number of passing comments to the effect that most of the time the legal system gets it right, and most of the people that are in gaols actually deserve to be there. And I talk about that and if Your Honour has read it you will see there is even a passing mention of a person that you imprisoned at that same section.

MR LANGMEAD: Mr Hoser if you could go to p.241 and Your Honour I do appreciate that this is one of the passages that is no longer - - -
HIS HONOUR: What page is it?
MR LANGMEAD: Page 241 of Exhibit B. What you say there Mr Hoser is in relation to Chief Judge Waldron of the County Court, "That like I have already said, the Chief County Court Judge doesn't seem too concerned with the truth". Now that part of the sentence relates to your experience in court with Chief Judge Waldron doesn't it?---Yes.
Then you ask, "Then what faith can Victorians have in their legal system", and you go on, "Not only that but myself and any other concerned citizen have absolutely no power to do anything about the recklessness of judges like Waldron". Now what basis do you have for the generalisation that the legal system is such that people can't have faith in it, and that there indeed are judges like Chief Judge Waldron, as you have presented him, what is the basis for the generalisations?---The basis, well the basis for the bit about Waldron is actually you have referred to a paragraph on p.241. Now the basis of that actually is on pp.238, 239, 240 and the top of 241 in relation to a legal aid application and when Waldron was giving his reasons for refusing me legal aid, he actually got his facts wrong. Now - - -
HIS HONOUR: I think you might have the missed the question which was being asked, it was accepting - - -?---He asked me the basis of it.
No you are not listening to the question, he is asking you the question not with respect to Chief Judge Waldron - - -?
---But the generalisation?
Yes. The question that was being asked was, apart from what you say about the experience with Chief Judge Waldron, what was the basis for extending it to a statement that concerned judges generally in the legal system, in other words I think the question is, apart from that experience with Waldron, was there some other material relating to judges generally which supported the statement which you there make?---I thank you Your Honour for clarifying that. He had actually asked me a double barrelled question though.
MR MAXWELL: Before the witness answers that, my learned friend's question with respect was a little different and we would object to it on the basis that it misreads the sentence. It says, "If the Chief County Court Judge doesn't seem too concerned with the truth, then what faith can Victorians have in their legal system". That is not a statement about any other judge, it is what is said to be a question which arises from a particular matter just documented. So to ask what's the basis for the generalisation, is in our respectful submission, to put a question on a false basis, there is no generalisation, there is a question raised based on one specific judge.
HIS HONOUR: That seems to me to have some force Mr Langmead.
MR LANGMEAD: Your Honour, the use of the word "if" is not in the sense of it being a mere possibility, it's a rhetorical question that if the judge doesn't seem too concerned with the truth, then the pages to which Mr Hoser referred indeed seem to be at pains to establish that that is a flaw suffered by Chief Judge Waldron, so in other words it should be, its meaning properly read is, given that the Chief Judge doesn't seem too concerned, then what faith can judges have, but the entire context makes that clear and the literal interpretation my friend puts on it with respect - - -
MR MAXWELL: Well I think frankly that subtlety is one which short of a 20 minute debate is unlikely to assist me
over - - -.
MR LANGMEAD: I will take the option of moving on rather than a 20 minute debate Your Honour?---Can I just apologise Your Honour I actually thought he had identified that paragraph at the top of p.241, so I was also a bit confused.
If you look at p.44 please Mr Hoser of Exhibit B, I'm sorry it's p.45, it doesn't have a number on it, do you have that page?---Yes.

Near the bottom of the page, you talk about how magistrates and judges are appointed. You say, "This is a secretive process based on patronage and not what you know but rather who you know. Appointments to the bench are usually treated as repayment for past favours"?---I'm not sure where you are reading from.
I'm reading from the bottom of p.44, the last words, "It seems that integrity or ability aren't always part of the job requirement", and you go on. Now in the general context, you - - -?---Sorry I'm still not picking it up.
It's the bottom?---Book B.
Yes Book B, p.45?---Page 45, yes.
You would agree that that is a generalisation that you say are usually treated for repayment for past favours, in other words that most cases, most appointments occur through that process, that is what you are putting there isn't it, to be - do you accept that?
MR MAXWELL: Your Honour before - I don't think the witness needs to answer that. Frankly that passage doesn't seem to be to assist me, and it seems to be that whatever the witness answers as to that, if it was capable of carrying an imputation against the witness, half the bar would be disqualified every time there is an appointment. I don't think it assists me.
MR MAXWELL: And it's not - sorry Your Honour, a matter complained of.
HIS HONOUR: Well I don't think that once you've taken the approach that you have, I don't think you can complain about that.
MR MAXWELL: No I accept that Your Honour.
HIS HONOUR: When you say in context as - - -
MR MAXWELL: I accept that Your Honour.
MR LANGMEAD: Your Honour, it's the context that adds the sting to what's there, but if Your Honour's not assisted by it, I will move on.
HIS HONOUR: I don't think so. I don't think so.
MR LANGMEAD: Go to p.655 please Mr Hoser, of Exhibit B. The second complete paragraph under the heading of, "Looking after the criminals", do you see that passage? Starting with the words, "The criminal is then forced"?---Yes.
"To front at court". Just bear with me one moment. "The criminal is then forced to front court but a deal is done with one or more of the clerks, the prosecution and the person hearing the matter, judge or magistrate, to give the person an easy ride through the system". Now that is a generalisation, do you have a basis for it?---There obviously is a basis for it and I would suggest if you read the preceding and the following pages, the basis would be there. Which would again be corroborated by the sources.
I put to you that those pages don't assert any evidence of a deal, direct evidence of a deal being done as you allege in the paragraph that I've read to you?---Well.
Can you point to - - -?---Yes, Your Honour, as I said I wrote the book a while ago. I can't remember, you know, the detail, but I'm just glancing at it just now to my testimony and drawn to it and on the same page, 655, there's on the one, two, three, fourth paragraph and basically the book speaks for itself, because I can't remember what was going through my mind at the time, or what - but it says, take for example, the case of Kathleen Weir of West Heidelberg. She was the treasurer of a major heroin syndicate. The ring trafficked at least $220,000 worth of drugs in just six months during 97/98. "On 27 May 1998 she plead guilty. Judge Leo Hart gave Weir a suspended sentence. She walked free without any tangible penalty. The police side had not opposed the application", and it goes on about another case involving more drug traffickers. And then there's a whole paragraph. There's a section underneath that as well, and it goes on. Now the basis of those cases, my recall is zilch but in answer to the question, Your Honour, I know it's a bit long-winded. There's been a paragraph with a generalisation quoted, or an assertion quoted, and it appears by reading

this book that there is corroboration or substantiation of that paragraph immediately following. And can I elaborate a little bit more, Your Honour?
HIS HONOUR: I think perhaps you should wait for the question, yes.
MR LANGMEAD: Is that the most direct evidence you say that appears in the book of a deal being done with the clerk, the prosecution and the person hearing the matter, judge or magistrate, to give the person an easy ride through the system simply to quote some results as to court cases?---I would suggest that there's probably several other cases in that book and other books involving the same sort of stuff and if you read the 1500 pages, I'm sure you'll find them.
Do you have any direct evidence in this book - do you present any direct evidence of a deal being done, other than what you've just cited?---Your Honour, I think we're talking about cross-purposes here. If I can help - - -
HIS HONOUR: Well can I assist by framing the questions I think is being put - it is being put to you that the two examples you've quoted are of what you're suggesting are lenient sentences being given in circumstances where you suggest they shouldn't have been given. Counsel is putting to you expressly the proposition that the statement of there being a deal done between the clerk of courts, prosecution and the person hearing the matter, judge or magistrate, to give the person an easy ride, the question's directed expressly for the proposition do you have any evidence of such a deal being done between prosecution and judge or magistrate to achieve the result?---Yes, I - Your Honour, if I could just help all of us here. This gentleman here keeps asking me for evidence. These books themselves are not evidence. They are a summary of evidence. Now the evidence is the sources that is sighted and the sources, as I said the list of sources runs a hundred odd page, those documents, be they court transcript, covertly tapes, tabloid clippings, letters, whatever, they are the evidence that form the basis of this book. Now Mr Langmead keeps asking me for evidence and in fairness to all of us, the books are a summary of the evidence, though not the evidence in themselves. Does that help.
Do the books refer to any instance of a deal being done between the prosecution, the judge and the magistrate to affect a result, that's the question. Can you refer to any of these issues - - -?---But I can direct - immediately identify a passage?
Yes?---No. However, what I will refer you to is that original paragraph that says, "A common scenario", is - and it talks about a scenario. It doesn't talk about a specific case. Now by way of example, in relation to this business with deals being done with magistrates and judges. In my time in the prison system, I spoke to a number of prisoners who gave me information to that effect, and they gave me specific case details and I was even able to check the results. The only thing I wasn't able to check, of course, is whether or not a deal had in fact been done. So I have listed that there as a scenario. I don't detail a case there, but I do refer you to the section about Judge John Yeldham where the police alleged that they had caught the judge having sex with under aged boys, this came out in New South Wales and the deal was allegedly done with the judge that he would be - look after the police and their cases. Now we know that Judge Yeldham committed suicide and there's been various material. You know, I don't have to rehash the Yeldham story. But, yes, there is evidence that that practice - it is completely within the bounds of human possibility that it could occur and there is evidence or some form of it occurred at least in New South Wales in relation to that particular judge. Now again I go back. It's not an assertion that it happens all the time with all judges, but it certainly is within the bounds of human possibility and that is why it is labelled there as a scenario.
MR LANGMEAD: Thank you Mr Hoser. Go to p.731 of Exhibit B please. You pointed out a number of times that there are passages in the book and indeed that it is your view that the system is not flawed in its entirety and that indeed many judges and legal officers perform their duties well. But have a look at the

paragraph in the middle starting with the words, "All things being equal"?---Yes.
"All things being equal, I can assure readers that it is unlikely any Australian judge or magistrate will accept the word of a civilian witness (usually the accused) over that of a government official, usually the prosecutor, even when there are more than one witness for the accused. The sooner these facts are realised, the better for those caught up in the mess". Now whether we used the word disgruntled, or unhappy, or that you are critical of what occurred to you in the system, I put to you that this is an example of a gross over-generalisation about the judicial system for which you have no basis and you present no basis as well?---No there is a basis. It's common knowledge. Your Honour, I think you would agree with me, it's common knowledge that if there's one witness saying one story and a policeman saying another story in relation to an alleged crime and

all things being equal, the police witness is usually believed and lawyer, Victor Purton, said that on Radio 3LO not long ago. He's a member of parliament. He said the same thing and my own experience with the legal system, many cases, having seen many different people, different scenarios, I - I hold that view that if there's all things being equal, there is a policeman telling one story and a person who is a civilian, for want of a better word, telling another story, as I say, if things are all equal, the policeman will be believed first and I stand by that.
You have repeated the view expressed at p.731. The question is directed to whether you present any evidence in Exhibit B in support of what I put to you is a generalisation?
---You want evidence to support that generalisation?
MR LANGMEAD: Is there any there?---Most certainly. The Hoser Files as referred to and there is a case in front of Magistrate Hore referred to in the Hoser Files and I can't give you the page reference but it's in there and that was a case where I was wrongly charged with over charging a passenger in a taxi. It was alleged I'd overcharged by $2 and the Magistrate found against me and I actually justify the Magistrate and say well look, basically he believed that witness, the, the Crown witness as opposed to me and all things were effectively equal and then I went on to show a subsequent case involving the same witness where they gave opposing evidence, which if it had been matched up, would have found in my favour, but of course the Magistrate in the first case was never privy to that evidence. So it wasn't an attack on the Magistrate it was just a statement of things as they are, so there is evidence for the assertion, yes and that's just one case and there any many others.
Adopting your perception of the case you just gave evidence of, you perceive that in the case you were involved in that your word was rejected over that of a government official, that's what you're saying in essence isn't it?
---It was a Crown witness. I was charged with over charging - the case is - - -
Listen to the question Mr Hoser. That's what you're saying isn't it that - - ?---No.
That case?---What I said is what can happen - - -
Just wait please?---Sorry.
You're saying that your evidence was rejected and that the evidence of a government witness was accepted?---In that case, yes.
How do you get from that proposition or that perception of yours, to this statement, "I can assure readers that it is unlikely any Australian judge or Magistrate will accept the word of a civilian witness, usually the accused, over that of a government official, usually the prosecutor". How do you get from your case to any Australian judge or Magistrate - - -
MR MAXWELL: Your Honour again I (indistinct). You've misquoted Your Honour, it was misquoted.
MR MAXWELL: The question that's been asked been answered?

---He's misquoted Your Honour.
Mr Hoser gave a lengthy answer two or three minutes ago about his view having observed many cases and been in a number himself, was that, other things being equal, that was the way things went and this is just retrace exactly the same ground as has been comprehensively answered.
HIS HONOUR: I think it probably has Mr Langmead.
MR HOSER: Can I just assist Your Honour.
HIS HONOUR: No, wait thank you, I'm dealing with an objection.
MR LANGMEAD: I simply put it to finalise the proposition because Your Honour I seek ultimately to make submissions on the evidence and in fairness I have to give Mr Hoser every opportunity to answer what I'm - - -
HIS HONOUR: I'll accept that, that's perfectly appropriate and I think that you can put the proposition that you're seeking to draw from that statement and give the witness the opportunity to deal with it.
MR LANGMEAD: Your Honour the proposition that ultimately I would seek to put to this court on the basis of this paragraph is that you make a generalisation that it is unlikely, "All things being equal, I can assure readers it is unlikely any Australian judge or magistrate will accept the word of a civilian witness, usually the accused over that of a government official, usually the prosecutor". I intend to submit to His Honour that that is a gross generalisation based on your personal experience in court and what you've heard about other cases and maybe what you've observed from the dock, but that none of that comes close to amounting to a sound or reasonable basis to make the generalisation that it is unlikely that any Australian judge or magistrate will accept the word of a civilian witness, as you've described. What do you say to that?---The paragraph read in full I stand by and it starts, and I quote it in full. It says, "All things being equal" which you Mr Langmead didn't quote the first few times you read the paragraph out. Now it is a generalisation, and it is quite clear it is a generalisation. It says, "All things being equal, I can assure readers that it is unlikely", unlikely being the operative word and bearing in mind I'm being asked to recall this some time after having written it. "Any Australian judge or magistrate will accept the word of a civilian witness, usually the accused, over that of a government official, usually the prosecutor", et cetera. Now I do stand by that. The court records stand by that. My understand is the conviction rate in contested hearings is overwhelming in favour of prosecution side and you know, having said that, there are also other statements in this very same book, which again as I said made it clear that most of the time the Crown do prosecute criminals. They're not prosecuting innocent people most of the time. Most of the time they do prosecute criminals and most of the people behind bars do in fact deserve to be there and I actually make the following comment in that section, that a lot of them deserve to be there longer than they are. So I think you're trying to put an unbalanced perspective on a book that, bearing in mind it is about corruption, is a lot more balanced than you Mr Prosecutor make out.
MR LANGMEAD: Could you go to p.679 please Mr Hoser. Under the heading "Protection of Paedophiles?" you pose another question, "How is this done", then in the fourth paragraph starting with the words, "Then there is the effective protection by the judiciary. This can be in the form of improper acquittals or prevention of matters going to full trial. Another common means is when the judges and magistrates impose minimal or no penalties for the most heinous of offences, again as a result of corrupt deals or other form of protection. There is no shortage of cases". Now in the context of that generalisation you, asserting that there is no shortage of other cases, you don't present even a sample of those cases, do you?---Same page, under the heading, "An Example", under the next heading, "No long term affects of rape, judge". If I can just contradict you

Mr Langmead, I present many examples in the pages of the book, bearing in mind I'm constrained by space and there are further examples in the references cited and it is not so much a criticism of corruption in terms of magistrates, I think it is a valid public criticism of leniency of sentencing for serious offences which I'm not the only person to have ever made that criticism.
As in earlier example that we went through, from leniency of sentencing you move to the proposition, as a generalisation that the judiciary effectively protects paedophiles, is that correct?---I don't, I don't, take that jump the way you do, no. I think the book speaks for itself.
I'm putting to you that you take that jump Mr Hoser, do you understand that question?---I would reject the jump in your words.
If that's answer, yes. Is it the case that everything that appears in Exhibit A and B is published on an Internet site managed by you?---No. We sell the books on the Internet, yes. The material is not published on an Internet site and the books have been published on CD Rom and that sums it up I think.
Is there a device on the Internet site that permits a person at that site to search the content of these books, albeit not to read it, to find out if the particular topic or person - - -?---Yes, you can use what they call a - I don't know what your knowledge of Internet is Your Honour, but you use a thing called a CDI script which actually searches the contents of the books but the books themselves are hidden from the Internet browser and the only information given is which book that particular word or name is in, that's correct.
So for example if you fed in the word "Paedophile" it would say - the search would reveal that this appears in what is Exhibit B?---Yes.
But no further details?---That's correct.
MR MAXWELL: Your Honour before the witness gives the obvious answer which is that the general applies to the particular, I object to this on the grounds of relevance. How is this put as being relevant to the tendency of the particular words to have the requisite affect.
HIS HONOUR: The scope of publication must be relevant. It was one of the arguments that you advanced to me that - - -
MR MAXWELL: With respect yes.
HIS HONOUR: It seems to me that if the publication is more broad then simply by sales of the books, it has some relevance.
MR MAXWELL: I accept that Your Honour. Your Honour will have noticed that the affidavit itself deals with the scope of publication expressly and indeed with book two, which the prosecution witness at evidence, failed to deal with.
HIS HONOUR: I appreciate that.
MR LANGMEAD: So the books are both advertised on this site that you control and it's possible to perform a search
that you described of them, but indeed it is not possible to see the entire text there or indeed any of the text?
---Yes, the only sections of either book that are on the Internet are chapter ten of book one and the final chapter of book two. There is no other on the web and those searches are as a marketing tool. I think that it quite obvious. People will pick up the name they like and think "I want to read about that person".
And Exhibit B, are you able to provide any more accurate information than is already before the court, any more accurate evidence as to how many CD forms of Exhibit B are in circulation, public circulation?---No, I will say Your Honour a problem that does occur and I know it has occurred in relation to the books at one of the major newspapers is one person buys the book and then they bootleg - buys the books on CD and they bootleg it, but we have no control over that. But having said that I don't think it's a huge problem because quite frankly, if people want the books they will buy the books because it's just the way it works, you know it's like lending out a book, the, the flow on is not that great as first off sales.

Is the purchase of a book using your Internet site, does a hard copy turn up in the mail or is an electronic copy delivered?---Well it's quite explicit on the site, you are posted a copy.
HIS HONOUR: I might have misunderstood you, you are saying that there is also CD's for sale?---We sell them on CD. The CD's Your Honour are very expensive, and we generally only target them towards academics and institutions and people like that.
How many of those have been sold of the two books?---On the CD's?
Yes?---The CD actually has all my books on them, all my corruption books, and we superseded that with a later version that has all my books on it, and we're in the hundreds but whatever I have put in the affidavit is close to the mark.
MR LANGMEAD: So where you say in the affidavit the previous (indistinct) proceeding which is at Exhibit A, Your Honour in the affidavit, "The book is also sold in CD version, CD's have been on sale since July 99 and about 300 of those have been put in circulation by Northern Publisher and the defendant's had no effective control over the copying and distribution of the book in its CD version". That's, you are referring there to Exhibit A, is it the case that Exhibit B has been similarly distributed in CD form?---The CD has both books on them yes.
I see, so when you refer there to the 300 that has Exhibits A and B on it?---It has Exhibits A and B and the sources, the list of the sources I should say. The reason being Your Honour is it runs another one hundred and something pages and the cost of printing that would up the book by another $10 a copy and we found that other than people that might want to sue me or investigate or students or academics, it wasn't viable to put it in a book and we actually - sorry I should also qualify it, we also put the list of sources on the Internet so people can down load them in the event they want to do research as well.
Do you ever publish extracts from Exhibits A or B on the Internet?---I have already said that. I answered that. We published the last chapter of book two on the Internet because the questions in terms of covert taping and trying to find the truth and so forth, when I'm asked all the time, and we found that if I kept on saying people to read the book, they thought I was just mad keen to sell the book, so we put that chapter on the Internet, and chapter 10 of Victoria Police Corruption 1 is also on the Internet like I said, and that is all.
HIS HONOUR: I'm not quite sure what is the last chapter, where does it start?---At - it's titled, "Blowing the Lid on Corruption", p.79 Your Honour.
I see yes.
MR LANGMEAD: Mr Hoser, in paragraph 6 of your affidavit you have swoon today, you say, "Approximately seven and a half thousand copies of book one were printed and approximately five and a half thousand of book two, as at the date of this my affidavit I estimate that 500 copies of each remain under my control. To your knowledge were any of the seven and a half thousand copies of book one or the approximately five and a half thousand copies of book two, were they destroyed by Kotabi or by any other source as not being sellable or being wasted or are they all in circulation to your knowledge?---My understanding is they are all in circulation.
Does that mean they were either sold or given to interested parties?---Most were sold, yes.
Of the 500 copies of each book, is it safe for the court to conclude that in the hands of the public, there is in the order of 5,000 copies of book two and 7,000 copies of book one?---They are probably fair estimations, there is variables I could go into, but they are reasonable estimates.
Do you have any personal knowledge of steps taken by the Attorney General to restrict sale of your books in book shops in Melbourne?---Yes.
Do you agree that the steps were taken with book sellers to prevent, to stop selling your book under threat of legal action being taken if they didn't cooperate. Do you have knowledge of that?---Yes, yes. But they were very

limited and when we approached the Attorney General on that, they said there is no ban on the book and we are free to sell them and that was reported in the Yarra Leader Newspaper in about October last year in a front page story that there is no ban on the book and that was from Hulls's spokesman. And when we approached Hulls to discuss the earlier letters that went out we couldn't get near him. And that was a year after publication.
To your knowledge, apart from the CD's, the hard copies of the book and the evidence that you have given of extracts appearing on the Internet and the search function on the site that you have given evidence of, are Exhibits A and B published in any other form to your knowledge?---Yes.
What other form is that?---They were tabled in the NSW Parliament on 2 July in their entirety, the only difference being if the pages that actually had the Hansard reproduced in each book, otherwise they are identical.
HIS HONOUR: That's 2001 is it?---No 1999. They were tabled in parliament and printed the next day basically Your Honour. Or effectively in those terms. And obviously people will have photocopied - students may have photocopied them, I haven't - once - what you have got to understand, once the book is sold, although we've got the copyright logo in the front of the book, it is basically out of our control. I have no doubt that people have photocopied bits and pieces they found useful, the CD rom as I said has been bootlegged, but notwithstanding all that, I don't think a huge quantity - I think your numbers are pretty well to the mark because for every copy that gets thrown in the rubbish bin, by mistake one might have been bootlegged or something, so I think it balances out.
MR LANGMEAD: And as you say the books reveal that you assert copyright 1999 in respect of both books, but have you taken any steps to enforce the copyright that you claim in these publications?
MR MAXWELL: With respect how is that put.
MR LANGMEAD: All right I will put it another way.
MR MAXWELL: Is it going to be submitted that there is some duty on a copyright owner to intercept to perceive - it's a right but as far as I'm aware, there is no duty known to the law.
HIS HONOUR: How is it put, it is not clear to me what it's relevance is.
MR LANGMEAD: Straw man, it's not put that there is a duty and it's not about to be put. What's about to be put is this, if I can put the question Your Honour, then just see any objections.
HIS HONOUR: All right, put the question and I will see.
MR LANGMEAD: Have you taken any active steps to encourage people to copy your publications, either electronically or in printed form?---We have actually taken the reverse.
HIS HONOUR: Is the answer to that no?---To actually encourage - we have encouraged people to read it but we have discouraged them to copy it and if I can explain how we have done that.
HIS HONOUR: That's all you were asked and you have answered the question.
MR LANGMEAD: Is it fair to say that you have taken really all steps that you can reasonably conceive of to sell this book, you have gone to great lengths to sell it?---All legal means yes.
Indeed, there is no suggestion that it's other than legal means to sell your books. And indeed have you even engaged in the step of door knocking personally to sell the book?
---Yes I have.
And is it your view that the more copies of the books that get sold, and the more that the issues in it are raised, that the better it is?---I believe that the issues raised in the book such as the fair administration of justice, the smooth running of the court system, tape recording of courts in all jurisdictions, and those sorts of issues, corruption issues across the board, I think are addressed in the books reasonably well, they are matters of public

interest and I believe that they are matters that should be discussed and addressed with the ultimate view as stated in the books to improving the system and I make no bones about that at all.
I want to ask you a geographical question Mr Hoser, in relation to any feedback that you have had from readers of your book. As an author of these two publications, have you had feedback from your readership?
MR MAXWELL: I object on the grounds of relevance.
MR LANGMEAD: The relevance Your Honour is I have tried to flag fro my friend's benefit is as to geography, that the extent to which this book has been distributed geographically is relevant to the practical reality, the real risk test, as indeed is the number and the form which is disseminated.
HIS HONOUR: It seems to me it could be asked in those direct terms, he may well have the ability to answer the question precisely without the detail required.
How widely has it been sold?---We well them wherever people live.
By that I meant how widely geographically has it gone, travelled?---All round the world, all round the country, all round the state, everywhere.
MR LANGMEAD: There are two aspects to it Mr Hoser - - -?---If I can qualify that, obviously the interest outside Victoria is diminished. I have addressed conferences interstate and sold books but as a rule of thumb you will find that the further you go away from Victoria the lesser number of books we have sold but they have gone everywhere.
In which cities have you addressed conferences where you have made reference to and sold Exhibits A and B?---Inverell, NSW, Melbourne, Sydney and they are the ones that spring to mind, I've obviously addressed other groups of people in conferences and things but those ones spring to mind.
Mr Hoser in relation to Exhibits A and B, Kotabi Pty Ltd has been the publisher of those, and that's your company, look I'll withdraw that and put it more specifically?
---Yes.
You are a director of Kotabi Pty Ltd?---The director I think.
The sole director aren't you?---I think so, yes.

It's fair to say that Kotabi Pty Ltd is in full effective control of you?---One way or the other yes.
There was no one else who determines what Kotabi Pty Ltd does is there?---When my accountant says to me don't do this or do that or my lawyer says don't do this or do that, yes well before these books were published they were sent to the Attorney General and we asked him specifically is there anything we shouldn't put in and other than names of juries which were blacked out, we were in the clear.
In relation to these two books, it could be said fairly that you caused Kotabi Pty Ltd to publish and distribute them?---It's a fair summation yes.
Thank you Your Honour.
HIS HONOUR: Yes. Just before re-examine, could I ask you to clarify something for me? The references to Mr Adams, which you've referred to, you say go back to the Hoser Files and you've told me where those passages appear, that's on p.70?---I don't have the book in front of me Your Honour.
Do we have a copy of the Hoser Files there?---Thank you.
I understand, and correct me if I'm wrong. If I understand correctly what you put as to these proceedings, this was a hearing in which the Police Office Bingley was - was he a prosecution witness, or a prosecutor in the case?---He was the police informant. The history of the events.
Well just - that's all I wanted to know. He was the informant rather than?---And a witness. He was also and a witness.
And a witness, all right. And your contention is that he and another witness, Bowen, was it? Had together
been - - -?---No, no. No Bowman was not a witness in that case.

Was Bowman involved in the case in some way?---Yes, intimately.
Yes, so he attended the court, did he?---He was present in the court. But Your Honour, this is the problem that I face trying to defend this. Passages have been quoted. Now this particular case is dealt with in about three or four chapters of the book and in all honesty, in terms of this particular case, I really do believe it's - - -
Yes, well don't assume I haven't read them?---No but it's just a question - the question implied that.
Yes, well could you just listen to the proposition I'm putting to you? What I'm just wanting to establish is that
Mr Bowman and Mr Bingley were both present at the hearing at which you got convicted on that occasion, is that right?---Yes.
Did Bowman himself give evidence in the case?---No.
Right. But he was present and you regard him as having been someone who had an interest in making sure that you got convicted?---Most certainly. Your Honour, there's about three chapters that deal with that whole section and it is definitely - - -
I know it is. Mr Hoser. Mr Hoser, you will have every opportunity in re-examination?---Sorry, Your Honour.
That's with any matters you want to put. I'm just putting some matters to you because I want to get your explanation for them. What is asserted as to the conversation which took place between yourself and Bingley was that it was a conversation which occurred outside the court after Bingley had, in your view, achieved his intended result, that is to get you convicted, and had achieved a sentence of imprisonment against you - - -?---Your Honour.
And you had then been released on bail, is that right?---Your Honour - Your Honour, I can't read people's minds, I was convicted of the offence - - -
I'm not asking you that. I'm just asking you is that the fact that the conversation which took place occurred after the hearing, after the conviction had been obtained, you say wrongly, by Bingley?---That's correct. That part of the question is right, yes.
You then had a conversation with him in which, amongst others, and I'm looking at the top of p.71, well actually take it at the bottom of the page, that Bingley says, "Oh well, it's a pity you don't know mate. Hoser, You've done badly, didn't you. You're probably going to be up for perjury now. Bingley, Who's doing a month's imprisonment. Hoser, But you did get done for lying in court. Bingley, "Month's imprisonment. Am I going to prison? Am I going to prison?" And it goes on, "And later, after a 60 second break, Hoser, Did you know I would get found guilty from the word go? Bingley, Well I paid him off, didn't I, so of course I did. Hoser, The penalty was a bit severe. Bingley, We worked it out before, three months, six months, no a bit too much. We settled for one", and then you say Bingley repeatedly asserted he'd paid off the magistrate. Then it goes on, "The whole aim of the case was summed up succinctly in the final lines of our conversation, Hoser, Well I think you've certainly done a good job in finishing off my cab-driving career. Bingley, Oh well, that's where we set out to do that. Hoser, Well you've certainly succeeded, I can't see me driving cabs for much longer. Bingley, No mate". Now the question I was wanting to ask you was this, At p.52, where you talk about the assault case prior to it occurring you say, "During the previous case Alan Brigle and I recorded the entire proceedings with our micro-cassettes. Nothing was said about, although we kept our machines concealed, there was little doubt that Bowman, at least, who had told the court he'd seen me several times, would've had a strong suspicion we were recording. For more than six months Brigle had been shoving his tape recorder under the noses of RTA officials and telling they were being taped", and you go on, "No RTA men had apparently suffered as a result, they're still busily pursuing the charges against us that had been laid before we armed ourselves with tape recorders", et cetera. Now,

as I read that, you are saying that at the time of this court case, prior to a conversation taking place, you say, outside the court,
Mr Bowman was aware of the fact that you and Mr Brigle were in the habit of tape recording conversations?
---Your Honour, you've got your wires crossed. That's talking about a separate case.
Well is it not talking about a case prior to - - -?---No there was two Bingley, O'Shannessy cases.
Is the passage on p.52 referring to the conviction which appears on p.70?---No.
When was that?---There was one case - the date I don't recall. It's probably in the book, it would be mid year, involving the same police witness against me, name O'Shannessy. Then there was another case in December of the same year and in the first instance I was convicted on both.
The conviction which is referred to at p.70, what was the date of that?---About 21 December 98, the date could be wrong by a day or two, and the other one - the other case was 16 August 1988, and that's accurate because it's out of the book.
So what's being referred to at p.52 is an instant which occurred prior to - - -?---Yes, on 16 August.
So what you're putting is that prior to the occasion on which you were convicted and this conversation occurred, Bowman, at least, was aware of the fact that you and
Mr Brigle were in the habit of tape recording people?
---Yes.
Did it every occur to you that the conversation which I've just read to you, from Mr Bingley, might have been him pulling your leg?---They've made that assertion since, however, that is a possibility and it's not discounted. But, if you let - let me finish Your Honour, if you play the whole tape and you know the circumstances, bearing in mind the comments weren't solicited and bearing in mind subsequent tape recordings made of Bingley refer to in the book in September the following year, where Bingley was admitted - tape recorder saying various things, which are quoted in the Hoser Files, one would form the impression that Bingley did not know he was being tape recorded, because in the later conversation, in September, he admitted to his knowledge of police - well I didn't know it was police up until - I suspected it was police, but he stated point blank that the police had taken tape recording gear from me, which was a matter totally unconnected - well you have to read the whole book in its context Your Honour and listen to the tape recordings, if necessary, and you will see how it's come about.
But you've got the tape recordings of this conversation, have you?---Yes.
Did I understand you to say that it did occur to you that you were having your leg pulled?---That did occur to me at the time, but it was just like - it was just a passing thought and bearing in mind Your Honour, this book was written some years after the event, but in the light of the later tape recordings of Bingley in September 1989, which are referred to and transcribed in part in this book, it is quite clear that Bingley was not aware that I was tape recording him. And you've also got to reconcile it also with Bingley's earlier comments. I was interviewed - record of interview by Bingley in - on March 7, 1988, and that was covertly taped by myself as well and when you reconcile at least three differently covertly taped recorded conversations with Bingley and the one that is subject here in this book, the one that you've been quoting, is the middle conversation, not the first or the last, it becomes quite clear that that possibility is unlikely. Now I have canvassed all various possibilities with a number of other people who have also listened to the tapes and they also have formed the view that it is unlikely that Bingley was in fact pulling my leg and it was just a bold admission, because he was just - he was just cocky and stupid for want of a better word.

But you accept that it's still a possibility, even now?---It is a possibility, albeit remote, yes.
Did you consider putting that in the book, in which you referred to Mr Adams?---My understanding is there might be something to that effect in the Hoser Files, but as I've made - - -
Could you listen to my question please Mr Hoser?---Sorry.
Did you consider putting that in the book under the photographs of Mr Adams where they appear in which it's referred to a policeman admitted to paying a bribe to Adams? Did you consider putting in that, "Possibly, I was having my leg pulled"?---No. Because there's the statement of fact, Your Honour, is the policeman did admit paying him the bribe, so there was no consideration of what you've just put to me, no.
Yes, all right. We'll adjourn until 2.15.
<(THE WITNESS WITHDREW)
LUNCHEON ADJOURNMENT

HIS HONOUR: Yes, Mr Hoser. Come back into witness box, please.

<RAYMOND TERRENCE HOSER, recalled:

HIS HONOUR: Just before you re-examine there is a couple of matters I want to put to Mr Hoser.
Mr Hoser, I have read what you have said about the trial where you were unrepresented, and I think your counsel described it as you "couldn't take a trick" during the course of the trial. I just want to put something to you. I notice at page 142 of book B, the second book, at the top of the page, the first full paragraph you say this: "It has always amazed me how an innocuous activity by myself is always deliberately misinterpreted by the prosecution as part of some major criminal plot". Given the stresses of appearing unrepresented, in a trial which I think went for about a month, did it - not this one, the trial before Judge Neesham; is that right, it went for about a month or so? --- That did. This paragraph refers to an earlier trial - - -

I know; I know? --- At an earlier day.

Why I am referring you to that particular passage is this: has it occurred to you the possibility that you may well have been doing precisely what you have accused the prosecution of there; that is, viewing every activity or every ruling which was made which had a potentially innocent explanation, as being one which was directed against you as part of some suggestion that you were facing a conspiracy? --- Your Worship - sorry, Your Honour - that is a very valid question, and one I have asked myself many times over the last 20 years; not just relating to these cases, but others. Now, it is the sort of question now,

if you read the books in full you will realise that that is not a possibility, and you will see, because I go through cases where they have gone in my favour, you will read earlier cases in front of other judges and magistrates which I won - and I explain why I won and why I lost, whatever the case may have been - but if you get the Hoser Files and you have a look at the relevant sections, which also relate to Judge Adams, in particular, there was an earlier case I mentioned in front of a Magistrate Hoare.
Now, in that particular case, the Magistrate accepted the police version of events as opposed to mine. Now, I actually, I won't say I justify the Magistrate, but I have an explanation, and there is a heading in the Hoser Files - I can draw your attention to the page if you pass me the book - where I actually explain how and why it could have been come about, and I explain that it is no great conspiracy. Basically, the Magistrate had chosen to accept one person's words against me. And I make a point at that particular point in the Hoser Files, I had no evidence other than my word to say that a single thing I had written was true and correct, as opposed to what they had said.
Then along came the next case involving the same prosecution witness, a Miss O'Shannessy, and in that particular case she gave evidence that totally contradicted and rebutted evidence that she gave in the earlier case. So she committed perjury in at least one of the cases, serious perjury. Anyway - and then, of course, that case also fell apart in that the - there is a whole stack of things that happened, including the fact that one

police officer admitted to being present in a room when she was present and that was corroborated by a covert tape. This is a situation where the police - I could go on for hours but - - -

Well, could I - - -? --- What I am saying is, yes, I have asked that question many times; and there is a saying that when you have a case of a conspiracy or a stuff-up, you always take the stuff-up, every time.

Well, do you, or is that - that quote, that you also take the conspiracy every time, do you view it that way - - -? --- No, no.

Or do you view it that you always take it as a stuff-up? --- No, Your Honour. If you read the two books in their totality, and also the Hoser Files, you will see that there are cases where there are obvious things that are wrong, and you can draw your conclusion as to why. And you referred to Adams - there is a detailed coverage of that in the

Hoser Files. My barrister at the time, a Miss Elleray, believed that, she was of the view that the Magistrate had been spoken to. They were her words. And in any event, they came out with this "paying off" the Magistrate and, as I say, in light of other covert tapes it tended to exclude the possibility that he was a alluding to me. There is also a case in New South Wales, which you have probably seen on television, in which a policeman by the name of Chook Fowler - - -

HIS HONOUR: Mr Hoser, I don't want to stop you, but let me take you to the sort of thing I have in mind to get your comment on it. One of the passages on which I have ruled that there was no case to answer - so don't understand or don't think that I am going to change my mind about that -

I just want to illustrate a point and ask you for a comment. It is on page 367 of the second book, and it is the passage which the Crown alleged against you, and which I have ruled had no case to answer, that says: "Neesham had probably made a deliberate mistake here because the date 1993 would indicate that I had premeditated and planned the alleged perjury in early 1994. It was part of his not so subtle and deliberate campaign to sow the seeds of doubt in the minds of the jurors".
Now, in the passage which runs prior to that comment being made, you refer to the intervention of the judge, at a time when you had produced the tape, you had asked the tape to be played. The tape was then played, and during the course of the tape, as you say yourself, "During the search of my office, the police retrieved a file marked 'Allegations of perjury 1993'. When that part of the tape was played Neesham ordered it to be stopped and said the following: 'Members of the jury, you heard one of the members of the search party refer just a moment ago to hear allegations of perjury 1993'. You should not think anything, but, and it is agreed that those allegations relate to the very matter you are hearing, not something else'".
Now, further on, at page 371, about that episode, you say that occurred, the judge said that, without asking anything of you, and said it in the presence of the jury as soon as the passage appeared in the tape, and the jury heard it. You said you "finally got a chance to raise the matter about Neesham's wrong statements about the 'Allegations of perjury 1993' with Neesham showing his error, he wasn't remorseful. He instead blamed me for not

tipping him off about the matter on the tape earlier!" Did one possibility occur to you, that what was occurring there was the judge, perhaps unwisely, but attempting to stop the jury from thinking that you had a prior conviction for perjury in 1993? --- That was possible, and it was mentioned in the case - I think one of the barristers mentioned that earlier, when you were arguing that point earlier in this case. That was possible, but the context of it was, perjury, the Crown case was trying to run on this thing, that I had premeditated and plotted to commit perjury, like a conspiracy, right? And if there is an allegation, I follow them up with alleged perjury in 1994, and the alleged perjury was committed in 94. It was implied that I was some great mastermind who had planned it as far as back as 1993, which is ludicrous, Your Honour. There is a thousand and one other probabilities that could possibly come into play.

Now, as I state in the beginning of the book - and bearing in mind that all through this case there has been paragraphs taken out of context and quoted, and bits and pieces - if the books are taken in their totality, I believe then - now, I haven't read the books in the last month or so, but I still believe I have got it right in terms of the overall perspective. However, I have always allowed the possibility that maybe there are other possibilities I have got wrong, or facts I have overlooked, or whatever, and that is why I have posted all the relevant transcripts and the list of all my sources, documents, inquest files, the whole box and dice, on the web; so that any given area of any of these books, not just the pictures, sections picked out by Mr Langmead, any

section of the books, if a person thinks, "I think Hoser has got it wrong" they can then look at the whole lot and come to their own conclusion. Now, notwithstanding the fact that it appears - and I could be wrong, Your Honour - you have only looked at sections of the book, I believe that if you were to read the books from go to whoa, with an open, unbiased mind, as open and unbiased as any person can be - and we all harbour biases to some degree - I believe that you would come to the same conclusions that I have, by and large.

When you lodged the 26 grounds of appeal and they were subsequently not argued by the QC who represented you, did he put to you that they weren't allegations which could be sustained, that they had innocent explanations? --- No. The state of play is explained in the book, Your Honour, and I again ask you to read the book. The situation is this: I engaged Chris Dane. At the time he promised me that if I hired him he would guarantee me an acquittal. I was -

when you are an unrepresented person - I don't like to say bullied by the law, so I don't - someone said to go to a barrister by the name of Chris Dane, so I did. They collected material for me, all the previous transcripts, copies of the books, files, the documents, the whole lot, and he was - - -

I won't ask you do go into the details of it - - -? --- In a court - -

All right, if you want to, yes? --- The reality is, unbeknownst to me he was representing another person by the name of Brookes - and again, as I say it is covered in the book here - and Brookes was up on a murder trial. He was a young person - I can't remember the details; you may know

more about the case than I - and it ran longer than expected. To cut a long story short, Dane did not read the transcripts, or most of them. He did not read any of the other material, and on the morning of the case he rang up the court co-ordinator, who I believe was Jack Gaffney - I could be wrong - and asked him for an adjournment. And Dane was told - and this was in my presence - he was told that he would not get an adjournment. So then Dane turned to me and said he wouldn't be able to argue my three-day case, my three grounds that I put up, and I said "I want you to argue the whole lot". And in the course of his argument Dane came up with some other comments which were very offensive to me because there was an implication that I known about the perjury, but I was charged wrongly or something. And my view was that I wasn't too concerned about the charge. I hadn't committed perjury and the evidence was there to see. So I was - that basically sums it up. The reality of the circumstances was Dane had not perused, had not properly briefed himself, and I had done everything as a client should, and I was effectively sold down the river by - whether it was by circumstances or what doesn't matter; it is covered in the books, the facts and circumstances, and that is the state of play.

All right. Thank you? --- I was in the dock there. Dane was standing at the front talking. I suppose I could have jumped up and said, "Hey, I sack you", but I probably would have been carried off by a couple of security people. I don't know the situation, but that is basically what happened.

One final question I want to ask you. At page 144 - and this is one of the counts on which I found there is a case to

answer - under the heading "Another Balls-up". "Balmford's bias in favour of police and the DPP isn't just something I've noted. In fact three Supreme Court Judges have noted it as well", you then in the following passage refer to the decision of the Court of Appeal in De Marco. Had you read that decision prior to that appearing in the book? --- My recall is that I had not. My recall is that information probably came from a news clipping and speaking to the journalist who wrote it. That would be my recall, and judging by the date, and the fact that this book was written over a two and a half-year period, I was probably not aware that there was even a legal database site. I mentioned it - Auslit - I became aware of it a while back, about a year ago; but, no, I don't recall having read that judgment.

Do you now suggest that the Court of Appeal made any comment about bias on the part of Judge Balmford? --- Well, the words speak for themselves, and my understanding is - and I spoke to, I have heard the comments in the court, I should say - there, the comment in the book says: "Balmford had misdirected a jury in a way that helped guide the jury to a guilty verdict". Whether that was deliberate or otherwise doesn't matter. The fact is it occurred and - - -

Well, can I ask you, do you know whether bias was referred to at all, by the Court of Appeal in that judgment? --- 'Bias' as a word, no, I have got no idea.

No idea at all? --- Not off the type of my head, no. But in fairness, Your Honour, a lot of things mentioned in this book are no longer in my memory; but my recall is - and this may not be accurate - at the time I presume I

followed on a news article written by a court reporter and it was probably someone, one of the, one of the regulars, and I would have spoken to them on the phone and asked for further and better particulars of the case, and they presumably told me, and I would have jotted down notes and filed them with - - -

Well, do you believe, then, that either in a published article, newspaper article or in something said by one of the court journalists, it was stated that the Court of Appeal referred to bias on the part of Judge Balmford? --- Words to that effect, yes.

And now that is, whether they used the word "bias" or whether

they used a word that means the same thing as bias?
--Yes.

Did you think the use in the first sentence, "Balmford's bias, isn't just something that I've just noted. In fact three Supreme Court Judges have noted it as well", do you think that that is an allegation of bias which you should have checked to see what the precise words were? --- Well, Your Honour, I think it was checked. I think we are splitting hairs in that your definition of "bias", and "bias" in the general sense may be different. The public at large view anything that would, could in fact alter the verdict as bias. Whether it is deliberate or inadvertent doesn't matter. The result is essentially the same. And I mean, we were talking about this business about that paragraph that Mr Langmead read out to me, when I said "All things being equal, if a police witness" - words to effect of, "if a police witness says one thing and a civilian witness says another, judges and magistrates will tend to side with the police witness", that is - now, you

know, some people will regard that as bias. People behind the Bench think that is just a matter of course. You know, I am speaking off the top of my head on that. But that is a general perception, and it is a general belief. And I mean serious bias, in my mind - I am not talking about cases where I have actually been a litigant, but I have often sat in courts waiting for my case to be heard, and I have seen it repeatedly, what happens is one person says something, and there is no other evidence which supports the story, and yet the presiding Judge or Magistrate has come along with words to the effect of "I am satisfied beyond reasonable doubt the policeman has told the truth. You are convicted", words to that effect. That is a common, everyday event, and in my view that is an inherent bias in the system, rightly or wrongly, and I believe that readers at large should be aware of the fact that if they do go to court, in those circumstances where they are unable to prove indelibly, by the form of tapes, transcripts or whatever, that a certain sequence of events has occurred they may have trouble proving their case or their defence; and I think the legal system is strengthened by people knowing, particularly unrepresented people, knowing what their rights are and where they are likely to come a cropper.

Yes. Thank you. Yes, Mr Maxwell?

<RE-EXAMINED BY MR MAXWELL:

Mr Hoser, just a few questions. You said in one of your answers to my learned friend, Mr Langmead, that you took steps to

discourage copying of your books. Would you tell His Honour what steps you took to discourage copying? --- Yes. The books themselves, Your Honour - this one is 736 pages,

that includes what they call the preliminary pages. The second one is 800 pages. Now, if you were to photocopy those at Officeworks it would probably cost you more than to buy the books, so that is an automatic discouragement. And that is not by chance, because it was suggested I publish them in four volumes, but we stuck to two for that very reason. In terms of the CD ROMS which are the most copyable items, because you can buy a blank CD ROM now for about a dollar, we have deliberately priced the CD ROM at well over a hundred dollars with the view that people will think, "Well, it is just as cheap to buy the books so I may as well buy the books". And again, with the number of pages to be printed, the cost of printing off a CD ROM, the printer and toner would work out dearer again, so it is prohibitive. Furthermore - that is the inherent discouragement of the CD ROMS. We have done that mainly so that people, genuinely interested people, students and institutions who want to investigate the material or whatever, can in fact have access to it all, and including in the references and sources, via the CD ROM. Whereas the average reader, member of the public, really doesn't want to read case judgments. The third thing which should be noted, and we have made this patently clear - it is referred to in Victoria Police Corruption 2 - is we sued The Age for violation of copyright, and they did in fact pay $10,000 for using some of my material without my permission and acknowledgment. That doesn't connect with these particular books, but it is referred to in Victoria Police Corruption 2 as a case where someone has unlawfully violated my copyright and we have taken action.

I wanted to ask you about the CD ROMS just to clarify the

matter: you were being asked about, but I don't think you were shown, what was in the affidavit from the defamation proceeding on which the Crown relied, and in that you have said, of book 1 - and this was April 2000 - - -

HIS HONOUR: Can I have that exhibit, please. What exhibit number was that?

MR MAXWELL: It is Exhibit F.

HIS HONOUR: I won't have those - - -

MR MAXWELL: It is only one sentence. So the evidence is complete on the CDs, because I think it is right to say we have inadvertently not dealt with this in the affidavit, You said as at April 2000 the book - and you were only talking about book 1, but you have now told His Honour both books are on the CDs - has been on sale. Since July 1999 about 300 of those have been put in circulation by the author and publisher. That is as at April 2000. What, in your best estimate, would be the comparable figure for sales of the CD as at October 2001 - just an estimate? --- Probably about double.

Thank you. You have mentioned several times that you have published all of the sources on which you rely. Where can someone wanting to ascertain what those sources are, and, if appropriate, check them - let me start that again. Where is a listing of your sources to be found for public access? --- Well, in each book, Your Honour, on the imprint page where it says "Published by", et cetera, there is a reference on the bottom of page, Roman iv, and it says, and it will be here somewhere - right? On the second last paragraph it says: "All information sources used to compile this book can be found at http://www.smuggled.com/Tran1.htm. Now if you go to that

web page there is a list of links, including one which says "List of all sources for the books, including Victoria Police Corruption, Victoria Police Corruption 2 and Hoser Files", and I do have a printout of that in the bag there. And as I said it runs over a couple of pages, the same font and layout. That file is available as either Word or PDF which means virtually any computer user can access them. We also publish that same list to CD ROM and again on the CD ROM it is available as Word PDF and HTM. So you have got three options there.

HIS HONOUR: That, I take it, would not include such matters as the De Marco judgment under that site? --- The source of the information where I got that information would be, so if there is a news clipping, or something, that would be there, yes, the news article. And as it happens, from the date you would probably be able to - you could probably identify it from the date without, too much drama looking. You are correct, I don't, don't recall the De Marco judgment being there, but you can check that yourself. I can provide you with a list and, yes, that sums it up.

MR MAXWELL: Thank you. But would it include a tape of the Bingley conversation? --- Yes, most certainly. There is a

vast number of tapes and other transcript material referred to there, including - oh, there is a huge number. It is many thousands of entries.

Now, you were being asked about that part of volume 2 which contains advice on covert taping? --- Yes.

Why, in your view, is covert taping - let me put that differently. What do you see as the benefit of covert taping? --- Well, it is summed up quite early in the piece

in that chapter. Basically, the aim of any corruption whistle-blower, or any person who wishes, is to establish the truth; and the aim of corrupt people is to hide the truth, or those who are opposed to the good guy, so to speak. So basically, the advantage of covert taping is so that if you covert - if you tape, for example, a policeman - and it is explained in detail in the book there, and I recommend you all read it - if, for example a, policeman is doing the wrong thing by you in the street, and you happen to covertly tape them, if they go to court and they perjure themselves, which is also a distinct possibility, you will then be able to produce the tape and say: "Hold it. This is what really happened", and the facts remain as documented in the Hoser Files and Victoria Police Corruption 2. My production of covertly made tape recordings of police and others has saved me from serious criminal conviction on a number of occasions. And I also have no doubt, Your Honour, that if the tape recording that I had made of the Balmford proceedings had been played to the jury in the Neesham trial, I would not have been convicted of a perjury I hadn't committed. And that is a salient fact that cannot be escaped.

Finally, Mr Hoser, you answered a question about steps taken to restrict publication by saying that the Attorney-General, or a spokesman for him had said there was no ban on the books, and that that was reported in the Yarra Leader. Would you have a look at this extract from that newspaper, and I have a copy for His Honour, and a copy for my learned friends. And do you recognise that as an extract from the Yarra Leader of Monday October 9, 2000? --- Yes, it is actually reduced in size. The newspaper itself is much

larger. It is the same size as The Herald-Sun. That is the front page.

And did you make a copy of the newspaper at the time for your own records? --- Yes.

And just take a moment to read it. You will see it refers to the relevant books, and that an order was placed by the Justice Department, and then there are some comments attributed to you. Do you see in the third column, "While we are keen to supply the books...", et cetera? --- Yes.

Can you read what is attributed to you, which is in that paragraph and the whole of the next column, and I want to ask you whether, to the best of your recollection, that is an accurate report of what you said at the time? --- It is. I will read it out - - -

No, no need to read it out - - -

HIS HONOUR: I am sorry. Go on.

MR MAXWELL: The witness has just confirmed, Your Honour, that what is recorded in columns 3 and 4 is, to the best of his recollection, an accurate record of what he said at the time.

HIS HONOUR: Starting with the "While we are keen..."

MR MAXWELL: "While we are keen to supply the books..." Then there are references in the final column to comments attributed to a Ms Wilson, who is said to be a spokeswoman for Mr Hulls. Do you know, were you present when those comments were made, or have you just read them in the paper? --- The first I have heard is in the paper. But I will say I did speak to the journalist before and after she wrote the article, and she confirmed them as accurate.

MR LANGMEAD: I object to reception of that evidence.

HIS HONOUR: It is a bit late. I have already received it. I

have seen it.

MR LANGMEAD: I am sorry, I am talking about the statement.

HIS HONOUR: On hearsay grounds?

MR LANGMEAD: Well, this hasn't sought to be tendered, but I will be objecting to this being tendered as well.

MR MAXWELL: Well, I do tender it, and perhaps to - my learned friend should make his objection - - -

MR LANGMEAD: I object to the tendering of this as it contains

some words attributed to this man that Mr Hoser can give without the benefit - he doesn't need this. It contains extraneous matters that are irrelevant to this proceeding, and neither the respondent's case nor the applicant's case are progressed by the reception of this evidence. Nothing is added to the words in quotes being put to Mr Hoser if he says, "Yes. I said those words". The rest is simply irrelevant.

HIS HONOUR: And it is on the grounds of relevance that you object to it?

MR LANGMEAD: It is on the grounds of relevance, yes.

HIS HONOUR: I see.

MR MAXWELL: Well, Your Honour, in my respectful submission - - -

HIS HONOUR: It is relevant. If it is going to be objected to on other grounds, I would have said it wasn't admissible. Go on.

MR MAXWELL: If Your Honour please.

HIS HONOUR: Are you tendering that?

MR MAXWELL: I tender that, if Your Honour please.

HIS HONOUR: Exhibit D2.

#EXHIBIT D2 - Newspaper article from Yarra Leader.

MR MAXWELL: If Your Honour pleases, I have no further questions in re-examination.

HIS HONOUR: Yes, thank you.

MR MAXWELL: Could Mr Hoser stand down? Of course, he will remain.

HIS HONOUR: Yes.

<(THE WITNESS WITHDREW)

MR MAXWELL: Your Honour, that concludes the case for the defence, the respondents. Your Honour, by agreement, and probably in any event as required by the rules, it is proposed that I address first on behalf of the respondents.

HIS HONOUR: Yes. Very well.

MR MAXWELL: And Your Honour, subject to what follows, my learned friends, my learned juniors and I rely on what we have said in the previous written submissions.

HIS HONOUR: Yes. You can take it that I will have regard to all of that.

MR MAXWELL: And I don't propose to repeat any of that, save to give emphasis to some particular aspects of those submissions. We, of course, have attended carefully to what Your Honour said on the ruling in the no-case to answer. I will just cover the matters in that as bearing on the final submission.
The burden of the final submission is, as Your Honour drew attention to, both in the course of my submission and in Your Honour's reasons this morning, addressed to the different question, that is to say, whether this court should be satisfied beyond reasonable doubt that either respondent is guilty of contempt of court. In our respectful submission, Your Honour could not be so satisfied on this material, having regard to all the evidence which is in, the tests which have been

adumbrated, and the character of the publication as identified principally in our outline at the beginning of the case.
Your Honour, Mr Hoser's affidavit is a very important document. In its first part it simply reproduces what was in the affidavit in the defamation trial, up to and including the general statement that "In relation to all my books I research them carefully". We had sought to persuade Your Honour that the Crown couldn't pick and choose in relation to the affidavit on which it sought to rely, but, as things have eventuated, we don't need to make that submission. We now have the writer himself saying those things; and it is in the nature of this proceeding that this evidence was only provided to the prosecution when Mr Hoser went into the witness box.

HIS HONOUR: Sorry, which information is that?

MR MAXWELL: The content of the affidavit.

HIS HONOUR: I see. Right.

MR MAXWELL: But I want to draw to Your Honour's attention that the cross-examination proceeded without demurrer, and concluded without any request for more time, an opportunity to get instructions, an opportunity to consider the affidavit further. It is not a very long affidavit, and in our respectful submission it is unmistakably clear in what it says, and we are not

surprised that no adjournment was sought. But it wasn't, and it is what wasn't cross-examined on which is of critical importance now, and this is a new pillar of the respondent's case now that the matter is going to judgment.
As I have mentioned, Your Honour, paragraphs 1

through to 7 of the affidavit are substantially in the terms in which they appeared in that earlier affidavit in April 2000, but what we did as a matter of candour was to make good the deficiency in the prosecution evidence about book 2, and that is covered in paragraph 6. What we omitted to do, but we have attended to in re-examination, is update the information about the CDs; and as I endeavoured to make clear in the submissions on the no-case, my clients do not shrink from what is in the books, nor do they shrink from the fact that they have sought to sell the books.
But, Your Honour, it is - what follows in paragraphs 8 through to 10, is critically important, and Your Honour will note was not the subject of any challenge other than in the most indirect fashion in relation to gross generalisations. And I will, at the risk of belabouring the point, take Your Honour to what is now uncontested evidence in this proceeding. He set out in the relevant book, and I will read from the affidavit, paragraphs 8, 9 and 10. I will read them. "I set out the facts and matters upon which my comments criticisms and opinions as expressed in the books were based. All transcript extracts relating to the passages complained of were taken from the official court transcripts and to the best of my knowledge at the time of publication were accurately reproduced. 9: To the necessary of my knowledge at the time of publication the statements of fact contained in the relevant books were true. Wherever in the relevant books I expressed views, opinions or beliefs, I was expressing views, opinions and beliefs which I held at the time of publication. 10: It was no part of my purpose in

writing the relevant books to harm the administration of justice. As stated at page 18 of Book 2 and elsewhere, my purpose in writing both books was to highlight what I perceived to be corruption as defined in the books, and wrongs in the justice system and in the conduct of the police. I sought to do so as the first step towards rectifying those deficiencies, and ultimately strengthening public faith and trust in the criminal

justice system".
As the High Court said in Fairfax, intention is always relevant. As I conceded in the opening submissions, it is not incumbent on the prosecution to prove an intent to harm; it is the tendency of the words in context, objectively viewed. But in our respectful submission it is a highly material matter that this witness has gone on oath to say what he says in paragraph 10. Though, even without that, we would have invited Your Honour to infer from what is said in the books and from the books themselves, that when the writer says at page 18 in effect what is now in paragraph 10, he was stating his honest intention, that that was, we have submitted previously was the irresistible inference from the books themselves in any event. But he has now sworn it, and he has not been challenged on it.
He has - and the importance of this cannot be overstated - verified the truth of the matters relied on, and he has not been challenged on that. He has sworn to having held the views opinions and beliefs which are expressed in the book. That means these were honest beliefs, absent any suggestion that he has lied in saying that. And what is - - -

HIS HONOUR: Well, in asserting that he was honestly holding views, opinions and beliefs, if what was published was not expressed to be a view, opinion or belief but a fact, does that alter it?

MR MAXWELL: Well, Your Honour, he says in 9: "To the best of my knowledge at the time of publication the statements of fact contained in the relevant books were true". That is the best he can do, and he avers the truth of the factual statements. That wasn't challenged. To the extent that there was any challenge at all, it was, that is too narrow a basis for the conclusion you seek to draw. And I will come back to that. That is a quite different kind of challenge. And what is unsurprising, in view of the way the case was conducted in-chief by the prosecution, but nevertheless of profound significance, is that there was no cross-examination on the underpinnings of any of the criticisms other than that of Magistrate Adams - not a word.
Now, we relied, in the no-case submission, on an inference that, absent some assertion by the prosecution that this was unreliable material, Your Honour would infer there was no basis than to take it otherwise than at face value. That is now established by sworn evidence. And Mr Hoser's position is all the stronger because, as he said, and this is not challenged, every source on which he relied, newspaper clipping, conversation, and so forth, personal experience, is available, has been on the public

record since the books were published in mid-1999; and the reason he wasn't cross-examined on it is that there was there is no basis to cross-examine him. Indeed, the prosecution, for reasons which remain a mystery, has not

bothered to investigate the facts.
And we draw attention to the fact that counsel, junior counsel for the prosecutor conspicuously avoided dealing, in his cross-examination, with any of the substantive bases of the Neesham criticisms, the Waldron, the Heffey, the Balmford criticisms. And the fact that Your Honour has already dismissed the counts - or not so much of the count as we rely on what is said about Judge Waldron - wouldn't have prevented my learned friend cross-examining on it for the reason that Your Honour put to me in connection with a statement about selection of judges, for example, that once we put context in issue then the approach to any part of the book, including things which are not even complained of, is at large and relevant.
It is, in our respectful submission, of great importance that the witness has verified what the reader would, we say, have gleaned in any event from the books, that is, his intention is to improve the system of justice, not to bring it down. He expressly disclaims a slur on all judges and all police. To the contrary, he has said in Your Honour's court today that the majority of police and the majority of judges - I may not be getting his words precisely right - do a very good, make a very good fist of a very difficult job. He was not challenged on that. There was no suggestion this is disingenuous or a little performance for the court's benefit. It is consistent with everything in the book. There are no prior inconsistent statements, because his approach is strikingly consistent, in our respectful submission, that is to say, a genuine concern about what he perceives and

describes as serious issues about inadequate, Inappropriate, improper functioning of the system, and he perceives that the airing of these matters in a way which exposes to scrutiny the basis of the criticisms is in the public interest, and in our respectful submission Your Honour should so find.
That doesn't mean that Your Honour has to find that they are true, and for the purposes of this proceeding it may not be necessary to find that they are true. But Your Honour has no alternative, in our respectful

submission, but to find that the matters were the subject - let me put that differently - that the author, Mr Hoser, has thoroughly researched the matters in the books. That is not to say that there may not have been further steps, and he has acknowledged in answer to a question from Your Honour that he thinks he didn't look at the Full Court judgment in the De Marco case.

But my learned friend asked him, "When you say you have made a study of the police corruption, what sort of study was that?", and Your Honour heard, in our respectful submission, a credible account, that is to say, it is a process over years of collecting information from a range of sources and also relevantly recording in great detail his own experiences. That is the study. So it is a mixture of personal and reported, and he said in evidence, and it wasn't challenged, "wherever possible I have sought to verify what I have been told".

And the absence of cross-examination, in our respectful submission, is all the more significant because my client's case has been on the table since last Tuesday. We put in a written submission, in the middle of

last Tuesday when the case opened, setting out how the case would be put on the no-case, and asserting that the onus lay on the prosecution to show want of good faith, and that, absent any evidence, it should be concluded that there was no contempt. So all we have done in the affidavit, in fact, is to verify things which we were arguing about, or verify a basis which we relied on in those submissions last week.

Now, Your Honour, one of the important issues was context, as we dealt with in paragraphs 16 and 17 of the outline, the tendency of the publication and the need to judge it by reference to all of the circumstances; and as we submitted in the reply, our learned friends' submission on the no-case confirmed that what we said about context was uncontentious. That is in paragraphs 19 to 26 of the reply submission.

But paradoxically, the cross-examination this morning has served only to make stronger the case we put in that regard, and I remind Your Honour, without being able, of course, to give transcripts references, that it was put to my client, Mr Hoser, that he published these books "to those who share similar concerns regarding the judicial system", or to "those concerned about corruption". .

That is our case. The questioning of course is directed to the apparent proposition that it is a vice that there should be any communication between people who share concerns about maladministration in the criminal justice. Well, in our respectful submission, that is what discussion and criticism in a free society is about, and people tend to gather together with those of like mind to

exchange views and opinions, and that is the kind of

movement which may or may not result in reform, and it is more likely to produce good things for the system when people come together than when individuals work in isolation.
And we said in paragraph 17 of the outline, little (d), "The author has a long-standing, demonstrated commitment to investigating and exposing what he perceives to be improprieties in the administration of justice".
Our learned friends apparently accepted that, and sought to demonstrate it by showing that his good faith involves providing copies of his campaigning books to others who he perceives to share those concerns.
Which leads me to what we would respectfully describe as the false dichotomy which our learned friend drew in his questions between a disgruntled litigant on the one hand and a campaigner on the other, as if they were mutually exclusive or contradictory. They are complimentary. They go together. He is a campaigner, in part, because he is a disgruntled litigant, and we said a great deal about that in our earlier submissions and I won't repeat it.
And, with respect, he put it eloquently at the end of his answer to one of Your Honour's questions. "If I had been allowed to play the tape that I made of what I said before Judge Balmford - I beg your pardon - at the proceeding in respect of which the perjury was alleged, I would not have been convicted". As I submitted in-chief, Your Honour wouldn't be surprised at someone having a burning sense of grievance about going to gaol for a false statement which he maintains to this day he did not make.

HIS HONOUR: Well, it wasn't a false statement, was it? It was

a false document which was being alleged.

MR MAXWELL: I am sorry, Your Honour - for an act of perjury which he maintains he did not commit. But, Your Honour, I want to come in a minute to the question of an unbalanced view of things, and in our respectful submission Your Honour would accept the force of, or accept the genuineness, the sincerity of what Mr Hoser said in answer to Your Honour's questions about, "Well, has it ever occurred to you that you impose a conspiracy or a black view on everything when really there may be innocent explanations?". And candidly he said "Yes, it has. I

have asked myself that many times". That has a ring of truth about it, as we submitted his books do, or what he says about what occurred, and he gave, in our respectful submission, a cogent account of why, having considered that, he has rejected it. He does not think that he jumps too readily to a conclusion. Now, he might be right and he might be wrong about that, Your Honour. Your Honour might take view that he is paranoid, to use a well-known term from psychiatry, that is to say, he believes he is being got at when he is not.

HIS HONOUR: Well, I see it was a word that was used by Judge Neesham in the course of the trial.

MR MAXWELL: Yes, Your Honour. Well, it may be that that is the view you take. But in our respectful submission, he hasn't presented in the witness box as someone with paranoid obsessions. Someone with paranoid obsessions wouldn't make the kinds of concessions which Mr Hoser made under cross-examination and in answer to Your Honour's questions. He has a degree of insight into his own perspective on things, and has tried to discount for it,

maybe insufficiently. In our respectful submission it wouldn't be surprising if he hadn't discounted sufficiently for his own partial view of what has gone on. He has suffered at the hands of the judicial system, the court system, he thinks wrongly and unfairly, and if that is not a perfectly balanced view of things, in our respectful submission, that is only to be expected. But it is not paranoid obsession.
But putting it less graphically, Your Honour would, in our respectful submission, recognise the notion of "can't take a trick", which we referred to earlier, which is different but has a sense - it is consistent with the sense that, you know, "if I am up against traffic officer or a policeman and I swear it didn't happen and he or she says it does, I am not going to be believed". And the defendant believes that he was telling the truth; he will start to get the feeling that the system doesn't give him a fair go. That wouldn't be an unreasonable view to form, and if that coloured what he thought about the next thing that happened, again that, in our respectful submission, would be well within the range of an appropriate response to circumstances, each of which is disclosed.

HIS HONOUR: Well, he is faced with the dilemma, I suppose, that he has been rejected on his oath by a jury of 12.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: So the answer to that would appear to be, they

would not have done so had the judge not been involved in some sort of a plot to ensure that that was going to be the end result. In a sense what you are saying is, it really doesn't matter that he is right, wrong or indifferent about that. If that is a genuine belief on

his part as to what occurred to him, you would say he is entitled to say it.

MR MAXWELL: We would, Your Honour, yes. But if someone believes he has been wrongfully convicted, he is entitled to say so publicly, and he is entitled to - Your Honour would say to me, "Well, he has done rather more than that". And so he has. We wouldn't be here if there hadn't been strong language used about those involved in the case.

HIS HONOUR: I think I should have regard, too, to the fact that the point you made about the unrepresented litigant. In this case the finding made against him, if you are right that he is a person who had, prior to that time presented himself as a campaigner, who should be accepted, et cetera, the fact of a jury's finding of perjury would obviously have a fairly unhinging or fairly seriously, impact on him in those circumstances. If there was an element of, the word paranoia - I can't think of another one to use - - -

MR MAXWELL: Hypersensitive, Your Honour.

HIS HONOUR: Of hypersensitivity, then no doubt the fact that it is a conviction at that stage, not about the traffic fine as some of the others had been, but about perjury, one might expect the sensitivity to be the greater because the difficulty of persuading an audience that you should be accepted thereafter will be so much greater because of it.

MR MAXWELL: Your Honour, we would respectfully adopt that, and we would invite Your Honour to find that what you have seen of Mr Hoser in the box would reinforce the basis of what Your Honour has just put in argument, that is to say,

someone who is conscientious to the point of exposing, in a hundred pages I think he said, his sources, is someone it is to be inferred wants to be received, accepted as credible or at least saying "Check me, verify me, test me,

validate me, or invalidate me. Show that what I have said is wrong". He has acknowledged candidly to Your Honour, as any sensible person would, he might be wrong in some of these things; and so that, exactly as Your Honour has put it, for a court finding to be made that this is someone who puts false evidence on oath is profoundly affecting and calculated to damage his reputation, and it is a finding which he would be expected to, given his view of it, that it is a wrongful conviction, that he would be expected strenuously to disclaim, to seek to discredit, and to draw attention to what he says are the various steps along the way where he was treated unfairly.

HIS HONOUR: I am going to take a break at some stage this afternoon. Just a five minute or so break, so when it is convenient to you, I will.

MR MAXWELL: Well, Your Honour, it is convenient now. My learned friend and I have expressed the joint hope and intention that we will finish today. I am finding I am taking longer than I thought I would.

HIS HONOUR: That is all right. I will try to make it brief, but we have been going since 9:30 so it is useful to have a break.

MR MAXWELL: I wasn't saying don't take a break, I was really trying to give Your Honour an indication, and I don't know how long my learned friend thinks he will be - now is a convenient time if the court pleases.

HIS HONOUR: All right. We will take a short break.

(Short adjournment).

HIS HONOUR: Yes?

MR MAXWELL: If Your Honour pleases. If I might now deal with some of the particular matters that were the subject of the cross-examination and questions from Your Honour. I won't - we have dealt, as Your Honour noted in our submissions in-chief, with the various passages, and again we - not in writing, but it is in the transcript and we rely on what was said there.

HIS HONOUR: Yes.

MR MAXWELL: Your Honour, the first matter is covert taping. This was the subject of some questioning. In our respectful submission the answer which Mr Hoser gave in re-examination was cogent, consistent with his view of the importance of a contemporaneous record, and consistent

with his - sorry, full stop. What he said in that part of the book is consistent with his desire to assist others to avoid being verballed, is a way of putting it, having things attributed to them which they did not say; or putting it differently, having those who make allegations say things in court which are contrary to what actually occurred. And Your Honour knows, as any counsel does, the enormously greater evidentiary weight of a contemporaneous record.

HIS HONOUR: I don't think this is a topic you need worry too much about.

MR MAXWELL: If Your Honour please.

HIS HONOUR: I don't see how it is harmful to you. If it is put that it is, you can deal with it in reply.

MR MAXWELL: If Your Honour pleases. But I only mention it because it is, it does tie up a thread which we dealt with

in the submissions on the passages, which is, there is a preoccupation with that topic.

HIS HONOUR: Absolutely. It starts from Day 1.

MR MAXWELL: It starts from Day 1, and they won't let me do it. Why won't they? What is the harm?

HIS HONOUR: It is not wise to be taping judges against an order that there be an no taping. But that is something which goes to the wisdom of the conduct that - - -

MR MAXWELL: Rather than the genuineness of it or the genuineness of purpose, which is to say, "Well, I want for my own protection to have a record", and indeed, of course, at the heart of his grievance about the conviction before Judge Neesham was that the very thing which he had done, which was to covertly tape his evidence, was not allowed to be in the proceeding.

HIS HONOUR: I don't ask you to do it, but you might be able to have your juniors check it, that passage in the book where the attempt to get that particular tape in, it is somewhat confusing because there seems to be a variety of tapes which are being addressed.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: The particular tape which was the one from the hearing in front of Judge Balmford, if someone can just tell me what the page is, where that attempt to get it in

is made and fails before Judge Neesham, I will recheck it, because I am not sure that when I read it I was reading the right tape.

MR MAXWELL: Yes, Your Honour. If I might then deal with the remarks about Magistrate Adams - - -

HIS HONOUR: Yes.

MR MAXWELL: To which Your Honour in particular has drawn

attention. My learned friend also cross-examined on it. Your Honour. The witness, Mr Hoser, was asked, "Well, what was your basis for what is said about Magistrate Adams with respect to the matter in which policeman Bingley allegedly paid the Magistrate?", and his answer, in cross-examination, was, as I noted it, in three parts. First, there was the Bingley confession. I will come back to that in a moment. Second, there was what he described as the overwhelming evidence of his innocence, and he had, as he said - and this wasn't challenged - his view of that accorded with a number of other people, each of whom, according to his evidence, was of the same view, that there was no way you could convict on that evidence. Thirdly, and importantly, he relied on the fact that the conviction before the Magistrate was overturned on appeal. Now, I need to deal with the first and third of those, in particular. The back cover of book 2 refers to, as Your Honour has seen, "the Magistrate that the cop said he paid off". It doesn't say "the Magistrate who was paid off". And the next sentence "Following the 1995 publication of Policeman Ross Bingley's confession that he paid off Magistrate Adams to fix a case, some of his other rulings that seemingly flew in the face of the truth or logic have come under renewed scrutiny". And he mentioned some others.
And as we submitted in the reply, our learned friends appear to have proceeded on the assumption that the reader would find his or her way to the Hoser Files as being the location of the confession. There is the point that this - I think Your Honour found in the no-case judgment that it was open to the view that this was an official

confession. In our respectful submission either it is not open when read by reference to the actual account in the book, the other book, or alternatively Your Honour would not be satisfied beyond reasonable doubt that it is a - -

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HIS HONOUR: There is a number of factors which it seems to me are important in this question of how one should view this passage. I mean, as I think in the course of your argument, I said there is the fact that it is a stand-alone page - - -

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: Inside the back cover, where everyone tends to have a browse, it has got a photograph which, if you wanted to have your photograph taken against an allegation that you were guilty of corruption you would look something like that I would imagine: head down, looking fairly grim. "Photo courtesy of The Age". So it is absolutely highlighted as a particularly significant feature; otherwise, why is that there? Why is that photograph in that particular issue out of 730 pages chosen to be the one? It would be hard to read that without concluding that it was suggesting some sort of official conclusion having been reached that this was the person who was engaged in corruption.

MR MAXWELL: Well, Your Honour, with respect, we don't accept the latter point, and I wish to address that a little bit more fully if I may; that it would be hard to read it otherwise than as suggesting an official confession. But the other thing is, Your Honour, I accept of course, as I think I did previously, the prominence which is given to this; but in our respectful submission there is no

particular perspective to be attached to the photograph; that is to say, it is in my respectful submission a photograph of a Magistrate in pensive mood, and no more - that it doesn't look to - - -

HIS HONOUR: But it is one of not many photographs in the book.

MR MAXWELL: That is so, I accept that. But I was just wishing to make clear the respondents wouldn't accept Your Honour's characterisation of it as the kind of photo you would publish if you were wanting to make it look as if he was guilty. In our respectful submission that is not a - that it is nothing more than what I have said: a photo of a Magistrate looking serious, and that it is neutral in terms of any inference to be drawn.
But, Your Honour, if we can continue, the points shortly are, that one then goes - and as we said in reply, we understand the prosecution not to dispute this - to the front cover, which says "The policeman", and that is clearly hooked up with the Magistrate on the book, and

"Bingley gained notoriety for several actions which are identified. After one case he confessed to fixing" - and in our respectful submission that is only open to one interpretation, that is to say, it was not during a matter but after one, so it is post-court. Now, whether it is official, and whether "confession" means confession to authorities or, as I submitted previously, that the word has its ordinary meaning, which is that you admit doing something, is entirely open in our respectful submission. But the fact is, as Mr Hoser pointed out, that where Mr Adams' photo appears in one or other of these volumes, there is, only four or five pages earlier, a specific reference to the Bingley matter and a footnote to the

Hoser Files; and I am not sure whether I have a precise note of that, but it was certainly the evidence given in cross-examination.

HIS HONOUR: Yes, at page 54 was the reference to the Hoser Files. The photograph is 57.

MR MAXWELL: Yes, Your Honour. Well, Your Honour, that is the point. And in our respectful submission, that is an answer to the, or it explains why we don't understand any serious issue to be taken with the proposition that the reader would find his or her way to the Hoser Files and read what is said there about the so-called confession, and it is described accurately in that book as a statement made in a conversation, and - - -

HIS HONOUR: Well, the particular quote, if you are referring to that, is somehow ameliorating the photograph. I mean, look at its terms. "Adams is well known for doing deals with the prosecution to predetermine a trial. Refer to the Hoser Files". It doesn't seem to me it ameliorates the situation very much.

MR MAXWELL: No, Your Honour, for the moment I am simply relying on, that the book itself provides the reader with the necessary signpost to the source of the material relied on. And there isn't time to, but we may be able to do it in reply, to identify any other mentions of Mr Adams in the Hoser Files; but the critical one is specifically the footnote, and the reader must in our respectful submission be expected to check that out before forming any view. In other words, you are put on inquiry by the book itself. What is more - - -

HIS HONOUR: But the specific one you are referring to there is at 57 in the first book.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: And you are put on inquiry by 54.

MR MAXWELL: I am sorry, Your Honour, yes. And 57 says, near the photograph at 57 says, we submit accurately, "In a separate matter a policeman admitted to paying", and then the reference is to the Hoser Files at 71, at page 54, and the reader would there see the transcripts of the conversation between Hoser and Bingley, and would know from the prefatory pages to the book that that tape - well, if the source is checked, the tape exists. Your Honour, in our respectful submission it would be a strange result if a man who says "This policeman confessed to paying that Magistrate, and I taped it and the tape is available" were convicted on the application of a prosecutor who hasn't bothered to get hold of the tape. What if it is true? And in our respectful submission, having heard Mr Hoser, Your Honour would be inclined to think that if he says - - -

HIS HONOUR: You mean, what if it is true that he said it or what it is true that the Magistrate was bribed?

MR MAXWELL: Well, the first question is, what if it is true that the tape says what is said? Then the question arises, well, is this to be taken at face value or not, and if it is, then what if the Magistrate was bribed? A very serious matter. My learned friend, the Solicitor, said if an allegation of bribing a judge was true it wouldn't be contempt. That is why this case shouldn't have been brought: because it might be true. In our respectful submission it would be a very odd result to have a man convicted of saying something when he says it is true and he is exposed for more than two years for raw

material which he says supports the allegation. No, I withdraw that. This is a 1995 book. It is six years since that was published, and nothing was done in relation to that book, as Mr Lee admitted; and Mr Adams, as far as the court knows, took no action in respect of it. It is the most serious allegation to have made by implication. I mean, if Your Honour could view the matter from the perspective of the campaigner who says "This is something which needs to be looked into. If I am right, this is an outrage. This is an abuse of the system". And in his assessment of this policeman, it was a cocky boast after the event, and Your Honour would know that it wouldn't be

the first time that sort of thing had been said. And if we might - - -

HIS HONOUR: Well, why would he not say, "admitted to me"? Why put it in the way, if not to give an impression to the reader, which is quite false, that is, that "this is something which is merely based on my say-so, that there was a genuine confession made to me outside a courtroom"?

MR MAXWELL: Well, Your Honour, because he would say, and in our respectful submission with some justification, "unlike allegations that have been made against me, I have got this on tape. I have a contemporaneous record of this conversation. See the sources for my book. That is why I can call it a confession, and why I can say that in the 1995 book, and republish it in the 1999 books, because I know it happened and if you doubt it, come and listen to the tape". Now, if Your Honour, in our respectful submission, was to say, "Well, the language is a bit overstated, that it should have said 'confession to me' or it should have used 'admission' rather than 'confession'",

in our respectful submission, that is applying a degree of stringency to an author; not just this author but authors generally. It may be that Your Honour is correct; that to be absolutely 100 per cent accurate it should have said "The policeman confessed to me that he had done it".

HIS HONOUR: But why shouldn't there be a requirement of greater stringency, the greater the seriousness of the assertion? I mean, as you accept yourself, it couldn't be a more serious assertion of corruption - - -

MR MAXWELL: I accept that.

HIS HONOUR: A Magistrate who is paid off to gaol someone in a court case.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: Now, if that is what is being alleged, why would it not be that stringency should be required?

MR MAXWELL: Well, Your Honour, I accept, with respect, the force of that, and the answer has to be the one we have already given, which is that if this were an - if no basis were put forward for this, then we would have a very different case. But in our respectful submission, an author who, in the very book itself, cross-references to the book in which the evidence exists, and in which the existence of physical evidence of the conversation is referred to, then that is where stringency might be

applied. You can't go round saying these things when you have only got your poor recollection of what happened. But if Your Honour accepts that he is beyond criticism in having kept a record of it and made it available to anyone who cared to inspect it or ask to listen to it, then the fact that his wording may not be entirely accurate doesn't turn it - doesn't put it beyond a reasonable publication

on the material set out. A fortiori, when, as I have submitted, nothing was done in 1995, no-one has come along and prosecuted him for contempt on the 1995 book which made the principal allegation, he would be entitled to assume that no-one took issue with it. And he does it again, relying again expressly on the material. That is really the key: the fact that you have a signpost in the book to the, so far unchallenged, contemporaneous record of this confession, admission.

That, in our respectful submission, ought to be an answer to the complaint that he wasn't in good faith, or that he acted without any proper basis. And we rely on the fact that, even where the pictures appear on the covers, the heavy reference is to "the cop said he took money". So it is - I mean, the imputation, we accept, is there. If what the cop said was true, then there was a corrupt Magistrate. But it is premised on that which the earlier book precisely verifies, and nothing has happened in the intervening four years to suggest that this is rejected, disbelieved, regarded as outrageous, defamatory, let alone contemptuous.

Your Honour, we then move to - but then I was going to submit, viewed from the perspective of the campaigner, he says: "I have evidence which, on my viewing of all the circumstances, suggests corruption. I want this investigated", that is, in our respectful submission, a proper matter to raise, and this is a proper matter for inquiry. I was going to say in relation to cocky admissions when you don't know you are being listened to. If Your Honour has seen any of the Four Corners programs about corruption in the drug squad in New South Wales

police, I mean, to the extent that Your Honour can take judicial notice of that, there is an extraordinary degree of cockiness and openness when there was no awareness that there were tapes and cameras in place.

But the third of the three bases for what is said about Magistrate Adams is that it was overturned on appeal, and, Your Honour, we need just to refer you to -

the short point is this: the prosecution led no evidence on the appeal. That is in the books. He has sworn it is true, and we refer Your Honour - - -

HIS HONOUR: You mean in the general sense?

MR MAXWELL: In the general sense. He hasn't been challenged on that. We invite Your Honour to see pages 130 to 131 of the Hoser Files, which talks about the non-leading of evidence. In other words, the prosecution gave up, consented to an acquittal. And at 733 to 4 of book 2 - 733 to 4 says, "If it hadn't been for my recording him, that conviction might have stood". This is at the introduction to the "How you Do Covert Taping" section. Does Your Honour see at the foot of 733?

HIS HONOUR: Yes.

MR MAXWELL: And the top of 734. Well, that is the inference he draws. It is because - and this is spelt out in the Hoser Files book itself - it is because he had Bingley on tape, he believes, they backed off. Well, in our respectful submission, that is a not an unreasonable inference. It might be right, but probably no-one will ever know unless someone in Government decided this was a matter warranting investigation where witnesses could be subpoenaed and required to answer questions. Then there might be some interesting matters to find out as to why the appeal was

abandoned. And that, when you put those three things together in our respectful submission, Bingley's confession on tape, the fact that on Hoser's view and that of others this was a conviction simply not open on the evidence which was overwhelmingly in his favour, and the prosecution runs dead on the appeal, pulls out, then one deals then with the question which Your Honour raised with Mr Hoser: "Well, did it ever cross your mind that this might be a joke? He might be having", as Mr Hoser put it "a lend of you, in saying this was all a deal with the Magistrate?"
His candid evidence was, "Yes, that crossed my mind, but I concluded that it was a cocky boast. I eventually excluded that possibility because I believed he didn't know he was being taped, because when they found out that I had been taping them they didn't run the appeal, and that was my judgment".
The other thing we would say, with respect, is that it is true he has had a chance to reflect on this after the event, but if the conversation occurred immediately upon his wrongful conviction, as he perceives it, he would be less likely to see the funny side of a statement in that state of mind. As he concedes, the answer to that

is, "Well, he has got time to think about it later and listen to it". But to the extent that the underpinning of Your Honour's question is, "Well, it is improbable, isn't it, that a policeman would openly say, 'I paid the Magistrate'?", then Your Honour is applying the view of the sensible reader which is to discount the seriousness of the allegation.
I mean, if we are right in saying that he has

conscientiously grounded these allegations in the evidence that he sets out in the Hoser Files, then if the reader says, "Oh, well, I would take that with a very large grain of salt", that weakens, to almost nothing the sting of the allegation. It is seen to be a highly coloured unjustified inference. We don't concede that it is that. But the more outlandish it is perceived by a particular reader to be, the less sting there is. We, our clients, stand by what is said, on the basis of the material referred to and the view of it which Mr Hoser has, after consideration, taken. He might be wrong-headed about it, but he is genuine, he is in good faith, he thinks this is a serious matter which should be investigated, and despite it being published six years ago, it hasn't been, as far as he knows, as far as the court knows.
Again, in relation to the question of the - if I might now move to the point of the file marked 'Perjury 1993', and Your Honour said in a question to my client, "Did it occur to you that one possibility was that the Judge was trying to help you?", and in our respectful submission that may be one way of looking at it.

HIS HONOUR: I mean, it stands out to be the likely one, I would have thought.

MR MAXWELL: Yes, Your Honour. But we would respectfully say that, for the reasons put in the principal submission, it was an extraordinarily - whether the intent was right, it is an extraordinary confusion on His Honour's part to think that a file with a date preceding the date of the alleged perjury could - I mean, without asking a question at least, and maybe there was a question - - -

HIS HONOUR: I don't think it is surprising at all. I have

seen it occur, people in a panic trying to avoid aborting a trial, trying to say something useful which will stop the jury's instant thought that there must be prior

convictions.

MR MAXWELL: I accept that. But Your Honour, in our respectful submission, if he has drawn the wrong inference - - -

HIS HONOUR: Perfectly understandable from his point of view. I understand the point you are making.

MR MAXWELL: That is all we would say, and because of the - - -

HIS HONOUR: Perfectly understandable if you start from the proposition that everything that is happening against you is designed to run against you.

MR MAXWELL: Yes. And also, when you take what we still think, with respect, is a reasonable point, that, leave aside the haste with which His Honour moved, on Your Honour's scenario a moment's ago, no more reflection than His Honour had time to make would have raised the question, well, how could there be a file predating the alleged perjury, and that is a point that is made in the book and in our respectful submission.

HIS HONOUR: Only because there had been a previous perjury; that is why. That is the inference the jury might have drawn: there must have been another occasion where he has committed perjury, and they are investigating that one too.

MR MAXWELL: Your Honour, in relation to Judge Balmford, there was, in our respectful submission, an important answer from Mr Hoser about the word "bias". His answers were candid, but he also went on to describe his, what he understands or believes about an inherent bias in the system, meaning the presumption in favour of prosecution

witnesses. He didn't put it that way, but the other things being equal, the sworn evidence of a prosecution witness will be believed where it conflicts with the sworn evidence of a lay defendant. So he, on his own account, uses "bias" in a more general way than it might be thought to have been used in that particular passage; that is, conduct which tends to be the result of a conviction, which is a correct characterisation of what the court said in De Marco, that is to say, it was a prejudicial direction, the effect of which required the quashing of the conviction.
Questions about generalisations - we would simply say that they would be seen as such; that the basis from which the generalisations are drawn or on which they are based is set out in the books, and it is a matter for the reader to decide whether they are justified or not. We made the

point, and I think Your Honour accepted it, that what is said about trusting the legal system at 241 is not a generalisation, it is just a corollary of what is said about Chief Judge Waldron, and the basis for it is clear. Attention was drawn to the general criticisms at page 17 of book 2. We remind Your Honour that at page 18 of book 2 is the general statement which is now verified in the affidavit, that "I am not attacking all police and all judicial officers, and furthermore, my purpose is to improve the system". So again, you read over, and we do say with respect that the books need to be read in their entirety, and indeed, so far as relevant, with the Hoser Files.
And three more specific matters, Your Honour. The application for leave to appeal: Mr Hoser has given

evidence that he was "sold down the river", to use his phrase. He deals with this in book 2 at 517 to 18. We invite Your Honour to look at what His Honour Mr Justice Winneke, the President of the Court of Appeal said in the report of the appeal - I am sorry I haven't copied it for Your Honour.

HIS HONOUR: I did have a look at it and I saw there was that reference there to counsel saying he "didn't have instructions to abandon" - in effect, didn't have instructions to abandon but wasn't going to argue.

MR MAXWELL: Yes. Well, Your Honour, in our respectful submission that is an extraordinary state of affairs, and we say this from the perspective of the defendant. Your Honour has heard the sworn evidence as to what occurred, and the last paragraph of the affidavit deposes to the fact that this was contrary to instructions which were to argue all the grounds, and he said as much in the witness box. But the judgment independently confirms that Mr Dane properly informed the court that he did have instructions to abandon the grounds, but having been told that there was an abandonment, by necessary implication went ahead and abandoned by necessary implication. And he was, as he said in answer to a question, "between a rock and a hard place". He has got a barrister appearing for him, having been unable to get legal assistance. I mean, yes, in the theory of the contract, he might have withdrawn the retainer. But for that to be realistically put against him, that, you know, "if you were serious about these other grounds of appeal you would have sacked Mr Dane and conducted the appeal yourself", I mean, that is just a wholly unrealistic submission in our respectful

submission.
The other thing that we draw Your Honour's attention to is the report which Judge Neesham made to the court appeal, which is Annexure B to the affidavit, and Your Honour will see when you come to, I think the foot of the second page of the affidavit, His Honour confirms that there was inappropriate behaviour by the prosecutor.

HIS HONOUR: Yes.

MR MAXWELL: And that on at least one occasion His Honour intervened. Now, that is, in our respectful submission, quite significant. You wouldn't get that from the judgment of the Court of Appeal because I assume that was a ground not pursued - no, I withdraw - - -

HIS HONOUR: Well, it looks as though His Honour reported on the 26 grounds.

MR MAXWELL: Yes, Your Honour yes - - -

HIS HONOUR: Yes.

MR MAXWELL: Exactly. The fact that His Honour would say, "Yes, the prosecutor had behaved inappropriately at times, and I had to caution him, and I did refer to it in the summing up" is very important corroboration of my client's perspective - not the whole of it plainly; but he wasn't imagining this. What he says in the book did in fact happen. The judge himself saw it and intervened.

HIS HONOUR: Well, something happened.

MR MAXWELL: Something happened. That is all we say. There will be differing perspective, of course, as to how bad it was, how often it happened; whether it was allowed to go through too often or not; whether His Honour saw it, and so on. But it is just that there is pro tanto important corroboration by the very person whose judgment is under

attack by this applicant. And His Honour very properly acknowledged that, on that point, yes, there were some things that had happened which the Court of Appeal should know about.
Reference to the alleged deals: again, this was, this is not a matter complained of. This is at 655 in the second book. Of necessity, in our submission, an allegation of that kind is based on inference, from circumstantial evidence. As Mr Hoser said, and this must

be right, you don't get, in the absence of someone like Mr Bingley, verification that these deals have been done. You look at something and say, well, this was a very serious offence and the person was convicted and they got a suspended sentence, and plea bargaining is a matter of open common knowledge. Plea bargaining does occur. It is not understood by the lay public by and large. It is the subject of criticism because it produces, some would argue - - -

HIS HONOUR: I must say I am not aware that plea bargaining goes on involving judges.

MR MAXWELL: No, Your Honour. Sorry, I - if I might - - -

HIS HONOUR: It is pretty strongly disapproved of, as I understand it.

MR MAXWELL: Yes, Your Honour, but - no, I meant plea bargaining between prosecution and defence - - -

HIS HONOUR: Yes. Well, of course, that happens.

MR MAXWELL: That happens, and yet, those who think that sentences are too lenient will say, "Well, it is no business of the prosecution to give up a charge or say, 'well, if you plead to this we will not press for a custodial sentence'". Those of us who practice in the

system understand that judgments of that kind are properly made for all sorts of reasons to do with witnesses and evidence and so on. But it is important to note that it is not asserted that these are deals involving prosecutor, informant and judge. The phrase is rather something like one or other of prosecutor, informant or judge. Now, that is not meant to be a - - -

HIS HONOUR: Or court staff, I think was the other one.

MR MAXWELL: The only point there, Your Honour, is that it is not, it is a much - - -

HIS HONOUR: Well, he is not charged with this.

MR MAXWELL: Precisely, but - - -

HIS HONOUR: Its only relevance could be on credit generally or - - -

MR MAXWELL: Yes, Your Honour, and we say that any attack on his credit, based on that, should be rejected, because it is a comment which can be made about these plea bargains.

Whether it is open to someone as an observer in the court, when the prosecution says "Well, Your Honour" - in the trial court - "we don't want a custodial sentence", the defence's plea, and then the judge says "Yes. Well, I heard what is said and I will sentence a Community Based Order". Someone out there might think, "Oh well, the judge has obviously been in on this. It is a three-way deal".
Now, it is not suggested that in any case that is so, but there is, it is one of those mysteries of the criminal process that the person who is not part of it doesn't understand and might misunderstand. I put it, say nothing more about it than that.
Your Honour, in conclusion, then, we respectfully

submit that applying the test which, as we understand it, Your Honour accepted as applicable, that is to say, that there is no offence unless the matter published has as a matter of practical reality a tendency to interfere with the due course of justice; or putting it differently, as Your Honour did in the reasons, it is a matter the publication of which creates a real risk of interference with the due course of justice, Your Honour would not be satisfied beyond reasonable doubt that any of the offending passages left, after Your Honour's ruling this morning, beyond reasonable doubt satisfies those requirements, and that conclusion, in our respectful submission, is informed by all the matters that have been put about both the particular context of the remarks in question, the perspective of the writer and the character of the books and their avowed constructive intent. If Your Honour please.

HIS HONOUR: Yes. Thank you, Mr Maxwell. Yes, Mr Langmead?

MR LANGMEAD: Your Honour, it might be appropriate to start with some of the matters that Mr Maxwell raised whilst they are fresh in your mind and mine.
Just by way of introduction, Mr Maxwell's last comment about avowed constructive intent: that of course is no answer or no defence, if there is an objectively assessed destructive effect, as assessed by looking at the words. And I think my friend concedes it is their inherent tendency that is the test.
So that there is no doubt about the relevance of intent, I understand my friend to concede that mens rea is not an order of the offence, but he uses the authorities to say that intent is relevant. Whilst it is relevant, it

nonetheless remains not an element of the offence, and we say that these matters as to Mr Hoser's declarations of his purpose take the matter no distance at all for the respondents.
As to the affidavit of Mr Hoser, it was put by my learned friend, at paragraphs 8 to 10, that there was no cross-examination on them; in a sense that he was not taken to 8, 9 and 10 and said "Look at this. What do you say?" that is correct. But if it is said that the substance of what is said there was not challenged, with respect, that is incorrect. Indeed, if you look at the first sentence of paragraph 8 of the affidavit, "I set out in the relevant books the facts and matters upon which my comments, criticisms and opinions, as expressed in the books were based", a number of his criticisms and opinions he was taken to with great particularity. When he was asked as to the basis of them he was challenged that there was an inadequate link with the only real basis he put, which was his perception of various court proceedings involving him and others. And indeed, it was put strongly and repeatedly that the necessary link was missing; and indeed that can only be seen as a challenge to the substance of what appears in the first sentence in paragraph 8.
It is said that what Mr Hoser deposes to in paragraph 9, that he verifies the truth and that he was not challenged. What he says in paragraph 9 is, "To the best of my knowledge at the time of publication the statements of fact contained in the relevant books were true". He then says, about views, opinions and beliefs that he expressed something different. He says "Wherever in the

relevant books I expressed views, opinions or beliefs, I was expressing views, opinions and beliefs which I held at the time of publication".
Now, that does not establish anything other than his belief in the truth of what he says. It does not link his summaries and accounts of matters that he calls facts with the extravagant opinions he expresses about particular judges and about the judicial system in general.
The mere fact that he held a view that he was expressing a view, opinion and belief which he held at the time of publication, with respect, takes the respondent's case nowhere, because we would interpose there that the evidence shows that in fact he unreasonably held such views, and that he was forever jumping at shadows; and that his perspective indeed was, as was discussed only moments ago, a perspective that everyone is against him. And whilst some of his conduct on that premise may be reasonable, or explicable, the premise itself is entirely

unreasonable, and there is no evidence to rebut that proposition.
It is said in paragraph 10 of the affidavit: "It was no part of my purpose in writing the relevant books to harm the administration of justice". That disavowal is to be read in light of various statements that I have taken Mr Hoser to, as to generalised comments; for example, about it being unlikely that any Judge or Magistrate in Australia would accept the evidence of a civilian witness over an official witness in a prosecution, and other statements that I will take you back to.
So to suggest that there was some mystery, mysterious unexplained gap in the cross-examination is without

substance.
It was said there was no cross-examination on the underpinnings of the passages, the remaining passages in the various counts of which complaint is made. The relevant test is: At face value, what is their tendency, do they have the relevant tendency? An objective test is of the likely effect or the effect that the words tend to have.
It was said by my learned friend that Mr Hoser referred to sources, and you heard Mr Hoser say that, nodding, I think, towards a bag, that he had them, had them here, a hundred pages or so. They were not tendered. Jones and Dunkell permits the inference that those documents would not have assisted.
It was said that there being no cross-examination on the passages, that is so, but the fact upon which the prosecution relies is that there is no evidence of their truth; merely of belief in their truth.
Indeed, Mr Maxwell, my learned friend, has pointed repeatedly to my learned leader, the Solicitor-General, saying that if something was true, that would be a defence, and that was said last week.
Mr Hoser gave evidence this afternoon. No other evidence was called. No attempt was made by my learned friend, either in the affidavit of Mr Hoser or indeed in examination-in-chief of him, to lead any evidence as to the truth of particular allegations. There is no doubt - it is not contested that he has a belief. But as to the objective truth, none has been called. The only exception to that, I point out, is of course the evidence in the exhibit that refers to Judge Neesham's response to what I

call the 26 draft grounds, Your Honour.

A further notable omission in this regard - for example, I think it was page 404 of what is Exhibit B to Mr Lee's affidavit - my learned friend says, and perhaps it was more with a flourish than factual recollection, that Mr Hoser didn't imagine what occurred between the prosecution and the jury; he didn't imagine it. And I think it was indeed the original case put by my learned friend that Mr Hoser heard about this afterwards, that others noticed it. One such asserted other is said to be a K.R. Sawyer, from an unnamed university, who is said to be a professor and a doctor.

Given the reliance placed on the evidence, of Judge Neesham, as to one or two episodes of this interference with the jury by the prosecution, Mr Sawyer has not been called and there is no explanation as to his absence. I again refer Your Honour to the inference that it is open to the court on the basis of Jones and Dunkell. It is open to the court that his evidence would not have assisted.

My learned friend noted, correctly, that in cross-examination I put that Hoser sought to share the views expressed in his books and indeed to share those publications with those similarly concerned about corruption. My friend then went on with less foundation, in my respectful submission, to either ask rhetorically or to assert that we put - I am now unsure without transcript which it was - but the words he used were: "It was a vice that people share concerns about corruption ". Whilst the question is rhetorical, the answer is of course no, and that was never put. It was a rhetorical flourish from my

friend.

The vice is that material is published which has the relevant tendency to undermine the administration of justice. As my learned friend would understand and, as I hope, Your Honour would understand, the questions put to Mr Hoser about his connection with like-minded people and with organisations consisting of such like-minded people, was of course to provide some particulars of evidence as to his status; in other words, on a spectrum from entirely unbelievable through to entirely authoritative, it is relevant to the practical reality test for Your Honour to place Mr Hoser somewhere on that spectrum. And we will be submitting, the Crown does submit, that Mr Hoser's scientific, his self-asserted scientific qualifications, experience and publications, albeit herpetology, that his assertion, for example, that he has made a study of police corruption, his references to - I will take Your Honour to this later, but he makes references in Exhibit B to people - and indeed he did so in cross-examination - to people asking him questions about how to protect themselves in these regards; he is assuming the role in the final

chapter in Exhibit B of adviser to those who would ward off the forces of corruption in the legal system through the use of covert tapes, and other methods prescribed there, or recommended there. We say they all serve to place Mr Hoser further down that continuum that I referred to, towards the authoritative end, rather than at the rabid, paranoid, entirely unbelievable end.
That is not Mr Hoser, and as my friend is at pains to point out to Your Honour repeatedly, he presents in the witness box as somebody who has some insight into his

position. And indeed if Your Honour is being invited to extrapolate from that presentation, Your Honour is also entitled to do it for this purpose, and that is, to move Mr Hoser yet another increment or two down towards the authoritative end of the spectrum to which I referred.
My friend referred to what was implicit in the questions that I put to Mr Hoser, of him being a disgruntled litigant and a campaigner. He referred to that as a false dichotomy. We reject that description. It is plain that a person unsatisfied with an experience with the court system could be a disgruntled litigant. It is plain that a person could be a campaigner without being a disgruntled litigant, and indeed, the two; it is not just a dichotomy, one could be either without being the other; one could be both. We simply put that Mr Hoser is both, and it is important, that conjunction.
There is something understandable, and I don't want to be understood in saying that that it is defensible, but there is something understandable about a person who perceives that they have been wronged, and we don't take issue that Mr Hoser so perceives in relation to himself and certain issues attending his cases, that that is his perception. But the next step is optional. What one can take is specific steps of approaches to the Attorney-General, the Ombudsman, legal advice, as a disgruntled litigant to say, "I seek redress and I seek it A in my case, and B in general, to prevent this wrong occurring again". To become a campaigner, and then to get to the area, as Mr Hoser has, of expressing opinions and engaging in what we will say is properly characterised as extravagant hyperbole about the system in general, on the

limited bases that he has named in the book and further advised of in evidence today, is unsustainable.

HIS HONOUR: Mr Langmead, I don't get time and a half after

4:15. Can you give me an idea of what duration you expect to be?

MR LANGMEAD: One to one-and-a-half hours, I would say.

HIS HONOUR: Okay. Well, I was going to suggest that if you were very close to finishing, I would have pressed on. But in those circumstances I think I should leave it until tomorrow.

MR LANGMEAD: Your Honour, would it be of assistance if I were to hand you an outline of submissions overnight, and I will simply hand them to my learned friends.

HIS HONOUR: Yes, both to me and to your opponents. Are you in trouble tomorrow.

MR MAXWELL: Yes, Your Honour, I am, but we don't suggest that the matter not proceed. I just want to indicate that I won't be here in the morning, Your Honour. My learned juniors will deal with the matter.

HIS HONOUR: Well, given that they have now got a written outline, that should assist in doing a reply in the morning.

MR MAXWELL: Indeed.

HIS HONOUR: Well, we will adjourn now until 10:30 tomorrow morning.

ADJOURNED UNTIL 10: 30 AM, WEDNESDAY, 31 OCTOBER 2001

.AL:LB IRS 30/10/01 P-452 MR LANGMEAD
Hoser

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.

.AL:LB IRS 31/10/01 P-515 MR LANGMEAD
Hoser

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.
* * *

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

R v Hoser and Kotabi Pty Ltd [2001] VSC 443 (29 November 2001)
Last Updated: 5 December 2001
IN THE SUPREME COURT OF VICTORIA Not Restricted
AT MELBOURNE
COMMON LAW DIVISION
No. 5928 of 2001

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

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

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

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

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HIS HONOUR:

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

Both books which are the subject of the charges were published in 1999. The first book was titled "Victoria Police Corruption" (hereafter called "Book One"). One passage from that book is the subject of the second count of contempt. That passage refers to then Magistrate Mr H.F Adams. Count 1 relates to the second book, titled "Victoria Police Corruption 2" (hereafter called "Book Two") and there were numerous passages identified by the Crown in the particulars of contempt on the first count of contempt. Apart from these books Hoser is the author of numerous other books and has published many papers, on topics concerning alleged corruption and in the field of zoology. One book, "The Hoser Files - The Fight Against Entrenched Official Corruption", published in 1995 by Kotabi, was referred to by Hoser in the course of his defence to the present charges. That book gives an account of court appearances by Hoser arising during his time as a taxi driver. One such appearance has direct relevance to matters discussed in Book Two.

On the first count of contempt, which relates to Book Two, 23 separate

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

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

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

"VICTORIA POLICE CORRUPTION" (BOOK ONE)

Book One, "Victoria Police Corruption", has more than 720 pages of closely typed text but also includes a number of photographs. In common with the second book, it appears to be a highly professional publication. Both books have a colour cover and Book One has a banner headline on the cover announcing it to have been "Previously Censored" and "The Book that the Victoria Police don't want you to read". The cover describes it as a book which deals with "Drug trafficking, murders, rapes, assaults, thefts, court fixing, corrupt judges and magistrates, money scams, car crash rackets, rapes, frauds, political corruption, OPP/police criminal activity, media manipulation and propaganda, cover ups at the highest levels, etc". On the title page, under the author's name, he is described as "Author of the controversial best sellers, "Smuggled: the Underground Trade in Australia's Wildlife" and "Smuggled 2 - Wildlife Trafficking, Crime and Corruption in Australia".

Author's notes opposite the Contents page claim copyright in Mr Hoser and provide ISBN numbers. The Author's Notes announce, inter alia, that "Most or all manuscript from this book has been tabled in various Australian Parliaments. Some are now the subject of official enquiries and investigations", and asserts that "All reasonable steps have been taken to ensure accuracy of material in this book. Furthermore, all reasonable steps have been taken to elicit and publish appropriate responses from all adversely named persons". There then follows the following passages:

> "In November and December 1996 material published by Raymond Hoser in previous books was subject to a series of three defamation claims against Raymond Hoser and Kotabi Publishing in the Sydney Supreme Court. The cases centred on attempts to ban Smuggled 2: Wild Life Trafficking, Crime and Corruption in Australia. All three cases came down in favour of author Raymond Hoser and neither that book or Smuggled was banned (temporary bans were lifted). Furthermore, in no case did any judge find a single statement in either book that was in any way false or defamatory. Two attempted defamation actions against Raymond Hoser in relation to "The Hoser files - The Fight Against Entrenched Official Corruption" failed. Both were dropped before they made it to court. Likewise for a pair of unsuccessful attempts to sue Raymond Hoser over information placed on the Internet web site. To order other corruption books by Raymond Hoser please contact the publisher at the above address."

The Author's Notes (in Book 2) opposite the Content's page identify Mr Hoser

as "Australia's most frequently banned author" and specify a web site at which contact may be made and relevant links be accessed. The note asserts that all information sources used in the compilation of the books can be found at another web site, which is also given.

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

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

"VICTORIA POLICE CORRUPTION 2" (BOOK TWO)

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

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

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

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

Hoser provides a detailed chronology in Book Two which records his arguments with government officials, including the New South Wales Wildlife Authority and police, commencing in New South Wales in 1976, and his prosecution by police - in New South Wales from 1981 and subsequently by Victorian police. He also details disputes, allegations of corruption and charges involving officials of the Road Traffic Authority, dating from about 1985, when he was driving taxis. The chronology indicates that he brought charges, himself, against Road Traffic officers and police on some occasions. The majority of the book is concerned with an exhaustive discussion, with some references to transcript, of, first, the hearing in the Magistrates Court of the traffic offence, then, secondly, his appeal against his conviction on that count, which appeal was heard by Judge Balmford. The appeal before Judge Balmford is discussed in detail as is his being subsequently charged with perjury. He next details the committal proceeding before Magistrate Heffey, and then, in considerable detail, he discusses the trial on the perjury count before a jury, presided over by Judge Neesham.

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

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

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

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

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

(A) PARTICULARS OF CONTEMPT REFERRING TO JUDGE NEESHAM

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

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

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

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

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

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

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

Hoser's trial for perjury commenced in September 1995 and continued for approximately a month. Prior to the trial he had applied to the Chief Judge of the County Court under s.360A of the Crimes Act 1958 for an order that the Legal Aid Commission grant him funding for legal representation, and complains that his application was rejected on a basis which was subsequently to be ruled erroneous[2]. It seems that he was offered a grant of legal aid for the trial, at some stage, but refused to accept a condition which the legal aid body imposed, namely, that a charge be placed over his property. Hoser, therefore, was unrepresented in the trial.

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

was made.

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

(B) PARTICULARS OF CONTEMPT CONCERNING JUDGE BALMFORD

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

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

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

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

(C) PARTICULARS OF CONTEMPT CONCERNING MAGISTRATE HEFFEY

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

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

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

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

(D) PARTICULARS OF CONTEMPT CONCERNING MAGISTRATE ADAMS

On the inside back cover of Book Two appears a full page photograph of Magistrate Adams, with eyes cast down and with a serious expression, under a bold title, "The Magistrate". A sidebar attribution for the photograph notes that it is "Courtesy of `The Age'". Under the photograph appears the following heading: "The Magistrate that the cop said he paid off", which is then followed by the following text (which constitutes the particular of contempt):

> "Following the 1995 publication of Policeman Ross Bingley's confession that he had paid off Hugh Francis Patrick Adams to fix a case, some of his other rulings that seemingly flew in the face of the truth or logic have come under renewed scrutiny. This includes the bungled inquest into the murder of Jennifer Tanner, which police falsely alleged was suicide."

On the inside front cover of the book, under a bold title, "The Policeman", appears a full page photograph of a person in a suit, again with head down, standing by a motor vehicle. Under the photograph is the caption, "Crooked Cop" and under that the following text appears:

> "Ross Allen Bingley gained notoriety for several actions including falsifying charges, perjury and using police protected criminals as witnesses. After one case he confessed to fixing the result by paying off

> Magistrate Hugh Francis Patrick Adams (see inside back cover). Several recently retired Victorian police officers have said that `fixing' court cases by paying off judges and magistrates, knobbling juries, harassing witnesses and other unlawful means is so common as to be effectively routine. Meanwhile the government maintains that charade, that this sort of thing never happens."

There is no particular of contempt relating to the words or photograph appearing on the inside front cover but it was submitted on behalf of the respondents that it was relevant to the defence to refer to that, so as to give context to the statements which appeared on the inside back cover.

COUNT TWO: RE: `VICTORIA POLICE CORRUPTION'; BOOK ONE

PARTICULARS OF CONTEMPT CONCERNING MAGISTRATE ADAMS

In Book One, as I have said, only one passage is the subject of a particular with respect to the second count of contempt. At page 57 the same photograph of Magistrate Adams appears as was used in the second book. Once again, attribution is given to `The Age' and the caption is, "Magistrate Hugh Francis Adams". Of the words which then appear not all have been included in the particular of the offence. The words in italics are those which are not part of the particulars of contempt:

> "In a controversial decision he let corrupt policeman Paul John Strang walk free from court after he pled guilty to a charge related to planting explosives on an innocent man. He then put a suppression order on the penalty. In a separate matter, a Policeman admitted to paying a bribe to Adams to have an innocent man sentenced to jail. Adams was also the magistrate who preceded over the first bungled Jennifer Tanner inquest. His finding in that matter was qashed (sic) and overturned. Adams has also come under criticism for his handling of other cases including the Wagnegg and Walsh Street matters."

Before dealing with the matters of fact and law which the plaintiff contended constituted these statements to be contempt, and the defences which were raised by the respondents, it is first necessary to provide some background to the perjury charge which was determined by the jury in the trial presided over by Judge Neesham.

THE BACKGROUND TO THE PERJURY CHARGE

A very large proportion of the chapters in the second book deal with Hoser's conviction by verdict of a jury on a count of perjury. Hoser was presented at the County Court at Melbourne on 4 September 1995 and after being convicted of perjury was sentenced by Judge Neesham to six months' imprisonment with two months of that sentence suspended for two years. The circumstances which gave rise to his prosecution for perjury commenced on 8 March 1992, when two police officers observed Hoser driving a taxi in the early hours of that day at the intersection of Sydney Road and Harding Street, Coburg. The police officers observed Hoser drive into the intersection against a red traffic light. They stopped him and issued an On the Spot Penalty Notice.

Hoser contested the charge, but in proceedings in the Magistrates' Court in November 1993 was convicted, fined and had his licence cancelled. He appealed from that conviction to the County Court and on 17 and 18 February 1994 the appeal was heard by her Honour Judge Balmford (at that time a judge of the County Court, but her Honour was later elevated to the Supreme Court). Once again, no transcript was taken of the proceedings. Hoser objected to the fact that the proceedings were not being tape recorded and upon her Honour's rejection of his contention that they should be, Hoser thereafter covertly tape recorded part of the proceedings, being the 28 minutes of his own evidence.

At the conclusion of the evidence for the prosecution on the appeal before Judge Balmford, Hoser produced a document and then gave evidence on oath and tendered the document, which he said was advice which he had received in

writing from VicRoads that the traffic lights at that intersection were malfunctioning at the time of his offence, and were showing red in all directions at that time. The letter purported to be written in reply to a telephone enquiry made by Hoser on 24 January 1994 about that intersection. Hoser said he had received this response by fax, on his home fax machine which, he said, did not print out the time of receipt of the document.

The prosecution sought an adjournment to make further enquiries, and upon the matter resuming evidence was led that the document which had been produced by Hoser, and which had the VicRoads' letterhead, also bore a reference number which was an internal reference number used by VicRoads to identify the intersection about which an enquiry had been made by a member of the public and to which the response related. The reference number in the document tendered by Hoser was not to the intersection at which he had been charged but to the intersection at King Street and Flinders Lane, Melbourne.

The prosecution tendered a letter from VicRoads which bore the same date as the letter tendered by Hoser and which was in identical form, save for the fact that it was referring to a different intersection and a different time and date, and which letter had been produced in response to a request for information made by Hoser on the same date on which he said he had made the enquiry about the intersection of Sydney Road and Harding Street, Coburg. In response to this material Hoser claimed that he had in fact made enquiries on the same date, that is, 24 January 1994, about malfunctions at two separate intersections.

Hoser was charged with perjury for this evidence and was committed for trial by Magistrate Heffey. According to Hoser, in committing him for trial Her Worship did not hear his tape recording of his evidence before Judge Balmford, having been told that the tape (which had been seized and copied by police) had not been brought to court, and having ruled that it was not necessary to hear it to be satisfied that there was a case to answer at trial. An attempt by Hoser to tender and play a copy of the tape was successfully objected to by counsel for the DPP.

On his trial for perjury in the County Court the count was amended so as to allege that he had falsely sworn on oath that the letter which he tendered had been sent to him, by fax, from VicRoads. At the trial in the County Court the Crown led evidence from witnesses from Roads Corporation and from an expert from the State Forensic Science Laboratory to the effect that the document tendered by Hoser had been a forgery and constituted a doctored version of the document which had been sent to him by VicRoads concerning the intersection at King Street and Flinders Lane. In other words, it was the Crown case that to bolster his case Hoser had produced a manufactured forgery, and had been caught out. The records of Roads Corporation disclosed no enquiry having been made by Hoser concerning lights at the intersection of Harding Street and Sydney Road.

In his defence to the charge of perjury Hoser claimed that he had been "set up" by police officers and officers of Roads Corporation, whom he claimed had been victimising him over a long period of time. He called another taxi driver, one Burke, who gave evidence that he had travelled through the intersection on the same evening for which Hoser had been charged and that the traffic lights were then stuck on red. The witness, Burke, appears to be the same person who gave evidence for Hoser in his earlier Magistrate's Court prosecution for assault which was heard by Magistrate Adams, out of which the "confession" was made by Bingley concerning the alleged corruption of the magistrate. As Hoser acknowledges in his book, Burke's credibility was the subject of sustained attack by the prosecutor in the perjury trial.

Unlike his previous encounters in the law courts, the decision in the perjury trial was not made by a magistrate or a judge, but by a jury of 12 citizens who had the opportunity to observe Hoser and his witness, and also the

prosecution witnesses. They disbelieved Hoser and his witness. A conviction for perjury was plainly a very serious setback for a person who proclaimed himself to be an authority about corruption and a person whose word should be accepted as truth.

Hoser appealed to the Court of Appeal, and was represented by Queen's Counsel, but his appeal failed. Hoser attended the hearing, and was present when, at the outset of the hearing, counsel announced that he proposed to argue only three grounds, those being three new grounds of appeal drafted by Hoser's lawyers, and that he would not argue the 26 grounds which had been drafted and lodged by Hoser. As appears in the report of the decision of the Court of Appeal (R v Hoser[3]), counsel advised the court that his instructions would not permit him to abandon those grounds, although he did not propose to argue them. Hoser complains that the abandonment of the 26 grounds of appeal was contrary to his express instructions. Although the original 26 grounds were not filed in the proceedings before me it is apparent from the terms of the report to the Court of Appeal by Judge Neesham what some of those grounds were, and the grounds are re-produced in Book Two[4].

Before examining the circumstances and context of the events referred to in each of the particulars of alleged contempt, it is convenient to discuss the relevant law applicable to a charge of contempt by scandalising the court.

WHAT CONSTITUTES CONDUCT WHICH SCANDALISES THE COURT?

The summary procedure of prosecuting instances of contempt by scandalising the court should be regarded as invoking criminal jurisdiction and, accordingly, requires that the charge be proved beyond reasonable doubt[5]. The Supreme Court has jurisdiction to deal with contempts of inferior courts[6]. The offence of scandalising the court is a well recognised form of criminal contempt and is not obsolete[7]. The offence of contempt by scandalising the court was described in the following terms by Rich J. in R v Dunbabin; ex parte Williams[8] when speaking of interferences with the course of justice:

> "...But such interferences may also arise from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to influence the confidence of the people in the court's judgments because the matter published aims at lowering the authority of the court as a whole or that of its judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office. The jurisdiction is not given for the purpose of protecting judges personally from imputations to which they may be exposed as individuals. It is not given for the purpose of restricting honest criticism based on rational grounds of the manner in which the court performs its functions. The law permits in respect of courts, as of other institutions, the fullest discussion of their doings so long as that discussion is fairly conducted and is honestly directed to some definite public purpose. The jurisdiction exists in order that the authority of the law as administered in the courts may be established and maintained."

There are generally recognised to be two categories of publications which scandalise the court, although they tend to overlap[9]. In the first place, there are those which impugn the impartiality or integrity of the court. The second category relates to scurrilous abuse. In this case the particulars on which I held there was a case to answer fell into the former category, although in some instances language was employed which was capable of constituting scurrilous abuse, also. Abuse or attacks on the personal character of a judge or magistrate which reflect upon the capacity of the person to act as a judge or magistrate - for example, by calling the judge or magistrate a liar[10] - would be capable of constituting scurrilous abuse[11]. In the leading case concerning scurrilous abuse, R v Gray[12], Lord Russell of Killowen CJ drew a distinction between criticism, on the one hand, and personal, scurrilous, abuse of a judge, as a judge. Lord Russell characterised

contempt by scandalising a court or judge as being conduct where an act done or a writing published was calculated to bring a court or judge of the court into contempt, or to lower his authority. His Lordship qualified that statement by holding:

> "Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of court."

In The King v Nicholls[13] Griffiths CJ observed:

> "In one sense, no doubt, every defamatory publication concerning a judge may be said to bring him into contempt as that term was used in the law of libel, but it does not follow that everything said of a judge calculated to bring him into contempt in that sense amounts to contempt of court."

In Attorney-General (NSW) v Mundey[14] Hope JA held that it may, and generally will, constitute contempt to make unjustified allegations that a judge has been affected by some personal bias against a party, or has acted mala fide, or has failed to act with the impartiality required of the judicial office, but in Ahnee & Ors v Director of Public Prosecutions[15] Lord Steyne, delivering the judgment of the Judicial Committee of the Privy Council, held that the imputation of improper motives to a judge could not be regarded as always, and absolutely, constituting contempt, and gave as an example of a possible exception an instance where a judge engaged in patently biased conduct in a criminal trial.[16] As I will later discuss, it is my view that none of the particulars with which I am concerned would constitute such an exception, i.e., by virtue of being criticism of what was patently biased conduct.

In stressing the importance of freedom of speech and the right of members of the public to criticise decisions of the courts, Lord Denning M.R. in R v Metropolitan Police Commissioner; Ex parte Blackburn (No 2)[17] said that every person had the right:

> "to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not."

Lord Denning then followed that statement with this important qualification:

> "All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication."

In citing the judgment of Lord Denning, with approval, Hope JA in Attorney-General (NSW) v Mundey[18], observed:

> "But criticism does not become contempt because it is `wrong headed, or based on the mistaken view of the facts or of the law. Nor, in my opinion, need it be respectfully courteous or coolly unemotional. There is no more reason why the acts of courts should not be trenchantly criticised than the acts of other public institutions, including parliament. The truth is of course that public institutions in a free society must stand upon their own merit; they cannot be propped up if their conduct does not command respect and confidence; if their conduct justifies the respect and confidence of the community, they do not need the protection of special rules to shield them from criticism. Indeed informed criticism, whether from a legal or social or any other relevant point of view, would be of the greatest assistance to them in the performance of their function. However, the law has undoubtedly imposed qualifications on the right of criticism, and they are qualifications that relate to the effective performance by courts and judges of their role in the administration of justice. Unfortunately these qualifications are ones the boundaries of which are difficult to define with precision, and indeed in respect of which courts have from time to time had

different attitudes."

The prosecutor is not obliged to prove that the comments actually did undermine the standing of the court or its officers. It is sufficient if the court is satisfied, objectively, that they had the tendency to do so[19]. In determining whether the material has that tendency, it is to be judged by reference to its impact upon the ordinary reader[20], or a reasonable person[21].

The first defendant denied that he had made the statements with any intention of interfering with the administration of justice or the standing of the judges. Indeed, he claimed that his intention was to enhance the reputation of the judicial system by exposing those instances where judges or magistrates had behaved improperly. His intention, assuming I accepted his assertion in that respect, can not be decisive on the question whether he has committed contempt.

Hope JA in Mundey held that in the circumstances of that case the issue whether the respondents statements constituted contempt had to be determined by reference to their inherent tendency to interfere with the administration of justice and that:

> "The defendant's intention, while of some relevance in this regard, is of importance mainly in relation to whether the matter should be dealt with summarily, if any of the statements did constitute contempt, and in relation to the question as to what penalty, if any, should be imposed"[22].

In John Fairfax & Sons Pty Ltd v McRae the High Court held that "the actual intention or purpose lying behind a publication in cases of this kind is never a decisive consideration. The ultimate question is as to the inherent tendency of the matter published. But intention is always regarded by the court as a relevant consideration, its importance varying according to the circumstances"[23].

The courts have long stressed that the jurisdiction to punish in a summary way for contempt by scandalising the court should be exercised "sparingly"[24] and "with great caution"[25]. There must be a real risk of the administration of justice being undermined[26].

The need to exercise caution is starkly demonstrated by the leading authority on scurrilous abuse, itself. In R v Gray[27] the judge who was the subject of the abuse was Mr Justice Darling, a judge who has been the subject of much criticism by writers since his retirement in 1923. The author, David Pannick, in his book "Judges"[28] said of the published criticism of Mr Justice Darling, which earned the journalist concerned a substantial fine (imprisonment only being avoided by virtue of a grovelling apology):

> "This splendid piece of invective effectively punctured the vain pretensions of Mr Justice Darling whose injudicious behaviour on the bench was frequently a disgrace."

Similar criticisms have been made elsewhere[29].

DEFENCES OF TRUTH AND FAIR COMMENT

The learned authors Borrie and Lowe[30] suggest that a defence of fair comment is available in Australia, but are more doubtful that a defence of justification (I shall employ the term "truth" to identify this defence) is available in cases of contempt. In his book, "Contempt of Court" Professor C.J. Miller[31] came to similar conclusions. Although the law can not be taken to be settled, it does now seem that both defences are available in Australia. In this case the respondents' defence to all charges was that the comments constituted fair comment, but, as I shall discuss, the defence of truth nonetheless arises.

In his affidavit Hoser made the following assertions:

> "7. When undertaking research for my books I take all reasonable steps to ensure the accuracy and truth of the statements made in the books and of any material relied on. I adopted that approach in writing the relevant books.

> 8. I set out in the relevant books the facts and matters upon which my comments, criticisms and opinions - as expressed in the books - were based. All transcript extracts relating to the passages complained of were taken from the official court transcripts and, to the best of my knowledge at the time of publication, were accurately reproduced. 9. To the best of my knowledge at the time of publication, the statements of fact contained in the relevant books were true. Wherever in the relevant books I expressed views, opinions or beliefs, I was expressing views, opinions and beliefs which I held at the time of publication. 10. It was no part of my purpose in writing the relevant books to harm the administration of justice. As stated at p. 18 of book 2 (and elsewhere), my purpose in writing both books was to highlight what I perceived to be corruption (as defined in the books) and wrongs in the justice system and in the conduct of police. I sought to do so as the first step towards rectifying those deficiencies and ultimately strengthening public faith and trust in the criminal justice system."

In the course of his evidence to me, Hoser said: "The point is made early in both books that the vast majority of judges and magistrates and police and so forth, are doing a very difficult job very well, and I think in the context of the books, what I am worried about Your Honour is that a perception is being put across that I have some sort of bent or vendetta against all judges and magistrates which is very far from the case".

Mr Maxwell QC submitted that because, in his brief cross-examination, counsel for the Attorney-General did not challenge directly the assertions made in the above paragraphs of Hoser's affidavit, it must follow that the plaintiff was obliged to accept the truth of what was there asserted. However, whilst it is true that (somewhat surprisingly) Hoser was not cross-examined directly on those matters, there could be no doubt that the Crown was challenging every one of Hoser's assertions as to his integrity and good faith, and the contention that the offending passages from his books constituted fair comment.

In his evidence Hoser emphasised the care he took to check the facts in his books. He said that invariably publication of his books was delayed for a substantial period "so that the facts can be checked and double checked and persons adversely named can be sent relevant manuscripts so that if they believe I have got something wrong, they have the opportunity to correct the whole thing". He did not suggest, however, that any of the persons named in the particulars for the two counts of contempt were accorded that opportunity.

No defence of truth was argued. Instead, what was argued was that if it was accepted that Hoser had written in good faith what he believed to be true, and had based his statements on facts which he believed supported the statements, then the Crown carried an onus of proving that what was asserted was not true. In the written reply counsel for the respondents put the matter this way:

> "The submissions for the respondents do not assert that the books themselves are evidence of the truth of the matters stated in them. Rather, it is the submission of the respondents that the books are to be taken at face value, in the absence of any basis for a suggestion that they should not be so treated"

To emphasise the point, counsel noted that Hoser had sent to the Attorney-General the transcript and tape of the "confession" which he said Bingley had made concerning the alleged corruption of magistrate Adams. Since the Crown had not taken steps to investigate whether there was truth in the allegation, then, so it was submitted, it should be presumed that it was true, unless the Crown disproved the allegation. I will later deal with that contention, in some detail. Insofar as the particulars other than those concerning Magistrate Adams allege bias, rather than corruption, then the case is put not that there was actual bias but that Hoser believed that he had been

the victim of bias and that his statements constitute fair comment made in good faith and based on the facts concerning what transpired in his hearings before the magistrates and judges concerned.

I turn then to consider what are the features of the defence of fair comment. As emerges from the decided cases, for a statement to constitute fair comment it must be honest criticism based on rational grounds, and be discussion which is fairly conducted. It must not be motivated by malice or by an intention to undermine the standing of the courts within the community. Lord Russell CJ in R v Gray saw no difficulty with criticism which constituted "reasonable argument or expostulation".

A further prerequisite for fair comment, namely, that the comment not impute improper motives, at all, to the magistrate or judge, was stated in the early decision of Ambard v Attorney-General for Trinidad and Tobago[32] where Lord Aitkin, delivering the judgment of the Judicial Committee, held:

> "But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

The apparent prohibition on any assertion of impropriety and the relevance of a claim of good faith were considered in Ahnee v Director of Public Prosecutions[33]. The Judicial Committee of the Privy Council was there concerned with a published allegation that the Chief Justice of Mauritius had improperly fixed the date and chosen judges to hear a case in which he had a personal interest. Their Lordships held that the offence of contempt by scandalising the court was not obsolete, but was an offence which was to be narrowly defined. Their Lordships added, at 306:

> "It does not extend to comment on the conduct of a judge unrelated to his performance on the bench. It exists solely to protect the administration of justice rather than the feelings of judges. There must be a real risk of undermining public confidence in the administration of justice. The field of application of the offence is also narrowed by the need in a democratic society for public scrutiny of the conduct of judges, and for the right of citizens to comment on matters of public concern. There is available to a defendant a defence based on the `right of criticising, in good faith, in private or public, a public act done in the seat of justice': see Reg v Gray[34]; Ambard v Attorney-General for Trinidad and Tobago[35] and Badry v Director of Public Prosecutions[36]. The classic illustration of such an offence is the imputation of improper motives to a judge. But so far as Ambard's case may suggest that such conduct must invariably be an offence their Lordships consider that such an absolute statement is not nowadays acceptable."

Their Lordships said that they preferred the view of the Australian courts, that exposure and criticism of judicial misconduct would be in the public interest (citing R v Nicholls[37]). The approach of the Australian courts, as adopted in R v Nicholls and R v Fletcher; Ex parte Kisch[38], also gained support from the Court of Appeal in New Zealand in Solicitor General v Radio Avon Ltd and Anor[39]. In that case the Court discussed the notion of "fair comment" and held that the mere fact that a criticism involved the imputation of improper motives to a judge or magistrate did not, in itself, determine that contempt had been committed. Their Honours continued:

> "If this were the law then nobody could publish a true account of the conduct of a judge if the matter published disclosed that the judge had in fact acted from some improper motive. Nor would it be possible, on the basis of facts truly stated, to make an honest and fair comment suggesting some improper motive, such as partiality or bias, without running the risk of being held in contempt."

The New Zealand Court of Appeal held in Solicitor General v Radio Avon that a defence based on fair comment was accepted to be available in R v Nicholls and R v Fletcher; Ex parte Kisch and was consistent with the view of the learned authors Borrie and Lowe, in The Law of Contempt, but their Honours held that comments would only avoid a finding of contempt "provided the allegation of partiality is free from the taint of scurrilous abuse and can be either justified or be properly considered as fair comment[40]".

The balancing approach which the court must undertake when considering a charge of contempt is discussed in Gallagher v Durack[41]. In that case the appellant, having successfully appealed against a sentence for contempt, imposed by a judge of the Federal Court, reacted to the decision of the Full Court in allowing his appeal by suggesting that it had been motivated by demonstrations staged by his union members. In the joint judgment, the High Court held;

> "The law endeavours to reconcile two principles, each of which is of cardinal importance, but which, in some circumstances, appear to come in conflict. One principle is that speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong headed. The other principle is that `it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon Courts of Justice which, if continued, are likely to impair their authority': per Dixon J in R v Dunbabin; Ex parte Williams[42]. The authority of the law rests on public confidence and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges. However, in many cases the good sense of the community will be a sufficient safeguard against the scandalous disparagement of a court or a judge and the summary remedy of fine or imprisonment `is applied only where the court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable': R v Fletcher; Ex parte Kisch, per Evatt J."

As may be seen, that statement, by its reference to "baseless" and "unwarrantable" criticism was consistent with the view that a defence of truth was open.

The High Court has more recently discussed the ambit of the contempt power, and the defences of fair comment and truth/justification, in the decision of Nationwide News Pty Ltd v Wills[43]. In that case the High Court was not called on to resolve the question of the range of defences which might be available on a charge of contempt, and the statements of the judges on these issues, therefore, are obiter. Nonetheless, the Court considered the issues in some detail, and the judgments suggest that defences of truth and fair comment are available to defeat the charge of contempt by scandalising the court. The judgments also discuss the relevance of a claim of good faith and the limits which might be imposed on criticism.

In Nationwide News v Wills the Court was interpreting a statutory provision which purported to prohibit all criticism of the Industrial Relations Commission, even criticism which was "justifiable, fair and reasonable"[44], thus purporting to create a protection from criticism which was much wider than that provided to any court, at common law. In considering the words

employed in the section ("calculated to bring a member of the Commission or the Commission into disrepute") Mason CJ, at 24, gave the word "calculated" its common law meaning in the law of contempt, namely, that it should be construed to mean "likely", rather than "intended".

In considering whether defences of justification and fair comment should apply, it was contended in argument that such defences were available at common law with respect to contempt. Mason CJ held, at 31-32, that at common law there would be no contempt if criticism was made in good faith by a person "genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice".

Brennan J held, at 38-39, that it would not be contempt to criticise court decisions "when the criticism is fair and not distorted by malice, and the basis of the criticism is accurately stated". His Honour held that it would be for the public benefit if comment was "fairly made" concerning conduct "that is truly disreputable (in the sense that it would impair the confidence of the public in the competence or integrity of the court)". Brennan J held that revelation of "truth" would be for the public benefit if it constituted "fair criticism based on fact", and that would be so even if the end result was that there would be less public confidence in a court or a judge. His Honour held that the laws of contempt do not suppress "justifiable or fair and reasonable criticism which exposes grounds for loss of official repute".

In their joint judgment, Deane and Toohey JJ, at 67, rejected the contention that the statute, in that case, imported defences which would be available at common law to a person charged with contempt, but in rejecting that contention their Honours accepted that, at common law, for a critical statement to constitute contempt it must have been "unwarranted"[45] or "unwarrantable"[46].

Deane and Toohey JJ, held, at 78, that, as with a court, it was important that members of the Industrial Relations Commission have the appearance as well as the substance of being fit and qualified and of acting fairly and impartially, and that the national system of conciliation and arbitration would be undermined were the public perception to be that the Commission's members were biased, unqualified, unfit, corrupt or customarily acted unfairly or improperly. Their Honours held that some control over "unfounded and illegitimate" attacks on the Commission could "in accordance with the traditional standards of our society, be justified as being in the public interest for the reason that it is necessary to enable the effective discharge of the important functions of conciliation and arbitration for the prevention and settlement of interstate industrial disputes". Their Honours held, at 79, that the protection of the Commission from unfounded attacks:

> ". . . does not mean that it is in the public interest that the substance of impropriety, bias or incompetence should be concealed under a false veneer of good repute. Indeed, the traditions and standards of our society dictate a conclusion that, putting to one side times of war and civil unrest, the public interest is never, on balance, served by the suppression of well-founded and relevant criticism of the legislative, executive or judicial organs of government or of the official conduct or fitness for office of those who constitute or staff them. Suppression of such criticism of government and government officials removes an important safeguard of the legitimate claims of individuals to live peacefully and with dignity in an ordered and democratic society. Indeed, if that suppression be institutionalised, it constitutes a threat to the very existence of such a society in that it reduces the possibility of peaceful change and removes an essential restraint upon excess or misuse of governmental power."

In his judgment in Nationwide News v Wills Dawson J, at 90-91, noted that the common law of contempt provided a very restricted basis on which criticism could be held to constitute contempt and cited the following passage in the

judgment of Griffith CJ in R v Nicholls[47]:

> "On the contrary, I think that if any judge of this court or of any other court were to make a public utterance of such character as to be likely to impair the confidence of the public, or of suitors or any class of suitors in the impartiality of the court in any matter likely to be brought before it, any public comment on such an utterance, if it were a fair comment, would so far from being a contempt of court, be for the public benefit, and would be entitled to similar protection to that which comment upon matters of public interest is entitled under the law of libel".

McHugh J, at 98, noted that many statements made about the Commission or its members might not constitute contempt of the Commission although they would constitute contempt if made about a court or a judge. His Honour held that the words of the section which the court was concerned to interpret could not be read down by reference to common law concepts relating to contempt by scandalising a court. McHugh J held, at 102, however, that a protection against justifiable as well as unjustifiable criticism went beyond the protection afforded any court of law. His Honour adopted the statement of the Privy Council in Ambard v Attorney-General of Trinidad and Tobago, that at common law no wrong is committed by persons who, in good faith, criticise courts or judges or the administration of justice, provided that they abstain from imputing improper motives and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice. His Honour noted, too, that R v Nicholls went further than that statement of the law, in stating that it was not in all cases of an imputation of want of impartiality that there would be a contempt of court (but noted that the instance which would provide the exception - i.e. which would not constitute contempt - would be where the conduct of the judge exposed himself or herself to such a charge, fairly made). Furthermore, at 102-103, his Honour held that while there were decisions of courts in other jurisdictions suggesting that truth or falsity were irrelevant to a charge of scandalising the court "this Court has said that the summary remedy of fine or imprisonment is applied only `where the attacks are unwarrantable' (referring to a passage in Gallagher v Durack, at 243, in turn citing Evatt J in R v Fletcher; Ex parte Kisch, at 257)."[48]

McHugh J held, at 104, that the common law principles relating to scandalising the court were not applicable to the Industrial Relations Commission, but that, in any event, the legislation went well beyond the protection which the law of contempt gave to courts. His Honour was not required to determine whether defences of fair comment and justification were available at common law in proceedings for contempt.

Whilst the statements in Nationwide News v Wills strongly suggest that defences of truth and fair comment now apply, the question can not be taken to be concluded. In Re Colina, Ex parte Torney[49], Gleeson CJ and Gummow J left open the question of the defences which might be available, but noted that the policy of the common law as to the ambit of contempt remained a matter of controversy, and their Honours cited Regina v Kopyto, as one of the cases which reflected the controversy.

83 Regina v Kopyto, was a decision of the Ontario Court of Appeal[50]. Cory JA, referring to the guarantee of freedom of expression to be found in s. 2(b) of the Canadian Charter of Rights and Freedoms, held:

> "A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. Because of their very importance in a democratic society the courts are bound to be the subject of comment and criticism, not all of which will be sweetly reasoned."

In that case the court held that the offence of scandalising the court conflicted with the entitlement of freedom of expression guaranteed by the

Charter of Rights and Freedoms. The comments made by Cory J.A[51], notwithstanding the significant difference between that case and the present, are nonetheless of relevance:

> "However, change for the better is dependent upon constructive criticisms. Nor can it be expected that criticism will always be muted by restraint. Frustration with outmoded practices will often lead to vigorous and unpropitious complaints. Hyperbole and colourful, perhaps even disrespectful language, may be the necessary touchstone to fire the interest and imagination of the public to the need for reform, and to suggest the manner in which that reform may be achieved. The concept of free and uninhibited speech permeates all truly democratic societies. Caustic and biting debate is, for example, often the hallmark of election campaigns, parliamentary debates and campaigns for the establishment of new public institutions or the reform of existing practices and institutions. The exchange of ideas on important issues is often framed in colourful and vitriolic language. So long as comments made on matters of public interest are neither obscene nor contrary to the laws of criminal libel, citizens of a democratic state should not have to worry unduly about the framing of their expression of ideas."

In the case before me it was submitted that the right to free speech, which had always been acknowledged to be a relevant consideration when determining whether statements amounted to contempt, must now be regarded as being paramount, by virtue of the decision of the High Court in Lange v Australian Broadcasting Commission[52], which, so it was submitted, gave free speech the status of a constitutional right.

In Lange the High Court held that the Commonwealth Constitution, by reference to several sections, gave an implied right of freedom of communication, but the court identified it as a "freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors[53]". The Court added that the relevant sections of the Constitution "do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power"[54]. It is, thus, doubtful that the freedom which the Court identified would bear upon the application of contempt of court principles. In any event, the Court stated[55] that the freedom was not absolute but was limited to what is necessary for the effective operation of the system of representative and responsible government.

The High Court held that even if there was an interference with the freedom of communication "about government and political matters" a law would not be invalid if it was "reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government . . .[56]".

The Solicitor-General contended that the application of contempt laws would be an instance of an acceptable limitation of the freedom of communication which was discussed in Lange, but that, in any event, it should not be considered that the principles in Lange were intended to interfere with the common law powers of courts to deal with contempt of court, a view taken by the New South Wales Court of Appeal in John Fairfax Pty Ltd v Attorney-General (New South Wales[57]). That view had also been expressed by Deane J in an earlier decision on the question of the implied freedom (Theophanous v Herald & Weekly Times Ltd[58]) and was suggested to be so, too, by Kirby P in John Fairfax Publications Pty Ltd v Doe[59], and by the Full Court in Western Australia in Hamersley Iron Pty Ltd v Lovell[60], which also held that the contempt laws were compatible with the freedom of communication discussed in Lange.

Mr Graham also contended that the State Constitution may not give rise to the

same implied freedom as was found to exist under the Commonwealth Constitution. He referred to the discussion by Kirby J in Yougarla v Western Australia[61].

I conclude that the principles in Lange do not detract from or alter any of the common law principles which I have held to apply with respect to contempt by scandalising the court, nor does the principle impose any additional restriction on the circumstances in which the court might conclude that it was appropriate to exercise the jurisdiction to punish contempt. It is my view that the constitutional freedom of communication, even if it was applied in full measure - to the extent and subject to the limitations that the High Court discussed in Lange - would add no greater emphasis to the statement of the importance of recognition of the right to free speech than had already been firmly embedded by the courts at common law[62].

As may be seen, for comment to be regarded as fair criticism it must be shown to have been made in good faith. I turn then to consider Hoser's assertion that each of his statements met that criteria.

GOOD FAITH? - TAKING THE BOOKS AT "FACE VALUE"

As noted above, Hoser's claim to have acted in good faith is not merely the assertion in his evidence, but he contends that a reading of his books demonstrates that when taken at face value they are the product of good faith of the author.

Counsel on both sides accepted that the passages identified in the particulars on which there is a case to answer needed to be read in the context of the books as a whole. On behalf of the respondents it was contended that various passages in both books, and also in the earlier book, "The Hoser Files", ameliorated any impression that the selected extracts constituted contempt. I was referred to numerous passages, in many instances self-serving statements, published by Hoser, and to detailed factual arguments set out in his books, not only in support of the conclusions which are to be found in the selected extracts, but also to support his contention that he was acting in good faith. The Crown, on the other hand, referred to passages throughout the book in order to discredit Hoser's claim that he acted in good faith, and his further claim that the opinions and statements made in the book were made only after careful examination of evidence and checking of sources. It was appropriate, in my view, that the books be used for the purpose of context in this way (see The Herald and Weekly Times Ltd v Attorney-General for the State of Victoria[63]; and Re Perkins[64]).

No defence of fair comment could apply to comments made in bad faith: see Solicitor-General v Radio Avon[65]. The learned authors Borrie and Lowe[66] observe that it is clear that comments made mala fide fall outside the protective umbrella of the right to criticise. The authors comment:

> "How can mala fides be proved? One way is to look at the language in the publication. It is easy, for example, to infer an intention to vilify the courts where outrageous and abusive language is used, especially where the article is one sided, containing little or no reasoning. In R v White[67] an early English decision of 1808, Grosse J decided that a censure of judge and jury in abusive terms constituted a contempt because the article: `Contained no reasoning or discussion but only declamation and invective... written not with a view to elucidate the truth but to injure the character of individuals, and to bring into hatred and contempt the administration of justice in this country.'

The authors then continue:

> "Cases of `scurrilous abuse' of a judge, particularly in R v Gray, where Lord Russell CJ said that the comment went beyond criticism, clearly by their language show an intention to vilify rather than to correct; if an article is written in abusive language, the bona fides of the writer will immediately be brought into question. The actual language used in an article

> is not, of course, conclusive proof of intention. Such factors as the party's attitude in court can also be important."

If one is to take the books at face value, especially Book Two, then it is difficult to accept that the author is motivated by good faith, or by a desire to correct rather than to vilify. The language used throughout is often both extreme and offensive; his comments about magistrates and judges almost universally contemptuous and sarcastic. His books, themselves, demonstrate how selective he is in his use of relevant material, and how prone he is to inflate a reasonable point by inflammatory language, or by making exaggerated claims as to what the fact demonstrates. At the same time I must make allowance of the fact that in Book Two, in particular, he is largely writing as one seeking vindication, claiming to be a person who has been wrongly convicted of a serious offence. In evaluating Hoser's claim to good faith, and the extravagance of his language, I have to also make allowance for what seems to be his highly developed belief that he is the victim of multiple conspiracies.

At page 142 of Book Two he states, "It has always amazed me how an innocuous activity by myself is always deliberately misinterpreted by the prosecution as part of some major criminal plot". I asked him whether that sense of conspiracy was one which rather more applied to himself. He said he had asked himself that question many times over the years, but said that that was not a possibility, having regard to the number of cases that he had won and the reasons why he had lost those cases on which he had been unsuccessful. He said in many cases it was not a conspiracy, just the magistrates choosing to accept other peoples' word rather than his own. He attributed that to perjury by the other witnesses rather than necessarily to corruption by the magistrates.

I give just one example of an exaggerated claim based on flimsy evidence in order to illustrate the difficulty I have with Hoser's contention that his books should be taken on face value, and that they demonstrate a person acting in good faith.

In a passage in Book Two in a chapter titled "Crime - Who you are determines the penalty", and under a sub-heading "Looking After the Criminals", the following passage appears:

> "Then there's (sic) the judges and magistrates who look after hardened criminals with lenient or non-existent sentences. These occur in various circumstances including when the criminal has mates in the system, but weren't able to actually prevent the charges being laid. A common scenario is when a straight cop busts a protected drug trafficker and refused to `pull' the charge. The criminal is then forced to front court, but a deal is done with one or more of the clerk, the prosecution and the person hearing the matter (judge or magistrate) to give the person an easy ride through the system. Instead of a penalty such as jail, the offender may get a suspended sentence, bond or whatever. The double standards show up when the penalty is compared to that of a non protected criminal."

Hoser then cites as examples two instances of sentencing of offenders, - the first being a person who he describes as "treasurer of a major heroin syndicate" who pleaded guilty and was given a suspended sentence, as to which he says "she walked free without any tangible penalty. The police side had not opposed the application". He contrasted that case with the case of two heroin traffickers "without the same level of protection" who, before another judge (for an entirely different incident), were sentenced to six years' imprisonment for drug trafficking of $60,000 worth of heroin. He offers not a word of evidence to support his assertion of corrupt deals being done to secure the more lenient result.

Various other cases are thereafter mentioned, apparently for the purpose of demonstrating that those who received what Hoser regarded as a lenient sentence might have their result explained by virtue of corruption, but, none

of the cases mentioned provides any support for the contention of "deals" being done with magistrates and judges to give the offender an easy passage through the courts, nor could he offer any better support for the allegation when he gave evidence before me.

Although his list of earlier publications, and two earlier books, were tendered, those books were not directly relevant before me, and I have not read them. I can make no judgment on those books but I am prepared to accept that Hoser does see himself as a crusader, and that his earlier books may well have been motivated by a genuine belief that he was exposing corruption. It is, however, difficult to accept his self-serving assertion that it was no part of his purpose in Book One and, especially, Book Two, to harm the administration of justice. In my view, he had a powerful motive in Book Two to seek to discredit the judicial system, in order to overcome the embarrassing facts that a jury had deemed him to be a perjurer and that his conviction for perjury had been upheld on appeal.

IS THERE A BASIS FOR GRIEVANCE?

In defending his client against the allegations of contempt, Hoser's counsel, Mr Maxwell QC, placed emphasis on the fact that most of the passages which are alleged to constitute contempt are the writings of a disappointed defendant, whose perceptions were coloured by that experience, and by a sense of injustice, which is aggravated by the fact that he was imprisoned for perjury. The fact that he had been unrepresented in his trial, compounded by his lack of legal training, meant that his perception of the events of his trial is a blinkered one, so it was submitted, but represents opinions honestly held. Furthermore, so it was submitted, his complaints are in many instances justifiable, or at the very least, understandable, as they are often based on fact, and the complaints contained in his original grounds of appeal to the Court of Appeal were never aired. The Crown, it was submitted, has not proved that his criticisms or allegations made against magistrates or judges were baseless or did not constitute fair comment made in good faith.

The defence of a charge of contempt for comments arising from court proceedings is not the opportunity for an accused person to make a collateral attack on the original proceedings, but I will address aspects of his perjury trial which he identifies as demonstrating that he had a basis in fact for his belief that the judge had been biased in his conduct of the trial. Those contentions are relevant to evaluating his claim of good faith and fair comment, and in evaluating those allegations it becomes clear that, whatever Hoser's own perceptions, the allegation of bias against the judge for the conduct of the trial is without substance.

Among the many factors which Hoser identifies as justification for his perception of the unfairness of his trial, the following are some of the most important:

* The fact that he was unrepresented;
* The fact that Judge Neesham had heard and rejected an appeal brought by Hoser almost two years earlier;
* The fact that the prosecutor made inappropriate attempts to ingratiate himself with the jury, giving rise to the belief held by Hoser, and some others who attended court to watch his trial, that he was communicating with the jury in the courtroom, during the trial;
* The belief that the judge and the prosecutor were meeting together outside court hours to discuss the case and to plot means to secure Hoser's conviction;
* The fact that Hoser was not permitted by Judge Neesham to tender in his trial a tape recording, which, in defiance of an express order of Judge Balmford, he had secretly made of his evidence during the appeal before Judge Balmford;
* The fact that Judge Neesham ordered the jury out of court on occasions when

Hoser was seeking to cross examine a witness, but permitted the witness to remain in court when asking Hoser what the scope and relevance was of the questions which he wanted to ask;

* Rulings and directions to the jury which Hoser said favoured the prosecution and did not assist him.

Analysis of these complaints (and I stress that they are only some of the matters which Hoser discussed in his books and in his evidence) discloses that even where in some instances there is a basis of fact to justify his complaint, Hoser has often, whether deliberately or unconsciously, so inflated the circumstances as to make his reporting of events quite unreliable and to raise doubts about his claim of good faith. In no instance is an allegation of bias capable of being sustained.

Hoser is an intelligent man and there are many indications throughout his books that he is an opportunist in seizing on events, and reporting them to his readers, in a way which attributes bias and unfairness in circumstances where, even as a non-lawyer, he must have known that innocent explanations were open. His posture of crusader against corruption does not prevent him being quite manipulative in seeking the sympathy of his audience. It is, however, important to try to ascertain those events which might understandably, even if wrongly, have caused him to feel badly done by in his court proceedings.

(A) THE ROLE OF THE PROSECUTOR

There seems to be little doubt that the prosecutor in the perjury trial acted quite inappropriately, at times, during the trial, and attempted to ingratiate himself with the jury. Hoser's claims, however, exaggerate the situation, and, in particular, unfairly attribute improper conduct or motives to the judge. Thus, in one of the passages which I ruled did not constitute a case to answer (but which I mention simply to demonstrate the capacity for leaps from fact to fantasy in which Hoser is prone to indulge) Hoser complained that, although he had not been aware of it himself, to any extent - until a spectator told him of it - the prosecutor "had spent most of the day apparently chatting to jurors", while Hoser was cross-examining. Hoser wrote in Book Two that Judge Neesham had been "green-lighting" the conduct of the prosecutor in that respect.

As is the practice for criminal appeals, Judge Neesham filed a report concerning what were then the 26 grounds of appeal lodged by Hoser. That report was tendered before me by counsel for Hoser, as support (from the judge himself) for the allegation that the prosecutor had behaved inappropriately. What the trial judge had to say, however, also demonstrates the hollowness of the complaint that the judge "greenlighted" such conduct. His Honour reported that he was not aware of there having been any "contact or dialogue" between the prosecution and the jury, but as to the suggestion that the prosecutor in the trial communicated with the jury, Judge Neesham reported:

> "Counsel for the prosecution did, at an early stage of the trial, behave in an inappropriate matter (sic) in the presence of the jury. That his behaviour was inappropriate was brought to his attention at p. 50 of the transcript, lines 4 and 9. Reference to that episode was made in the course of my charge at p. 1602. As a result of it I kept watch upon counsel for the prosecution. He did frequently look at the jury and from time to time smile at it. I did not think that further intervention by me was called for until I had occasion again to rebuke him for his facial expression at p. 808 of the transcript. He had, in the meantime, been rebuked for other inappropriate behaviour at pp. 462 and 464. I saw no winking at the jury nor facial gesture other than what I have described. I saw no attempt to distract the jury from its task. Had I done so I would have intervened immediately."

As counsel for the Attorney-General contended, far from it being the case that

Judge Neesham "greenlighted" the conduct of the prosecutor, he "redlighted" that conduct.

It is apparent, however, that the prosecutor had been acting in a quite inappropriate manner which merited censure, and received censure, from the trial judge. Such conduct would at any time be inappropriate, and arguably improper, but for it to be conduct indulged in by a senior crown prosecutor in a trial when a person is unrepresented reflects appalling judgement on the part of the prosecutor and a total disregard for the importance of maintaining both the reality and the appearance of fairness in such circumstances. Such conduct can itself undermine the administration of justice. The fact that any such conduct occurred would be likely to create a sense of anxiety and unfairness in an unrepresented person in Hoser's position, and I will have regard to that fact when assessing these charges.

(B) DENIAL OF TENDERING OF THE COVERT TAPE OF EVIDENCE

Much was made on behalf of Hoser in the proceedings before me of his suggestion that he had been denied the opportunity to present his defence to the perjury charge, because Judge Neesham had refused to allow him to make use of the tape recording of the proceedings before Judge Balmford which he had covertly made (in defiance of the order of Judge Balmford) during the hearing of his appeal before her Honour. In his book Hoser constructs an elaborate defence to the perjury charge whereby the tape recording would constituted definitive disproof of the allegation of perjury. The actual basis of the perjury allegation, as is discussed in the judgment of the Court of Appeal, was such that it seems to me highly unlikely that the playing of the tape recording could have made the slightest difference to his prospects of defence to the charge. None of his 26 grounds of appeal expressly complained about denial of use of the tape, and Hoser in his lengthy discussion of the trial does not set out the transcript of his application for tendering the tape and the reasons for refusal by the trial judge. I expressly asked to be directed to any such passage in the book and the passages to which I was directed do not overcome that deficiency.

Hoser's defence was in part, that in order for him to be guilty the Crown had to prove that he swore that it was VicRoads, which sent him the fax. He contended that he had never actually said that it was sent by VicRoads, because he claimed that he was not home when the fax arrived, and, thus, he could not see who had sent it. It was plain, however, that the thrust of the charge of perjury was that he had sworn that the document was a genuine one sent to him by VicRoads, by fax, in response to his query about the intersection. It was the Crown case that it was a forgery and had never been received by Hoser in the form in which it was produced by him to the court. Thus, Hoser's contention that he had not sworn that he was actually at home when the fax arrived was beside the point. At his perjury trial Hoser seems to have accepted that it was a forgery, but suggested to police witnesses that it may have been a forgery created by his enemies at VicRoads who had sent it to him in order to trap him into relying on it for his defence.

If the jury had a reasonable doubt as to who forged the fax then it would have had a reasonable doubt on the perjury charge. It is plain that his conviction was very much the product of the jury's disbelief as to his own evidence and that of his witness, who Hoser recounts coming under strong attack by the prosecutor.

In the final analysis, however, the charge of contempt does not require an analysis of the evidence on which Hoser was convicted and the merits of the arguments he made at trial or in his book. Hoser is entitled to protest to the world that his conviction was unjustified, and to argue his case as he wishes, with whatever selectivity of references to evidence that he choses. The issue before me is whether in seeking to argue that question he has gone beyond the boundaries of legitimate criticism of his court case and entered the area of

contempt of court, by making baseless allegations of bias and impropriety against the trial judge.

(C) OUT OF HOURS CONTACT BETWEEN JUDGE AND PROSECUTOR

The gulf between Hoser's perception of his trial, and reality, is starkly demonstrated by his complaint in Book Two (being, also, one of the grounds of appeal which was not argued) that the judge and prosecutor were meeting after hours to discuss the evidence in his case[68]. This allegation was based on the fact that when the prosecutor and judge, in open court, were referring to transcript as to argument which had taken place at an earlier time during the trial, the judge spoke of having queried the prosecutor on some point "the other night". Hoser wrote that thereby the judge and prosecutor: " . . had together let the cat out of the bag. They had spoken about my case in my absence overnight!". Judge Neesham reported to the Court of Appeal that the suggestion that there had been such contact was entirely false. His Honour reported:

> "There is no truth in the allegations made, nor any basis for it. All contact between the prosecution and myself took place in court in the presence of the appellant."

(D) THE TRIAL JUDGE "MISLEADS" THE JURY

There are some instances where Hoser's perception of unfairness was probably due simply to his lack of experience in court procedures and practices. For example, in Book Two[69], he complained about remarks made to the jury by Judge Neesham during the course of the playing of a tape recording of a police raid on his premises, which he had covertly made at the time, and which he requested be played to the jury. Hoser was charged with perjury alleged to have been committed in February 1994. On the tape recording of the police raid a police officer was heard to speak of a file titled "Allegations of perjury 1993". Judge Neesham, who had not heard the tape before, immediately interrupted the playing to say to the jury:

> "Members of the jury you heard one of the members of the search party refer just a moment ago to hearing `Allegations of Perjury 1993'. You should not think anything, but, and it is agreed that those allegations relate to the very matter you are hearing, not something else."

At a break, and in the absence of the jury, Judge Neesham complained to Hoser that he should have warned him that there was a reference on the tape to a 1993 perjury file.

In his book[70] Hoser complained that: "Neesham had probably made a deliberate mistake here because the date 1993 would indicate that I had premeditated and planned the alleged perjury in early 1994. It was part of his not so subtle and deliberate campaign to sow the seeds of doubt in the minds of the jurors". To an observer familiar with criminal trials, however, what is quite obvious is that the incident probably arose from the judge's fear that the jury would conclude that Hoser had a prior conviction, or at least had been charged with another perjury on an earlier occasion, and his comment was his rather urgent, and possibly unwise, attempt to eliminate any risk of prejudice (and avoid the aborting of the trial) by giving an innocent explanation for the mention of a 1993 file. In fact, the file which was referred to by the police officer during the raid was one made by Hoser himself and its title reflected his assessment concerning the evidence of VicRoads officers in another case in which he had been involved.

During his evidence before me I asked Hoser whether he accepted that that was a possible explanation for the judge's intervention. He agreed it was possible, and said that: "I have always allowed the possibility that maybe there are other possibilities I have got wrong, or facts I have overlooked, or whatever, and that is why I have posted all the relevant transcripts and the list of all my sources, documents, inquest files, the whole box and dice, on the web; so that any given area of any of these books, not just the pictures,

sections picked out by Mr Langmead, any section of the books, if a person thinks, "I think Hoser has got it wrong" they can then look at the whole lot and come to their own conclusion."

The difficulty with that explanation is that a non-lawyer would not be given any hint from what Hoser wrote that there may be an innocent explanation open as to what occurred. That is a fault which is constantly repeated throughout the book. In many instances it is highly likely that if more substantial extracts from transcript had been included in the book the innocent explanation would be obvious to the reader, but it is Hoser who decided how much of transcript was to appear in the books. It is highly unlikely that any reader would be minded to seek out the transcript, by using the web site, in order to check allegations for which Hoser does not suggest an alternative explanation may be open.

(D) "NOT INTERESTED IN THE TRUTH"

Hoser repeatedly asserts in Book Two[71] that Judge Neesham had no concern for the truth, and he quotes the judge, himself, saying to the jury when summing up the case that "A Criminal trial is not a search for the truth". That expression has been used by trial judges, when charging the jury, for a very long time. It is a good illustration of the dangers of the law's adherence to outmoded language.

The phrase is used by judges in a manner which is intended to be for the benefit of the accused person. Thus, the jury is told that their task is to decide only whether the Crown has proved the charge beyond reasonable doubt, and if they have such a doubt then the accused must be acquitted, even if that means that the public is left wondering what was the truth as to what happened. The phrase is also used at times to explain why a criminal trial does not seek to resolve all questions which might arise during a trial, as many issues are irrelevant to or remote from the issues which the Crown must prove. I consider that it is highly likely that the phrase that Hoser highlighted was used in the course of a longer explanation to the jury of the kind I have just suggested is the usual context for its use in a summing-up, and that would have been apparent had Hoser provided the full context of the phrase. Nonetheless, the phrase is capable of giving rise to the sort of misunderstanding that Hoser expresses, namely, the understanding that in determining the issues the jury are engaged in an exercise in which truth does not matter. The opposite is the case, and in assessing the evidence of witnesses in order to decide whether - having regard to the relevant issues of law and fact on which they have been directed - the Crown case has been proved beyond reasonable doubt, the jury is very much concerned to find the truth. In my opinion, it may be time for the phrase to be replaced when charging a jury.

(E) WAS THE TRUTH HIDDEN FROM THE JURY?

There are many examples of innocent conduct by the judge being misunderstood by Hoser, and treated as evidence of impropriety and bias. His complaint about the removal of the jury also arises from Hoser's ignorance of legal procedure. An unrepresented accused will often ask questions in cross-examination which a barrister would know would be ruled inadmissible or irrelevant. The difficulty for the trial judge is that an inappropriate question might prove disastrous for the accused if allowed to be asked or answered, or it might simply be unfair to the prosecution to permit an irrelevant or inappropriate question to be asked. As inconvenient as it often is, it may be necessary to ask the jury to retire while the judge considers whether the proposed questions are admissible, and for that purpose the questioner will be asked to spell out what is intended to be asked. It is often preferable that the witness not be present during that process, but it is sometimes a matter of judgement as to whether it is necessary to remove the witness when considering whether to allow the question. To Hoser there was only one way to view such an incident:

> "Throughout the case he gave prosecution witnesses an advantage by asking me in their presence what evidence I sought to get from them and what questions I sought to ask. From Neesham's and the prosecution's point of view this was designed to allow these witnesses time to think of the best answers they could give knowing in advance the answers I sought. When doing this, Neesham made sure that the jury was hurriedly shifted from the Courtroom so that they'd never know how he was actively aiding and abetting the prosecution witnesses".[72]

SUMMARY AS TO ISSUES IN THE PERJURY TRIAL

That review of the complaints, while not exhaustive, demonstrates how ready Hoser was, in his book, to attribute dishonourable motives to the judge, in circumstances where the reader would have had difficulty appreciating that there may have been deficiencies and omissions in the narrative which he was providing.

Notwithstanding his conviction, Hoser is perfectly entitled to maintain his innocence and to attempt to persuade others as to that. He is not, however, entitled to make false accusations that the trial judge corruptly engineered a miscarriage of justice in order to convict an innocent man. To an experienced criminal lawyer a mere reading of the 26 grounds of appeal is enough to indicate that there could be no possibility of them establishing an error of law. No doubt counsel for Hoser on the appeal made that assessment, and substituted grounds which were arguable. Hoser is very unhappy with the fact that his own grounds were not argued, but they were, in the main, merely particulars of the themes that he had been denied a fair trial by the trial judge and also argument about the weight which should have been attached to various items of evidence.

It is appropriate to refer to the judgment of the Court of Appeal when assessing his complaint that he had been denied a fair trial and that his books should be regarded as the writings of a man who had a justified sense of grievance. Even allowing for the fact that his own grounds of appeal were not argued the impression of unfairness can not stand against the statements of the Court of Appeal.

Counsel for Hoser sought to address a range of his complaints under three grounds of appeal, one of which was a complaint that Judge Neesham failed to maintain judicial control over the admission of evidence. The President of the Court of Appeal (with whom Brooking and Callaway JJA agreed) said this, at 541:

> "This trial lasted for approximately a month. It generated nearly 2000 pages of transcript. Although I do not pretend to be familiar with the whole of that transcript, it would seem to me from such familiarity as I have gained that the learned judge was well alive to the difficulties faced by the applicant as an unrepresented person and also of the obligations which that circumstance imposed upon him to ensure that the applicant received a fair trial. On more than one occasion the learned judge referred to the difficulties which the applicant faced and reminded the jury that they needed to take account of those difficulties in assessing the evidence. It is also clear that his Honour was solicitous to ensure that where questions of law needed to be determined in the absence of the jury, the applicant was advised of that fact and that, where necessary, the questions should be determined in the absence of the jury. Where it appeared that the prosecutor was exceeding permissible limits in the questions which he asked, or their form, his Honour intervened to stifle the excesses. The fact that the only complaints made under this ground are the ones to which I have adverted tends to confirm the view which I have formed that his Honour did not fail in his obligations in the manner suggested by this ground of appeal."

EVALUATION OF THE EVIDENCE ON THE COUNTS OF CONTEMPT

Having regard to the principles of law discussed above I return to the

passages which I have found establish a case to answer of contempt.

ANALYSIS OF PARTICULARS CONCERNING JUDGE NEESHAM

For the convenience of the reader I repeat the particulars:

[diamond] Particular (iii), page 260, in a Chapter titled, "A Hot Bed of Corruption":

> "Perhaps most tellingly, he was one of those judges who had refused to allow me to have the case tape recorded, thereby effectively stamping him as a crook judge who wanted his activities never to be opened up to scrutiny. My initial judgements of Neesham as corrupt and dishonest were further proven during the course of the trial and its aftermath, much of which will be explained in the material which follows."

[diamond] Particular (iv), page 274, in a chapter titled, "Another Can of Worms":

> "As soon as the trial proper commenced, Neesham's bias against me commenced in earnest and his desired result was clearly known. His whole modus operandi was to guide the jury towards a guilty verdict. Furthermore these actions were separate to others which also appeared to have been taken to ensure the jury's verdict was pre-determined."

[diamond] Particular (vii), page 329, in a chapter titled, "The Twenty Counts of Perjury":

> "Of course Connell had been doing effectively what Neesham had told him. It was a classic case of bent judge improperly helping a prosecution witness."

Each of the passages asserts that Judge Neesham was biased in the conduct of the case, and in pursuit of a desired outcome for the prosecution, and dishonestly made rulings so as to ensure that the jury returned a false verdict of guilt in the perjury count.

In his report to the Court of Appeal Judge Neesham said that while at the outset of the trial he recollected Hoser having been before him previously on an unsuccessful appeal, he had no recollection of the details of the previous case. As to the suggestion that he might have been biased on account of that previous contact, his Honour said that possibility had not entered his mind. On the previous appeal, Judge Neesham had followed the practice of there being no transcript or recording of appeals and refused a request Hoser said he made to be allowed to tape. That explains the reference in the first particular, above. The first passage accuses the judge of being "a crook judge who wanted his activities never to be opened up to scrutiny" and of being "corrupt and dishonest". Having regard to the legal authorities cited above, the passage amounts of scurrilous abuse, and also an accusation of bias and impropriety. The assertions are baseless. To apply the words of Mason CJ in Nationwide News v Wills[73], the facts forming the basis of the criticism are not accurately stated and the criticism is not fair and is distorted by malice. It is not "honest criticism based on rational grounds", to use the words of Rich J in R v Dunbabin[74], or to use the words of Dixon J it is not "fair and honest and not directed to lowering the authority of the court[75]".

The second passage accuses the judge of "guiding" the jury to a conviction, and of acting in a manner designed to ensure that result. Subject to my later discussion of the question whether there was a real risk of undermining the administration of justice, those allegations of bias and impropriety constitute contempt by scandalising the court.

The final passage refers to the evidence of a prosecution witness, one Connell, a solicitor who was employed by VicRoads and acted as prosecutor in many VicRoads prosecutions. He was called simply to deny that he had sent to Hoser the forged fax which he claimed had been sent by VicRoads. Hoser cross examined him for two days, the task being prolonged, he asserts, because of the objections by the trial prosecutor and adverse rulings by the judge as to the relevance and admissibility of the questions. It appears from Hoser's own account that he was attempting to introduce onto the trial his allegations

that VicRoads officers were corrupt and had a motive to discredit him, but was also attacking the credit of the witness. Those were quite legitimate pursuits on his part, and the judge did not suggest otherwise.

The laws of evidence relating to attacks on credit of witnesses - and the extent to which a questioner can explore collateral issues, or must be bound by the answer given by the witness - are quite complex, and most unrepresented parties experience extreme difficulty when cross examining on these topics. Within those areas the problems are at their most complex when the questioner seeks to put documents to a witness and to rely on the contents of the document to prove some fact. It is very obvious from his own account that Hoser was experiencing difficulty in cross examining Connell for these reasons, and was constantly and innocently in breach of the laws of evidence. As a general rule, where a witness is shown a document which is not his own, and denies that he is aware of its contents then cross examination will not be permitted on the document. Hoser was attempting to prove, among other things, that VicRoads officers had forged documents in previous cases. At one point in his cross examination Hoser sought to question Connell over documents produced by other officers in a case involving a person named Brygel, who was an ally of Hoser. The judge ruled the questions as to these documents inadmissible and three times Hoser sought to re-open the topic. The judge then sent the jury out and questioned Hoser about the relevance and purpose of his questions and of the documents. Connell had already denied knowledge of some or possibly all of the documents and he was present in court when Hoser was questioned by the judge.

The third passage, above, reflects the fact that the judge told Hoser that he would permit the documents to be put to the witness but that if he denied that he knew the contents of the documents then Hoser would be bound by that answer. Upon the return of the jury the witness gave that response to the questions about the documents.

However frustrated Hoser may have been about the situation, the statement in the third particular of contempt cannot be regarded as fair comment, having regard to his use of the words "bent judge" and to the fact that it accuses the judge of deliberately seeking to coach the witness so as to obtain answers to the detriment of Hoser. The accusation of the judge being "bent", when taken with the two other passages and in the context of the general attack on the trial and the judge made in the book, renders the passage contempt in my view, and discredits the claims of fair comment and good faith.

One must be careful not to penalise the author of a statement for the use of language which is merely a product of the author's lack of sophistication or inexperience as a writer, and must make due allowance for the emotional response of the writer to a disappointing legal outcome. In one respect it is similar to the situation which arose in Attorney-General v Butler[76] where the writer might have avoided a finding of contempt if in making the criticism that he did he used moderate language, however strongly, rather than employed "intemperate and inflammatory" language. Just as in that case, it was Hoser's choice as to the words used and they betray his lack of good faith in making his comment. But the contempt in this case does not depend solely on the use of the words "bent judge", but arises because the passage represents a baseless allegation of serious and deliberate impropriety against the judge. Subject to my consideration whether in all the circumstances the statements constitute a real risk of undermining the administration of justice, in my opinion, each of the passages above constitutes contempt by scandalising the court.

ANALYSIS OF PARTICULARS CONCERNING JUDGE BALMFORD

The particulars relating to Judge Balmford were as follows:

[diamond] Page 142, in a chapter titled, "Forgeries, Forgeries, Forgeries":

> "Like I've noted, Balmford wanted to convict me and get the whole thing over

> with as soon as possible. After all she had obviously made up her mind before the case even started. Recall, she'd refused to allow the matter to be tape recorded."

[diamond] Page 144, in the same chapter:

> "Balmford's bias in favour of police and the DPP isn't just something I've noted. In fact three Supreme Court judges have noted it as well."

The first passage relates to a ruling made by Judge Balmford, towards the end of the appeal hearing, that she would not stand the case down while Hoser attempted to locate his witness, Brygel, whom he had expected to be at court to give evidence. Hoser had already completed his evidence. There is little doubt that the comments made about Judge Balmford were intended to convey the author's belief that her Honour had decided the appeal without regard to the evidence, and that she had adopted that approach because she was biased against Hoser. That is a serious allegation to make, and is based on no evidence apart from her Honour's conclusion that the appeal should be rejected, and upon her refusal to permit Hoser to tape the proceedings.

There is little doubt that Hoser has a particular fixation on the question of the tape recording of all proceedings, and it is a perfectly reasonable opinion to hold. It was, however, the practice in the County Court not to permit tape recording, a decision based on costs considerations, apparently. To an objective observer Hoser's request to tape proceedings may have seemed quite reasonable and the rejection of his application may have been considered unreasonable. However, even if the decision was unreasonable (and I do not suggest that it was), that would hardly demonstrate that it was motivated by bias and a desire to hide the truth.

The claim of bias is made significantly more serious by virtue of the additional assertion that her Honour had been held to be a biased judge by three judges of appeal. That suggestion was based, he said, on the decision of the Court of Appeal in R v DeMarco[77].

The Court of Appeal in DeMarco ordered a re-trial in what their Honours said was a very strong prosecution case of murder. At the time of that trial Justice Balmford had been appointed to the Supreme Court. The Court of Appeal held that her Honour had misdirected the jury on the question of lies told in consciousness of guilt. No ground of appeal alleged bias, and none of the judgments of the Court of Appeal mentioned bias. The suggestion that the Court noted "bias in favour of police and the DPP" is totally baseless.

When queried about the passage Hoser was decidedly uncomfortable. I have no doubt that he knew by the time of giving his evidence, at least, that the allegation was totally false. He said that when he wrote the comments he had probably not read the judgments of the Court of Appeal and he believed that he must have been told by a court journalist who had reported the decision in the media that the judgments spoke of "bias", or else he may have read that in a newspaper report of the decision. I do not believe that a court journalist would have made such a statement, and there is no possibility that a media report would have suggested that there had been a finding of bias.

As an alternative position, Hoser said that he had used the word "bias" in the way a lay person would, not as a lawyer might. He said that the word was used in the same sense that it would be used to assert that there was bias in the system because magistrates and judges preferred the word of police to that of accused persons.

Hoser told me that he meant that her Honour had misdirected the jury in the DeMarco trial in a way that helped guide the jury to a conviction and "whether that was deliberate or otherwise doesn't matter". Immediately after the passage identified in the second particular, cited above, there was another passage in which Hoser identified the case by name and said that DeMarco was sentenced to 23 years imprisonment by her Honour. He wrote that all three judges had overturned the conviction and that "they said Balmford had

misdirected the jury in a way that helped guide it to a guilty verdict". Although it was said that that passage lent support to Hoser's evidence as to what he meant when he said "bias", and thus removed the sting of the word, I do not accept that. In my view, the reader would simply take it that the two conclusions, bias and misdirection, were part of the finding of the Court of Appeal. In my opinion, Hoser intended the reader to have that understanding. To employ the words used in the decision of the Full Court of the Family Court in Fitzgibbon v Barker, the second particular represents "a gross distortion of the findings in the case... calculated to lessen or discredit the authority and prestige of the Court in the minds of reasonable people[78]". In this case the distortion of the finding of the court was directed not at the reputation of the Court of Appeal but against Justice Balmford.

I reject his explanations of the meaning and use of the word "bias" in the passage. In my view, it was intended to suggest that her Honour had been identified by the Court of Appeal to be a biased judge who favoured the prosecution. In my opinion, there is no possibility of this having been written in good faith. Hoser had an interest in discrediting the proceedings which were the origin of his charge of perjury, just as he had an interest in discrediting the magistrate who committed him for perjury, and the judge who presided over the trial at which he was convicted.

Although the name of the case was given and the date of judgment the Court of Appeal it is improbable that a member of the public reading that passage would have been alerted to the true position and have sought to investigate further. Had they done so then, as Hoser acknowledged, despite his claim that all sources were available so that the readers might make up their own minds, the DeMarco judgment was not on his web site.

Neither passage constitutes fair comment made in good faith. In alleging bias and prejudgment both comments were motivated by malice and betray an intention to lower the authority of the courts. The second particular also makes an untruthful statement of fact which, in itself, denies acceptance of a claim of good faith[79].

These two particulars constitute all of the elements of contempt by scandalising the court. Whether the jurisdiction to punish for contempt should be exercised will finally turn on whether the passages, and those others that similarly demonstrate the elements of contempt, constitute a real risk of undermining the administration of justice. I will discuss that question later.

ANALYSIS OF PARTICULARS CONCERNING MAGISTRATE HEFFEY

The passages concerning Ms Heffey were as follows:

[diamond] At page 208, in a chapter titled, "A Policeman's Magistrate":

> "In siding with the police, Heffey made her ruling where she goes through the motions of stating the alleged `facts' and `reasons' for her decision. She said she was going ahead because I had failed to notify the other side of my intention to seek an adjournment pending legal aid. That her statement was an obvious lie was demonstrated by the multiple letters in Hampel's files and Heffey's own court records. Then again, I suppose it was a case of not letting the truth get in the way of a pre-determined outcome."

[diamond] Page 212:

> "Oh and just in case you haven't yet worked it out, my committal to stand trial had clearly been well determined before a word of evidence was given."

The criticism of Magistrate Heffey is twofold, one being an accusation of bias and the other of dereliction of duty, in failing to have regard to the evidence in the case before her. The first passage relates to her Worship's refusal to grant an adjournment, which Hoser sought. Her Worship said that he had failed to give notice to the prosecution. Hoser asserts in his book that he had given notice by letters to the Crown and that there were letters to that effect on the court file. The second passage relates to the fact that he was committed for trial, and immediately follows a passage concerning an

objection he made at the outset of the committal as to the order of witnesses. His application was rejected. Hoser records: "Heffey sided with the Police. They could do as they pleased".

It is by no means uncommon that persons whose evidence has been disbelieved by a judge or magistrate conclude that their word was given less weight than that of the police officers or other officials who prosecuted the case against them. It is the nature of the adversarial system that witnesses on both sides may be equally convinced of the truth of their evidence, and the dishonesty of their opponents, when, to the objective observer, it appeared that either only one side could be right, or else that truth was a moveable feast. The experience of "professional" witnesses, such as police officers, undoubtedly gives them an advantage in court and makes it more likely that their evidence will seem credible, especially when the defendant is unrepresented and is likely to have been as rambling a witness, and yet so self confident and argumentative an advocate of his own cause, as Hoser was before me.

Comments, merely, that a judge or magistrate has an apparent disposition to believing the evidence of police witnesses when that evidence is in conflict with the evidence of civilian witnesses would not, in my view, constitute contempt. Indeed, it is part of the skill and experience of legal practitioners (which they apply in advising clients and in their conduct of proceedings before courts) to make assessments of the inclinations, temperament and proclivities of judges and magistrates when confronted with particular issues and with witnesses in instances of such conflict of oath against oath.

In Mundey Hope JA drew the distinction between contempt and mere recognition of the differences in temperament, and attitude, of tribunals of fact, in the following way[80]:

> "Furthermore, it does not necessarily amount to a contempt of court to claim that a court or judge had been influenced, or too much influenced, whether consciously or unconsciously, by some particular consideration in respect of a matter which has been determined. Such criticism is frequently made in academic journals and books, and the right cannot be limited to academics; and although the use of particular language may reduce that which might otherwise be criticism to mere scurrility, the use of strong language will not convert permissible criticism into contempt, unless perhaps it is so wild and violent or outrageous as to be liable in a real sense to affect the administration of justice. On the other hand, it may and generally will constitute contempt to make unjustified allegations that a judge has been affected by some personal bias against a party, or has acted mala fide, or has failed to act with the impartiality required of the judicial office. However, the point at which other forms of criticism pass into the area of contempt is a matter in respect of which the opinions can differ, and differ quite strongly."

In R v Brett[81] O'Bryan J held:

> "It is clearly not a contempt of court merely to say that a judge may, in his approach to a problem, be influenced by his character and general outlook."

The use of the word "lie" is capable of constituting contempt of court when directed at a judicial officer, but its use might be explained as being intended to imply merely that her Worship failed to check her file adequately (I am not accepting that such criticism is valid, for the purpose of this analysis). The context of these passages is important. There are many passages in Book Two concerning the committal proceedings which, quite apart from being couched in very offensive and insulting language against the magistrate, would suggest to a reader that Hoser was indeed intending, in both passages, to convey that the magistrate was acting in a deliberately biased and improper manner, so as to favour the prosecution, and that the use of the word "lie"

was not intended to have an innocent connotation. Although those other passages give context to the passages in the particulars they did not form part of the charge, and Hoser was not cross examined about them.

The language employed by Hoser (apart from the words, "obvious lie") is less exaggerated and offensive than that employed by him elsewhere in his book. Indeed, the language is less offensive than some of the passages on which I ruled there was no case to answer. That ruling was made before I had received detailed submissions on the law from the Crown (more comprehensive submissions being made at the time of final addresses) and before I had conducted my own research. The Crown had also not addressed the passages in any detail in submissions, nor had I the opportunity to examine the book in detail, as I have subsequently been able to do. In hindsight, Hoser may have been rather fortunate to have received favourable rulings on some of the passages about which the Crown complained[82]. It is a tribute to the eloquence of Mr Maxwell, who presented his client's case both ably and frankly, that he succeeded as to those particulars. Mr Hoser's good fortune continues, because, in all the circumstances, I hold a reasonable doubt whether - adopting the words of Hope JA, in Mundey - the first passage might be interpreted as merely constituting strong language used in permissible criticism. I am not, therefore, satisfied beyond reasonable doubt that the first particular constitutes contempt by scandalising the court.

As to the second passage, an accusation that a magistrate decided a case without regard to the evidence is undoubtedly capable of constituting contempt. In context, however, I do not think it must necessarily be taken that way by the reader. Hoser only made brief reference in Book Two to the four days of evidence heard at the committal. He did not himself give evidence at the committal so it was not really a case of a complaint being made by Hoser about the word of prosecution witnesses being preferred to his own by Ms Heffey. I have a doubt as to whether he might be taken to be saying, merely, that her Worship was a person whose natural inclination was to accept the word of prosecution witnesses. That may be offensive but it does not constitute criminal contempt. In any event, the sensible reader would appreciate that given that she heard no defence evidence it would hardly be surprising that Magistrate Heffey concluded that the uncontradicted evidence was sufficient to constitute a prima facie case. As the trial before the jury was later to demonstrate, the evidence was capable of satisfying a jury beyond reasonable doubt.

I do not suggest or accept that her Worship decided the committal without regard to the evidence and, despite his words, above, I do not think any intelligent reader would reach that conclusion, even on Hoser's own account. I have a reasonable doubt, as to whether the second passage amounts to contempt.

BACKGROUND TO THE STATEMENTS CONCERNING MAGISTRATE ADAMS

In the book "The Hoser Files", Hoser details the events surrounding criminal charges which had been brought against him in the Magistrates' Court and where the informant was the police officer, Bingley. The magistrate was Mr Adams, who convicted Hoser and imposed a fine with respect to a count of theft and sentenced him to a month's imprisonment on a charge of assault by kicking and 14 days imprisonment, concurrent, on a count of assault. On page 70 of the book, "The Hoser Files" (which was tendered before me), Hoser recounts what he says is a covertly taped conversation that he had with Bingley outside the court after Hoser had been released on bail pending an appeal. As recounted in the book, the conversation was as follows:

> "Bingley: I'm very, very happy. Hoser: So what dealings did you have with Roger Bowman before the case? Bingley: I can't say. and Hoser: You might have won this case, but you're gonna lose your job because of this. Bingley: Four weeks jail isn't it? Hoser: Glad you're pleased. Bingley: Very. and Bingley: Go ring my mates up at IID (Internal Investigations Division].

> Hoser: At who? Bingley: IID. Hoser: Who's IID? Bingley: You don't know? Hoser: I just asked you, who's IID? Bingley: Oh well, it's a pity you don't know, mate. Hoser: You've done badly didn't you? You're probably going to be up for perjury now. Bingley: Who's doing a month's imprisonment? Hoser: But you did get done for lying in court. Bingley: Month's imprisonment. Am I going to prison? Am I going to prison? And later, after a 60-second break Hoser: Did you know I'd get found guilty from the word go? Bingley: Well I paid him off, didn't I, so of course I did. Hoser: The penalty was a bit severe. Bingley: We worked it out before. Three months, six months, nah, bit too much. We settled for one. Bingley repeatedly asserted he'd paid off the magistrate The whole aim of the case was summed up succinctly in the final lines of our conversation: Hoser: Well, I think you've certainly done a good job of finishing off my cab driving career. Bingley: Oh well, that's where we set out to do that. Hoser: Well you certainly succeeded. I can't see me driving cabs much longer. Bingley: No mate. end."

ANALYSIS OF PARTICULARS CONCERNING MAGISTRATE ADAMS

The particulars concerning Mr Adams were as follows:

[diamond] Book Two, Inside back cover (Count One):

> "Following the 1995 publication of Policeman Ross Bingley's confession that he had paid off Hugh Francis Patrick Adams to fix a case, some of his other rulings that seemingly flew in the face of the truth or logic have come under renewed scrutiny. This includes the bungled inquest into the murder of Jennifer Tanner, which police falsely alleged was suicide."

[diamond] Book One, page 57 (Count Two):

> "In a controversial decision he let corrupt policeman Paul John Strang walk free from court after he pled guilty to a charge related to planting explosives on an innocent man. He then put a suppression order on the penalty. In a separate matter, a Policeman admitted to paying a bribe to Adams to have an innocent man sentenced to jail."

Both passages allege corruption of a most serious kind against the magistrate. Hoser asserts that he was merely stating the fact that a policeman (whom he believed was corrupt) had made such an allegation concerning Mr Adams. In neither instance was it made clear that the "confession" or "admission" was not something which occurred as part of some court proceeding or official enquiry, but was a statement made to Hoser, in circumstances where Hoser now admits even he wondered at the time if he was "having his leg pulled". Given Hoser's enthusiasm for self promotion, it was, in my view, quite deliberate on his part that he did not mention his own role as the recipient of the "confession", and did not spell out that the references to "a case" and to "an innocent man" were to his case and to himself. He deliberately created an impression that the "bribery" of the magistrate had been exposed by some official process. Hoser denied to me that that was his intention.

When asked what the "separate matter" was that was referred to in the second passage, he said it was "the Bingley-Hoser matter". Hoser said he used the phrase "separate matter" in a non-legal way, and was merely intending to say that it was in a different court case. He said he believed that he had been told the truth by Bingley as to the bribery of the magistrate because, having regard to the evidence in the case, it was "impossible for a reasonable judge to have convicted me".

As to the conversation with Bingley at which the "confession" was made I put to him that at page 52 of "The Hoser Files" he stated that during an earlier case the witness Bowman (who he contended was in league with Bingley, on both occasions, to frame him) would have had a strong suspicion that he was being secretly recorded). In those circumstances, Bingley is likely to have been similarly aware of Hoser's habit of covertly taping all conversations with a person such as himself.

I asked Hoser whether it occurred to him that Bingley might have been "pulling

his leg" in the comments that he made. Hoser said that that had occurred to him at the time when the statements were made, and he agreed that it remained a possibility, but a remote one, he thought. He said that Bingley had, in fact, later claimed that he was, indeed, pulling Hoser's leg.
Hoser said that he had canvassed the possibility with other people, who had listened to the tapes, as to whether Bingley was pulling his leg but they had also formed the view that it was unlikely that Bingley was doing so. Hoser said that having regard to the fact that he had subsequently taped Bingley again (to Bingley's detriment, Hoser contended) it was unlikely that he had been aware of the tape recorder at this time. Hoser concluded that it was just "a bold admission because he was - he was just cocky and stupid for want of a better word".
I asked Hoser why, if the possibility remained that he was having his leg pulled, he did not say as much in his passages referring to Adams. He said he did not do so because it was a statement of fact, by the police officer who had admitted paying the bribe, so he gave no consideration to making such a qualification.
In saying he accepted the truth of what Bingley said Hoser also relied on the fact that the convictions before Mr Adams had been overturned on appeal. As emerged in the evidence before me, the Crown did not contest the appeal. I was not given the reasons but one can safely assume that the tape recorded statements of Bingley were a source of embarrassment to the Crown. That would have been so whether or not the Director of Public Prosecutions considered that Bingley had been telling the truth.
One of the complaints made by counsel for Hoser was that despite the fact that, at some time after publication of "The Hoser Files", Hoser supplied to the Attorney General a copy of the tape and transcript of what Bingley had said, the Crown did not cause any investigation to be conducted into the truth of his statements on the tape. It seems to me that that failure to act demonstrates that the Crown officials did not take the tape seriously.
The location of the photo and the comments on the inside back cover of Book Two - at a place where a browser might read them - accompanied by a full page photograph, was intended by Hoser to give maximum exposure to the allegation of corruption. The photograph in Book One and the comments made there gave the matter less exposure than in the second book but still gave greater prominence than to the allegations made against most others named in the book. In my opinion, in both books Hoser intended the reader to understand that Mr Adams had been exposed in some serious, official, investigation into corruption, or by a confession made in the context of a court case.
In Nationwide News v Wills, Mason C.J held that for fair comment to apply the facts forming the basis of the criticism must be accurately stated, and the criticism must be fair and not distorted by malice[83]. Brennan J adopted a similar approach and held that there was an obligation to state the critical facts truly[84]. In R v Brett[85] O'Bryan J held that an untruthful statement of facts upon which the comment was based may vitiate what would otherwise have been regarded as fair and justifiable comment. His Honour held that "malice and an intention or tendency to impair the administration of justice are elements in contempt of the kind which scandalises the court or the judge".
I do not believe that Hoser then or now believed that the magistrate had, in fact, made a corrupt arrangement with Bingley to convict and imprison Hoser. Indeed, as was clear from his evidence, his position really is that he believes that it might be so. Whatever the truth of the events which led to the charges heard by Magistrate Adams, I accept that Hoser is convinced that he should not have been convicted. Thus, his true position is that, since he can not otherwise explain his conviction to himself, he is willing to accept that it could be because the magistrate had been bribed, and that the police

officer, who he believed told lies on oath as a matter of course, had told him the truth, on this occasion. For the purpose of the defence of fair comment I would accept, therefore, that Hoser believed Bingley's statement might possibly have been true. I do not, however, consider that he even thought it was probable that it was true.

I do not therefore find that he published facts that he knew were untrue, and he does not lose the benefit of the defence of fair comment on that account. More difficult is the question whether he should be denied the defence by virtue of a finding that he was recklessly indifferent as to whether the allegation was true. Recklessness, as much as a knowledge or belief that a statement was untrue, would deny him the defence[86]. The statement in this case was more than just that a police officer had accused the magistrate of taking a bribe. The plain inference, brought about by the misleading way the circumstances of the "confession" were presented, was that the allegation had substance. In presenting the statement in that way in both books he was acting with reckless indifference as to whether the assertion was true.

In my view, Hoser did not disclose the circumstances of the "confession" because he was aware that a reader might be dismissive of his allegation had he done so. It was simply convenient for him to adopt Bingley's stupid comments and to place them before readers as truth. Furthermore, the passage which appeared at page 54 of Book One, reflects the lack of good faith. Hoser there stated: "Adams is well known for doing deals with prosecution to predetermine a trial". Even on his own account, the statement of Bingley could not support that assertion. Furthermore, in my view, the information which was not disclosed to the reader as to the circumstances of the "confession" constitutes a failure to meet the obligation suggested by Brennan J that the basis of the criticism be accurately stated[87]. The reader could not have known that to the author the allegation was, at its highest, merely, one that was possibly true.

The defence of fair comment would not be open in these circumstances, and were there no other defences to consider I would have been satisfied that the Crown had proved both particulars of contempt concerning Magistrate Adams. There remains, however, the question of the "defence" of truth.

As I earlier discussed, the question whether truth was a defence to a contempt charge has been a matter of controversy, but whilst not finally resolved statements in the High Court suggest that the defence should now be regarded as being available. What requires clarification is what is meant by the statement that truth is a "defence".

The respondents did not, in fact, contend that they relied on a defence of truth, rather they relied on a defence of fair comment, made in good faith, on matters of public interest and based on facts which they believed to be true. As may be seen, however, in arguing the fair comment defence the question of the truth of the assertions has been raised, and that, in turn, introduces questions concerning the onus of proof and the nature of the defence of "truth" which do not appear to have been decided in the authorities which I have considered.

Mr Graham accepted that if a statement was made that a magistrate had taken a bribe and that allegation was true then the person making the statement could not have committed a contempt. In R v Kopyto[88] Cory JA, obiter, observed that it would be "repugnant to a sense of justice and fairness" to hold otherwise, in such a situation. In my opinion, it would be a defence in such circumstances even if in making the allegation the person used scurrilous language of a kind which might constitute contempt had the allegation not been true (although it might still constitute contempt if, in making an allegation which stated the truth as to one matter, the author added embellishments which were untrue and which of themselves had the tendency to undermine public confidence in the administration of justice). Likewise, it seems to me that

truth could not cease to be a defence if the author of the statement acted in bad faith or with the intention of undermining respect for the system of justice. If the allegation was true then the system was undermined by the truth, not by its exposure.

In the present case Hoser says that he can not prove that it is true that Magistrate Adams took a bribe, nor does he seek to prove the truth of that allegation. Hoser says that his motive in publishing the statements about the magistrate was "basically to flag an area of possible further investigation, if that makes sense".

The only evidence that he had as to whether the magistrate had been bribed was, first, what Bingley said, and secondly, the fact that, in his opinion, the case against him was so weak that it was impossible for a reasonable magistrate to have convicted him. The only explanation which had been offered to him for that outcome which made sense was the explanation offered by Bingley. (It would seem that Hoser rejects outright any explanation that the magistrate may have regarded him to be a liar, whether because he was or because he presented himself in such a manner as to lead the magistrate to that, false, conclusion. He also apparently rejects the possibility that what he regards as being the "overwhelming" evidence that he was innocent, may have seemed less than compelling to a disinterested observer). As a third factor, Hoser also pointed to the fact that the Crown had allowed his appeal to succeed against the convictions ordered by Magistrate Adams, without offering any defence to the appeal.

Thus, Hoser claims that he merely reported, in good faith, the fact that a police officer had claimed that the magistrate had been bribed, a proposition which he believed might be true because Hoser could see no reason why the magistrate would not have acquitted him. Having expressly disavowed that the respondents were taking a defence of "truth", Hoser's position, nonetheless makes truth a direct issue. The position adopted is that whilst he did not assert that what was said was, in fact, true, rather than being what he believed might be true, it was for the Crown to prove that it was not true.

In raising facts which might, if true, mean that the charge was not proved the position adopted is very similar to that of the "defence" of provocation or self defence in a murder trial. No accused is obliged to prove a defence of provocation or self defence, but they are obliged to identify some credible evidence which fairly raises either question, and if the accused does so then the onus rests with the Crown to disprove the defence. If a reasonable doubt remains whether the accused was acting under provocation or in self defence then the charge of murder has not been proved.

Use of the word "defence" as a shorthand expression in discussion of a "defence" to a criminal charge does not mean that there is any onus on the accused person to prove that he or she is not guilty. It seems to me that once it is accepted that there is a "defence" of truth, then a similar position must pertain in the law of contempt by scandalising the court, as would pertain where a "defence" of provocation[89] or self defence[90] is raised in a murder trial. Thus, in this contempt case, whether or not Hoser seeks to prove positively the truth of the allegation which has been made, if there is some credible evidence of the truth of the allegation, then the Crown must prove beyond reasonable doubt that the magistrate was not bribed or corrupted as alleged in the published statements.

There are compelling policy reasons why courts were reluctant to allow a defence of truth. As was discussed by the Australian Law Reform Commission in a research paper in 1986[91], to allow such a defence risked the court becoming embroiled in an investigation of the merits of the scandalising remarks, in effect, allowing the contempt proceedings to be used as the forum for an attempted re-trial of the original proceedings which had been the subject of criticism. On the other hand, the Law Reform Commission referred to

the Street Royal Commission into allegations made by the ABC about the corruption of the Chief Magistrate in New South Wales and another magistrate. The Commissioner concluded they were corrupt. Had the ABC been charged with contempt and been denied a defence of truth it would probably have been convicted if truth was not a "defence"

It would be contrary to public policy and to the functioning of the administration of justice, and it would be inimical to judicial independence, that by making what seem to be scurrilous allegations an accused person could, in effect, when defending a contempt charge, seek to conduct a re-trial of the original proceedings and, in the process, to mount a trial of the magistrate or judge against whom the criticism had been directed. Since the complaint is about the conduct of the magistrate or judge would the question of bias or corruption be resolved without the judicial officer giving evidence? It has been suggested that it would be inimical to the interests of justice and the principles of judicial independence to have judicial officers called to give evidence in such circumstances. Whilst the position of magistrates is less clear, the authorities suggest that judges of both superior and inferior courts are not compellable witnesses, in any event[92].

Those are powerful considerations, which continue to carry weight once it is accepted that a "defence" of truth is permitted. Those considerations no doubt explain why the Solicitor-General complained that defence counsel were seeking to mount a collateral attack on the verdict of the jury, and why he and junior counsel for the plaintiff stoutly resisted any suggestion that the Crown was obliged to produce any evidence in disproof of the allegations made by Hoser concerning magistrate Adams. In seeking to defend the courts in that way, however, the Crown now faces a dilemma once it is accepted that the recent Australian authorities suggest that truth is now a "defence". By not producing such evidence in disproof of the claim of corruption it risks failing to prove the case beyond reasonable doubt.

What constitutes some credible evidence to raise the "defence" may require analysis in later cases. In my view, however, it could not be sufficient for an accused person to merely allege that he or she was the victim of bias and corruption, and to point to the transcript of the trial in order to raise the "defence", especially where the trial had been the subject of an unsuccessful appeal. In my view, a presumption of regularity would have application in that situation. It may be that an accused person, to raise the defence, would have to first point to some clear evidence of the kind contemplated in Ahnee v DPP[93] and by McHugh J in Nationwide News v Wills[94] when considering instances of patent bias which would constitute an exception to the general rule that it would always be contempt to accuse a judge or magistrate of bias or a lack of impartiality.

In this case Hoser points to the transcript of the statements by Bingley from the book "The Hoser Files". As is apparent from the extract in the book, the whole of the conversation is not set out. Hoser has sworn that that is an accurate record of what was said. It is not disputed by the Crown that a policeman made such statements. In those circumstances there is sufficient material before me to raise the "defence". That places the onus squarely on the Crown to prove the allegation is not true. If a reasonable doubt remains then the accused must be acquitted.

Hoser says that he supplied the Crown with copies of the tape and the Crown has had his version of the allegation since the book "The Hoser Files" was published in 1995 and the Crown has chosen not to investigate the allegation at all. How then, his counsel submit, could the court be satisfied beyond reasonable doubt that the magistrate did not take a bribe, as Bingley claimed? There are very powerful factors which suggest that the allegation against the magistrate is complete nonsense. In the first place, the statement is made by a person whom Hoser regards as not a witness of truth, and who has

subsequently denied that the statement was made seriously. Secondly, the statement itself strongly reeks of it being nonsense told contemptuously (and very unwisely) to stir up Hoser. Thirdly, there is an inherent improbability of a magistrate being bribed, at all, let alone with respect to such relatively minor offences, for an unknown fee, and in bizarre circumstances where, according to the Bingley tape, the prosecution was permitted to chose for itself what sentence of imprisonment it would like, in a range between a month and six months.

For the Crown, counsel relied on the presumption of regularity, but that does not seem to me to take the matter any further. If there was corruption then it would, indeed, be "irregular". The Crown relied on the failure of Hoser to tender his tape, as evidence that it could not have helped his cause, but it seems to me that I already had evidence of what was, in part at least, on the tape and I had evidence that the Crown had a copy of it, so the Crown itself could have used the tape to discredit the claims. Extracts of the published transcript hint that Hoser might have omitted passages which were not helpful to his cause (e.g, the cryptic "Bingley repeatedly asserted he'd paid off the magistrate". One wonders why, in a book of 320 pages, as "The Hoser Report" was, the author would omit such devastating material). Hoser was not cross examined, at all, about the content of the tape.

So the question remains, has the Crown, having chosen to call no evidence at all, and to have conducted very little cross examination on the allegations concerning the magistrate, removed all reasonable doubt as to whether the allegation of corruption was true? Is it a reasonable possibility that Bingley was a perjurer and was frankly admitting, in an unguarded moment, to an innocent man who had just been convicted upon that perjured evidence, that he had bribed the magistrate? If that was so then the conversation might well have been as appears on that portion of the transcript which was before me. Is it a reasonable possibility that the Crown abandoned the appeal because it believed it was possible that what Bingley had said was the truth?

I did not hear the tape, I can not say what tone of sarcasm may have been used by Bingley (although the words suggest that it was quite likely to have had that tone). I did not have any evidence as to the reasons why the Crown did not contest the appeal.

It is in many ways an unsatisfactory situation to reach, because the slur on the magistrate is a profound one, and is advanced by a person, Hoser, who, in my opinion, is demonstrably a person worthy of little credit as a reliable reporter of any case in which he has been involved, and who in publishing the allegations against Magistrate Adams in the way that he did, was not acting in good faith, because he was deliberately hiding from the reader important and relevant facts which might have had a significant bearing on whether the reader gave the allegation any credibility at all.

I believe the true explanation is very likely to have been that Bingley was making a stupid but false claim that he had suborned the magistrate. In so doing he has himself undermined the administration of justice and has placed the magistrate in a dreadful position. The damage to the magistrate is done not by Hoser but by Bingley, whose stupidity has created the problem. With hindsight, the decision not to contest Hoser's appeal against the decision of Magistrate Adams was unfortunate, because it allowed Hoser to use that decision in support of his contention that there must have been truth in what Bingley said, but I have no knowledge of the circumstances in which that decision was taken or the reasons for it. It is highly likely that the Director of Public Prosecutions was motivated by considerations of fairness to Hoser.

I reach the point where, notwithstanding my conclusion that Hoser was acting cynically and was deliberately misleading his readers in his statements about the magistrate, I can not be persuaded beyond reasonable doubt that the

allegation is untrue, and accordingly the second count (which has only one particular, and that relates to Magistrate Adams) and the particular (i) on the first count, have not been proved beyond reasonable doubt.

IS THERE A REAL RISK AND/OR A PRACTICAL REALITY OF UNDERMININING THE ADMINISTRATION OF JUSTICE?

Having concluded that some of the particulars do constitute the elements of the offence of contempt, some further questions arise before a finding of guilt would be appropriate.

In John Fairfax and Sons Pty Ltd v McRae[95] the High Court held that there must be no hesitation in exercising the summary jurisdiction for contempt "even to the point of great severity, whenever any act is done which is really calculated to embarrass the normal administration of justice". Their Honours held, however, that because of its exceptional nature the summary jurisdiction to punish for contempt should be exercised with great caution and "only if it is made quite clear to the court that the matter published has, as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case".

Their Honours held that sometimes the court might consider that a technical contempt had been committed but that because the tendency to embarrass the administration of justice was slight, or because of special circumstances, it should refuse to exercise its summary jurisdiction.

A closely related proposition (if it is not, in fact, merely an alternative way of stating the same proposition), is that there must be a real risk of prejudice to the due administration of justice rather than a mere remote possibility, if contempt was to be made out: Ahnee & Ors v DPP[96], and see Attorney-General v Times Newspapers Ltd[97]).

In the passage of the John Fairfax v McRae case in which the court discussed the requirement of there being a "practical reality" in the tendency to interfere with the administration of justice, a distinction is drawn between technical contempts which the court chooses not to punish and instances of contempt where punishment is appropriate. That case was not concerned with an allegation of contempt by scandalising the court but with a newspaper publication which was held by the trial judge to constitute contempt by having a tendency to interfere with a pending proceeding in a court. The tendency to interfere with justice with which the court was concerned related to the risk that the fair trial of the defendant in the other court proceedings would have been compromised by the offending publication.

The concept of technical contempts was one which Brooking JA held to be more commonly applied in cases of contempt arising from media publications which were said to have a tendency to prejudice the fair trial of the proceedings: see Re Perkins; Mesto v Galpin and Ors[98].

The analysis of conduct alleged to constitute contempt requires a balancing of the competing considerations of the right of free speech - and, in particular, the right to comment in good faith on matters of public importance, including the administration of justice - on the one hand, against the necessity, for the purpose of maintaining public confidence in the administration of justice, of ensuring that the institutions be protected against baseless attacks on the integrity and impartiality of judges and magistrates, and against scandalous disparagement of those judges and magistrates: see Gallagher v Durack[99].

It is that balancing process which must be undertaken when considering whether to exercise the jurisdiction to punish for contempt. The concept of technical contempts has been doubted to now be relevant[100]. In Attorney-General (NSW) v John Fairfax & Sons & Bacon[101], McHugh JA, with whom Glass JA and Samuels JA agreed, held that the distinction between punishable contempts and those that would not be punished should no longer be applied, and contempts which were not worthy of being punished should be regarded as not being contempts at all. The court held that the test as to whether a publication did constitute

contempt should be that stated in John Fairfax v McRae, namely, whether as a matter of practical reality it had a tendency to interfere with the course of justice.

Once again, I note that the decision of the NSW Court of Appeal, as was the case for the decision of the High Court in McRae, was concerned with a publication which dealt with pending court proceedings, and the issue was whether the publication had a tendency to interfere with the due conduct of those proceedings, and was not a case where the offence of scandalising the court was alleged. In both cases, passage in the judgments make it clear that the fact that the contempt related to pending court proceedings was the focus for the discussion about the need to demonstrate that the interference with justice was a practical reality. I accept, however, that for a finding of guilt beyond reasonable doubt I must be satisfied that the statements do have the tendency as a matter of practical reality to interfere with the due administration of justice, in the ways earlier discussed.

Mr Maxwell submitted that none of the comments in the present case met the requirement that as a matter of practical reality there was a real risk of interference with the administration of justice. Among the factors which he submitted were relevant were the fact that the author was a serious writer; the relatively small number of publications of the statements; the fact that readers would appreciate that he was writing as a disappointed litigant; the fact that he does not have a prominent public profile; the fact that in the two years since publication nothing has occurred which suggests that the standing of the courts or the administration of justice have been diminished; the lack of any sense of urgency in the Crown taking action; the fact that readers could go to the source material themselves. Common sense, it was submitted, will prevail, and the readers would be able to make allowance for Hoser's exaggerations and his blinkered perspective.

Allowance must be made for the fact that Hoser had been engaged in court battles over many years, and that his word had very frequently been rejected by judges and magistrates. He is a self opinionated and obsessive person with a highly developed sense that he is the victim of conspiracy. His many failures as a litigant and defendant have fuelled what appears to be a well developed sense of paranoia. In short, he is a person with a very blinkered perception of what is occurring in the cases in which he appears, and that would have been particularly so in a case where so much was at stake for him, defending the charge of perjury, and where his ignorance of court procedure and of the laws of evidence was bound to be a serious handicap in his appreciation of what was taking place during the month long trial. I have regard to these considerations.

As to the suggestion of Crown delay in prosecuting this matter, evidence was tendered that the Department of Justice had written to booksellers as early as July 2000 warning them of the risk they faced that legal proceedings for defamation or contempt might be taken against the books. There was also evidence that during that year the Crown sought formal confirmation from a number of bookstores as to the numbers of books they had sold. These proceedings were commenced in May 2001. I do not know why proceedings were not taken sooner, but I do not draw an inference that the Crown did not regard the books as representing a real risk to the reputation of the courts, as they now contend. I accept that it is relevant, though, that two years have passed since the books were published and the reputation of the courts has not appreciably been diminished in that time. The reputation of the courts might, however, have been diminished in the eyes of those who read these books; it would be near impossible to determine that, as a matter of practicality. The relevant issue, however, is merely whether the publications had a tendency to produce that result.

Mr Maxwell submitted that trenchant criticism of judges and magistrates is

often made by appellate judges, including findings that the tribunal had been guilty of actual or apprehended bias, and no suggestion is made that such criticism undermines the standing of the courts or their judicial officers. Similar leeway for criticism should be permitted to those who are participants in the judicial system, as litigants, he submitted, before it could be concluded that criticism would imperil the standing of the courts. The cases cited by counsel, and referred to by Hoser in his evidence[102], were, indeed, cases where either strong criticism was made by appellate judges (in some cases as to competence, rather than bias), or else where comment by counsel suggesting that a judge was biased was deemed not to constitute contempt, but in each instance publication of the matter was incapable of undermining the reputation of the courts or judges. In the first place, the public would regard the criticism as having been measured and justified, or at least (when made by counsel), to have been made in the exercise of the legitimate right of defending an accused person. The responses of the appellate courts would be regarded by the public as constituting a vindication of the system of justice, not its undermining. Criticism of judges and magistrates is not the sole province of appellate judges, but, on the other hand, the fact that a critic is neither a lawyer nor a judge does not render that which is plainly contempt to be something which is not contempt.

I accept, however, that in determining whether the offence has been proved beyond reasonable doubt as to any particular of contempt which is pleaded, the passage must be shown to have the real risk[103] (whether by itself or in combination with other particulars) of interfering with the administration of justice in the way discussed, or, put in the alternative way, must have the tendency to achieve that result as a matter of practical reality.

The suggestion that there was too limited a publication for these statements to cause any harm to the administration of justice requires closer examination. That, in my opinion, is not the case. It is, of course, true, that publication was not of the order of a newspaper or major organ of communication but there was a quite sophisticated marketing campaign and wide publication of the statements. Furthermore, Hoser has set himself up to be a person of eminence in the investigation of corruption, as a person whose statements may be relied on as accurate and as one whose opinions are sought by governments and by the broader community.

At page 693 of Book Two, Hoser described himself as "one who has made a study of police corruption Australia wide". Hoser said that he gets people coming to him daily wanting him to write books about corruption as it has affected them. It might be a disgruntled litigant or a policeman or ex-policeman offering to provide him with information, he said.

Hoser gave evidence before me both by affidavit and orally. In his affidavit he said of himself "I am an investigative author and zoologist by profession. I have written and published over 100 scientific articles and papers and journals and magazines in various parts of the world including Australia, the United States of America and Europe". He tendered a list of publications. He deposed that of 7,500 copies printed of Book One all but 500 had been sold and of approximately 5,500 copies of Book Two all but 500 had been sold. In addition to the printed books, both books are contained on a CD and he has sold approximately 600 CDs.

He stresses his qualifications as a scientist[104], with the undoubted intention that his opinions on the legal system will be regarded as being equally objective and careful as might be expected of scientific enquiry. He said that at certain times he has been a member of two organisations, known as "Whistleblowers" and "Lawatch". He plainly regards himself as a focal point for such organisations and for any other persons disgruntled, for one reason or another, with the justice system.

The final chapter in Book Two is titled, "Blowing the Lid on Corruption,

Beating Attacks by the Corrupt and Avoiding the Pitfalls". The author states that "The following chapter has been written here as a response to the thousands of requests for information I receive about how to insure oneself against the adverse effects of corruption and/or improper prosecution by government authorities and police". The author states that "I spend hundreds of hours a year explaining to people the best methods to combat corruption at the coalface". The chapter provides such advice as the necessity of taping other persons covertly, keeping copies of all documents, and sub-chapters giving such advice as "never believe a word a government official tells you (likewise for what is in the media)" and "always go through the motions of using the government's own system of "investigation of corruption eg Ombudsman, members of parliament, ICAC, etc", even though the odds of success are remote. He gives advice as to use of the media, and a variety of other suggestions.

He said that his list of sources runs to a hundred odd pages; they include court transcript, covert tapes, tabloid clippings, letters and other material. He said that a person using the Internet requesting information about a particular person or topic would be told what book it is in which that matter is referred to. He said the CD contains a list of sources so that people can download those if they want to do their own research. He said on the Internet he has also published the last chapter of Book Two and chapter 10 of Book One. He agreed he had door knocked personally to sell the book to households.

He said of his publications:

> "I believe that the issues raised in the book such as the fair administration of justice, the smooth running of the court system, tape recording of courts in all jurisdictions, and those sorts of issues, corruption issues across the board, I think are addressed in the books reasonably well, they are matters of public interest and I believe that they are matters that should be discussed and addressed with the ultimate view as stated in the books to improving the system and I make no bones about that at all."

He said the book has been distributed all around the world with the main interest being in Victoria. He has travelled to conferences in New South Wales and addressed conferences in Victoria. As I said earlier, his books have been sold at major booksellers and by Internet advertising

PLACING RELIANCE ON THE GOOD SENSE OF THE READERS, AND NOT THE CONTEMPT POWERS?

The many statements of appellate courts about the need for restraint in the exercise of the contempt jurisdiction are of course important reminders that this is a criminal jurisdiction, and that the courts must be ever alert not to use a significant power to assuage the hurt feelings of judges and magistrates. But against that, in my opinion, the courts should not be so anxious to demonstrate their robustness and lofty disregard for trenchant criticism that they fail to recognise that a concerted campaign against the integrity of the courts and judicial officers, even if employing what the appellate courts might regard to be simplistic and patently absurd arguments may, if unanswered, damage the reputation of the courts, especially at the trial level. It is, after all, more difficult to mount a credible argument that three or five appellate judges are all part of a conspiracy or are tainted by bias than it is to allege that against a magistrate or judge sitting alone.

In an article titled, "Attacks on Judges - A Universal Phenomenon"[105] Kirby J noted the ferocity of criticisms of the High Court of Australia following upon such contentious decisions as those relating to native title. Kirby J noted that of the critics few demonstrated any familiarity with what the judges had actually written in their judgments. He noted too that the attacks "the like of which we have never seen before in Australia" continued for

months and were "unrepaired by an effective defence of the court by the traditional political guardian of judicial independence, the Attorney-General".

The earlier statements of appellate courts, stressing the extreme caution which must be exercised before punishing contempt, must be read now in the light of the new reality that organised and quite sophisticated campaigns against the integrity of the courts, if unchecked, may prove very effective in damaging the reputation of the courts. The "practical reality" of the judicial system being unreasonably damaged must today be considered against the backdrop of the means of mass communication provided by desktop publishing and the Internet. This is a case where such a sophisticated campaign is being waged.

Mr Maxwell submitted that if judges and magistrates have been defamed then they have their remedy; they may take defamation proceedings. Hoser himself both in evidence and in his books stresses the fact that he had not been successfully sued for defamation and that many of those he has attacked have not even issued proceedings against him. It must be recognised, however, that it would be very rare for a judge or magistrate to take such action. In the first place, the person who would make such unjustified attacks on the integrity of the judicial officer is unlikely to be worth suing. But more importantly, the costly, time consuming and distracting pursuit of defamation proceedings (and the great reluctance of the courts to grant an interlocutory injunction where a defendant, however, feebly, claims justification[106]) makes the pursuit of such proceedings entirely unattractive, for a judge or magistrate who may have no interest in gaining financial benefit but is simply wanting to defend the institution of the court against unfounded and damaging attack.

The reality, as Lord Denning observed in R v Metropolitan Police Commissioner; Ex parte Blackburn[107], is that judges by virtue of the nature of their office cannot reply to such criticisms or enter into political controversy. As McHugh J observed in his dissent in Mann v O'Neill[108], it is unseemly, and an approach which is inimical to public acceptance of the independence of the judiciary, for judges and magistrates to use the defamation laws to respond to scurrilous and contemptuous abuse. It is appropriate that the contempt laws should continue to be used in appropriate cases to protect the courts from such attacks which sap confidence in the administration of justice. There is, however, a longstanding alternative view, that in most instances the attacks can be ignored, on the basis that the good sense of the community can be relied on, so that the public will have no regard to them.

In Bell v Stewart, a case in which a judge of the Arbitration Court was criticised as being out of touch with industrial reality the court held[109] that it was ridiculous to suppose that the administration of the arbitration law could be in any way interfered with by virtue of the publication of the words of criticism. Knox CJ, Gavan Duffy and Stark JJ held, however, that:

> "So the case must rest upon the words being calculated to lessen or discredit the authority or prestige of the court in the minds of reasonable people. No reasonable man could attribute any charge of `false play' or injustice to the learned President on the words used."

Their Honours held that the words used, including satirical comments, could not "sap or undermine the authority of any court in the mind of any reasonable person". Their Honours added that "amongst reasoning men, we believe that the practice of the court would rather be supported and seemed to be well calculated to ensure a proper and just administration of the law free from the prejudices or want of knowledge of any particular officer".

In their separate judgment, Isaacs and Rich JJ in Bell v Stewart[110] held that the occasions on which the jurisdiction of contempt would be exercised would be exceptional. They added that that would be so because in this

category of contempt what occurs "is primarily abuse only, from which the good sense of the community is ordinarily a sufficient safeguard, and, such contempt not touching any pending proceeding, its affect on the administration of justice must generally be remote".

In my view, these considerations have less weight when one is dealing with a lengthy, professionally produced, book written by an author professing to have credibility and to have a reputation for careful research, who purports to quote accurately from official transcript, but does so selectively and with malice. While the good sense of the public may be relied upon, to some extent, in identifying hyperbole and fatuous argument, it can not be assumed that Hoser's books would be dismissed as ridiculous, and his complaints of bias and corruption as unfounded. Notwithstanding his assertions that he makes his source material available to readers, the reader is not in a position to judge whether Hoser's use of transcript and other material is selective and whether his assertions give a frank analysis of competing arguments. If the test is whether the statements are likely to be believed[111], then in my view a significant section of the readership, even reasonable and intelligent readers, may believe the statements to be true.

The Foreword to Book Two is written by a former member of Parliament and although to a discerning reader it might, itself, be regarded as containing absurd statements, it nonetheless adopts entirely Hoser's view of the world and says he was wrongly convicted by a "knobbled jury" and asserts that the jury was directed to convict by the judge, and after the judge had "deliberately hidden from the jury. . . in clear violation of all legal morals, ethics and principals (sic)" a tape which constituted "proof of Hoser's innocence".

Hoser is not responsible for the statements of Mr Campbell, but they are given prominence, and might be regarded by some readers as worthy of credit. That presumably is why the Foreword is included. Assuming Mr Campbell to be a reasonable person, if he can be so gullible, should I assume that others would not be? I think not.

CONCLUSION

I conclude, beyond reasonable doubt, that there is a real risk that as a matter of practical reality the statements relating to Judge Neesham and Judge Balmford have a tendency to undermine the confidence of the public in the administration of justice and to lower the authority of the courts. I am satisfied beyond reasonable doubt that Count One of contempt by scandalising the court has been proved as against both respondents.

I am not satisfied beyond reasonable doubt that those particulars relating to Magistrate Heffey and Magistrate Adams constitute contempt by scandalising the court. Count Two will be dismissed.

I will hear submissions on sentence.

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[1] Book Two, p. 17.

[2] R v Phung [1999] 3 VR 313.

[3] [1998] 2 VR 535, at 538.

[4] Book Two, pp.462-463.

[5] Witham v Holloway (1995) 183 CLR 525, at 534; Hinch v Attorney-General (Victoria) [No.2] (1987) 164 CLR 15, at 49, per Deane J; Ambard v Attorney-General for Trinidad and Tobago [1936] AC 322, at 329.

[6] John Fairfax and Sons Pty Ltd v McRae (1955) 93 CLR 351, at 365.

[7] Nationwide News Pty Ltd v Wills (1992) 177 CLR 1, at 31-32; Re Colina and Anor; Ex parte Torney (1999) 200 CLR 386.

[8] (1935) 53 CLR 434, at 442

[9] See Borrie & Lowe, "The Law of Contempt" 3rd Ed, at p.340

[10] Or to call a judge an "imbecile": Re Quellet (1976) 72 DLR (3rd) 95, per Tremblay CJ Q, at 97 (Quebec Court of Appeal).

[11] See Borrie and Lowe, "Law of Contempt", 3rd Ed, at 343
[12] [1900] 2 QB 36, at 40.
[13] (1911) 12 CLR 280 at 285.
[14] (1972) 2 NSWLR 887 at 910-911.
[15] [1999] 2 AC 294 at 304-5.
[16] See the later discussion by McHugh J in Nationwide News v Wills at pars [79]-[80] herein; see, too, R v Nicholls (1911) 12 CLR 280, at 286, per Griffith CJ as quoted by McHugh J.
[17] [1968] 2 QB 150 at 155.
[18] [1972] 2 NSWLR 887, at 908.
[19] Saltalamacchia v Parsons [2000] VSCA 83, at [10].
[20] R v Brett [1950] VLR 226, at 232, per O'Bryan J.
[21] Bell v Stewart (1920) 28 CLR 419, at 425-426.
[22] Attorney-General (NSW) v Mundey, supra, at 911
[23] John Fairfax & Sons Pty Ltd v McRae, supra, at 371.
[24] Re Colina and Anor; Ex parte Torney (1999) 200 CLR 386, at 391, per Gleeson CJ and Gummow J, at 428, per Hayne J; MacLeod v St Aubyn [1899] AC 549, at 561, per Lord Morris.
[25] John Fairfax Pty Ltd v McRae, supra, at 370.
[26] See Ahnee v Director of Public Prosecutions, at 306.
[27] [1900] 2 QB 36.
[28] "Judges", Oxford University Press 1987, David Pannick at 111-112.
[29] See Dictionary of National Biography, at 211 ("He was not a great judge"); and "May It Please Your Lordship" by E.S. Turner, 1971, at 225-228.
[30] "Law of Contempt" 3rd Ed, at 356-357,
[31] "Contempt of Court", 3rd Ed, C.J. Miller, (2000), at 584-587.
[32] [1936] AC 322 at 335.
[33] [1999] 2 AC 294.
[34] [1900] 2 QB 36, 40.
[35] [1936] AC 322 at 335.
[36] [1983] 2 AC 297.
[37] (1911) 12 CLR 280 at 286.
[38] (1935) 52 CLR 248.
[39] [1978] 1 NZLR 225 at 231.
[40] Citing Borrie & Lowe, 1976 Ed, at 383-384.
[41] (1983) 152 CLR 238 at 243.
[42] (1935) 53 CLR 419 at 447.
[43] (1992) 177 CLR 1.
[44] Ibid, per, Brennan J at 39.
[45] Citing Gallagher v Durack, supra, at 245.
[46] Citing R v Fletcher; Ex parte Kisch, at 257.
[47] (1911) 12 CLR 280, at 286.
[48] Note, too, the requirement that the comment be "baseless", as stated in Gallagher v Durack, supra, at 243.
[49] At 390, citing, among other cases, Regina v Kopyto, (1987) 39 CCC (3rd) 1.
[50] (1987) 39 CCC (3d) 1 at 14.
[51] Ibid, at 14-15.
[52] (1997) 189 CLR 520.
[53] Ibid, at 560
[54] Ibid, at 560.
[55] Ibid, at 561.
[56] Ibid, at 567.
[57] [2000] 181 ALR 694.
[58] (1994) 182 CLR 104, at 187.
[59] (1994) 37 NSWLR 81, at 110-111.
[60] (1998) 19 WAR 316, at 325.

[61] (2001) 75 ALJR 1316, at 1329, 1333-1336.
[62] See Gallagher v Durack, supra, at 243; Ahnee v DPP, supra, at 305-306; Attorney-General v Times Newspapers [1974] A.C. 273, at 315; Nationwide News v Wills, supra, at 34.
[63] [2001] VSCA 152 at par. [16].
[64] [1998] 4 VR 505.
[65] [1978] 1 NZLR 225, at 231.
[66] "The Law of Contempt", 3rd Ed. at 349
[67] (1808) 1 Camp 359n.
[68] Book Two, p. 448.
[69] Book Two, p. 367.
[70] Book Two, p. 367.
[71] Book Two, p.304, as one illustration.
[72] Book Two, p. 280.
[73] Supra, at 32-33.
[74] R v Dunbabin, Ex parte Williams, at 442.
[75] Ibid, at 437-438.
[76] [1953] NZLR 944, at 948.
[77] Unreported decision of Court of Appeal, (Winneke P, Tadgell and Charles JJA), 26 June 1997.
[78] Fitzgibbon v Barker (1992) FLR 191, at 201.
[79] See Nationwide News v Wills, supra, at 31-33, 38-39, 78, 103; R v Brett, supra, at 229.
[80] Attorney-General NSW v Mundey, at 910.
[81] [1950] VLR 226, at 231.
[82] As I noted in my reasons, delivered on 30 October 2001, when ruling, on the no-case submission, I did not accept the truth of any of the particulars on which I ruled there was no case to answer, and I also observed that most were "arguably defamatory, and constitute offensive and extravagant abuse".
[83] Nationwide News v Wills, at 32.
[84] Ibid, at 53.
[85] [1950] VLR 226 at 229.
[86] See R v Kopyto, supra, per Goodman JA, at 48.
[87] Nationwide News v Wills, at 38.
[88] R v Kopyto, at 32.
[89] Masciantonio v R (1995) 183 CLR 58, at 67-68.
[90] Zecevic v DPP (1987) 162 CLR 645, at 657.
[91] "Contempt and the Media", The law reform Commission, Discussion paper No.26, March 1986.
[92] Cross on Evidence, 1996, par [27205].
[93] [1999] 2 AC 294, at 306, speaking of "extensive and plainly biased questioning".
[94] At 80; see too R v Nicholls, supra, at 286.
[95] (1955) 93 CLR 351, at 370.
[96] At 304-5.
[97] [1974] AC 273 at 312 per Lord Diplock.
[98] Unreported Court of Appeal, 3 April 1998 at p. 11
[99] (1983) 152 CLR 238 at 243.
[100] See Borrie & Lowe, 3rd Ed, at 77-78.
[101] (1985) 6 NSWLR 695 at 708.
[102] Magistrates Court of Victoria v Robinson [2000] VSCA 198; Gillfillen v County Court of Victoria [2000] VSC 569, unreported decision of Nathan J; Lewis v Judge Ogden (1984) 153 CLR 682; R v Crockett [2001] VSCA 95.
[103] I consider that that phrase, as used in Ahnee v Director of Public Prosecutions, should be regarded as being to the same effect as the requirement for there to be a "practical reality".
[104] As to his qualifications as a zoologist, Hoser said he has an applied

Herpetology certificate from Sydney Technical College.
[105] 72 ALJ 599.
[106] See National Mutual Life Association of Australasia v GTV Corp. Pty Ltd (1989) VR 747, at 764; Holley v Smythe (1998) QB 726, at 743.
[107] Supra, at 155.
[108] Mann v O'Neill (1997) 71 ALJR 903, at 920; (1997) 145 ALR 682, at 704.
[109] At 425.
[110] (1920) 28 CLR 419, at 429.
[111] Gallagher v Durack, at 244.

TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF VICTORIA

COMMON LAW DIVISION

MELBOURNE

THURSDAY 29 NOVEMBER 2001

BEFORE THE HONOURABLE JUSTICE EAMES
B E T W E E N

THE QUEEN (ex parte ATTORNEY-GENERAL FOR THE STATE OF VICTORIA)
Applicant
- and -
RAYMOND TERRENCE HOSER
First Respondent
- and -

KOTABI PTY LTD
Second Respondent

HIS HONOUR: In this matter the Crown has brought two counts of contempt by scandalising the court. My reasons for decision as to those counts are set out in a written judgment and regrettably the reasons are far too lengthy for me to read now for the purpose of setting out those reasons for decision.

I will not attempt to summarise my reasons because to do so is likely to fail to adequately indicate the basis for my decision which can be found by those who are interested in reading the written reasons. Because I am not going to provide my reasons now, so much as simply a summary of my findings, I have ensured that there will be ample copies available of my reasons for any members of the public who are interested to know the basis for my

decision and my analysis of the books which were the subject of the charges and of the particulars which were referred to in the charges.

I therefore at this stage simply summarise the findings that I made with respect to these charges. On Count 1 I am satisfied beyond reasonable doubt that the three particulars relating to Judge Neesham and the two particulars concerning Judge Balmford, as she then was, constitute contempt by scandalising the court. In reaching those conclusions I reject Mr Hoser's contention that the statements were published in good faith and without malice.

As to the particulars concerning Magistrate Heffey, I have a reasonable doubt as to whether they constitute contempt and the benefit of that doubt goes to the respondents. In reaching that conclusion, I do not accept that there could've been any basis for a suggestion of bias or impropriety. My reasonable doubt is based on the fact that it is possible that the statements should be regarded as not in fact having made allegations of bias, but as having been intended to be criticism which - whether justified or not - could not constitute contempt as a matter of law.

As to the particulars concerning Magistrate Addams, these particulars - one is in the first count, and the second count is solely concerning with a particular relating to Magistrate Addams.

I have concluded that those passages in the two books referring to Mr Addams were not written in good faith and did not constitute fair comment. Any defence based on fair comment would have failed. The defence however based on fair comment has raised a question as to the truth of the allegation of corruption contained in those passages and made whether directly or by implication in those passages.

I have concluded the truth is a defence, even when - as here, the respondents expressly state they do not seek to establish that the allegations are true. Indeed I have concluded that Mr Hoser does not believe that those allegations are true, but merely asserts that it is possible that they are true.

Once some material is identified which raises the question of truth, then it seems to me the same principle applies here as applies in the criminal law generally, but as I've discussed in my analysis, it appears not to have been the subject of discussion in the authorities with respect to an offence of contempt.

It seems to me that following those principles, once some material is raised or is identified which raises the question of truth, then the Crown must thereafter prove beyond reasonable doubt that the allegation is not true. That is a very difficult task for the Crown, because there are important policy reasons why the court should not embark on what amounts to a collateral attack on decisions of a court, nor should allow unjustified attacks on judges or magistrates not having been made in good faith to be perpetuated under the guise of defending a charge of contempt.

Nonetheless these are criminal proceedings. Whilst it is my view that the probability of there being any truth in the allegations contained with respect to Magistrate Addams, that that probability is remote. Notwithstanding that, in my view I could not be satisfied beyond reasonable doubt that the allegations are not true. And therefore the particular of contempt in Count 1 relating to Magistrate Addams, and the second count which solely relates to Magistrate Addams, are not proved beyond reasonable doubt.

Accordingly I find that both respondents are guilty of contempt on Count 1, and I dismiss Count 2. I publish my reasons.

As counsel will see, the reasons are very lengthy indeed, and I've no doubt the parties will want to examine those before making submissions both as to penalty and as to costs. Do you have any time that you would suggest is convenient? I was going to suggest next Tuesday, but I'll do it earlier or later.

MR MAXWELL: 10.30 on Tuesday would be convenient, if Your Honour please.
HIS HONOUR: Mr Graham?
MR GRAHAM: I'm in the same position, Your Honour.
HIS HONOUR: All right. Are there any matters that need be raised now? Or will I simply adjourn the matter to - I will adjourn the further hearing of this matter - - -
MR GRAHAM: There is one matter, Your Honour, which I will raise because Your Honour may be assisted in advance of hearing submissions. If I refer Your Honour to three authorities, two of which are concerned with the Sentencing Act. The first of them is the case of Hinch - I don't have the full citation but it's Hinch v. Attorney General of Victoria (1987) V.R. 721. It was concerned with the penalties in Sentencing Act 1981, and there are passages at pp.731 and 749 which Your Honour might care to look at.
HIS HONOUR: Yes, thank you for that, I will check that before next week.
MR GRAHAM: A later case which is not yet reported, which is Hugo Alistair Rich v. Attorney General of Victoria (1999) V.S.C.A. 14. I would refer Your Honour to what the President said in paragraph 46 and 47 in relation to the Sentencing Act 1991.
HIS HONOUR: Thank you.
MR GRAHAM: There's also a question which may arise as to the form that any judgment of Your Honour might take, but I don't think I need trouble Your Honour with giving references in advance about that.
HIS HONOUR: No, I'll leave all those questions at the moment. I've simply made the findings which I think I'm required to put in terms of finding guilt beyond reasonable doubt, but otherwise what flows from that I think is a matter for submissions.
MR GRAHAM: If Your Honour pleases.
MR MAXWELL: Your Honour, it's likely, I think, as in the case itself, that we'll put in a written outline. We'll endeavour to have that to Your Honour's Associate by the end of Monday, and of course provided to our learned friends.
HIS HONOUR: That would be helpful if you could. The further hearing of this matter to deal with submissions as to sentence and costs and any other issues which arise will be adjourned to 10.30 a.m. on Tuesday, 4 December.
ADJOURNED UNTIL TUESDAY 4 DECEMBER 2001

TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF VICTORIA

COMMON LAW DIVISION

MELBOURNE

TUESDAY 04 DECEMBER 2001
(2nd day of hearing)

BEFORE THE HONOURABLE JUSTICE EAMES
B E T W E E N

THE QUEEN (ex parte ATTORNEY-GENERAL
FOR THE STATE OF VICTORIA)
Applicant
- and -
RAYMOND TERRENCE HOSER

First Respondent
- and -

KOTABI PTY LTD
Second Respondent

HIS HONOUR: Yes, Mr Graham?
MR GRAHAM: As Your Honour pleases. Yesterday we filed an affidavit by Allison Patricia Kate O'Brien, to which were exhibited a series of extracts from what I think I can safely now refer to as Mr Hoser's web site. I understand from Your Honour's Associate that that affidavit didn't find its way to Your Honour.
HIS HONOUR: No, unfortunately it didn't, and I just had a very quick look through then, but I haven't completed looking at them, you will have to take me to any passages you want me to have regard to.
MR GRAHAM: Yes. Your Honour has the exhibits, I understand?
HIS HONOUR: Yes, I do.
MR GRAHAM: Before I go to the affidavit and the exhibits, I should refer to the fact that there is a further affidavit sworn by the same deponent, rectifying an omission that she made in preparing the first affidavit. She failed physically to mark each of the exhibited documents with the relevant exhibit number, AOB1 through to 15, but she shows, by means of her second affidavit and the exhibit notes, that they are what she says they are, so that point of proof is rectified.
MR MAXWELL: Your Honour, before my learned friend goes any further, may I object to the admissibility of any evidence of this kind.
HIS HONOUR: Yes. What is the basis of the objection?
MR GRAHAM: Your Honour, that the matter which is before the court this morning is the question of penalty and costs. In respect of the matters the subject of Your Honour's judgment, these extracts are mostly, if not all, of documents which were created before the trial ended. That is to say, these were contemporaneous notes published on his web site during the trial and with reference to the transcript as it became available.

Just as Your Honour has noted that the cross-examination of Mr Hoser was surprisingly limited, so we would respectfully submit that it is surprising that the Crown, if it wanted to make some point about this material, did not supply it to the court by way of cross-examination of Mr Hoser at the time. Just as on the first day, Your Honour disallowed an application for amendment, on my submission that the Crown should not be allowed to tidy up its case at the last minute, so it is respectfully submitted that Your Honour should not allow the late introduction of material, the purpose of which has yet to be elaborated but which if it had any bearing on the matters for which Your Honour now has to consider penalty, should have been put in issue when Mr Hoser was in the witness box with an opportunity to answer it, and that is not now available and it should not be permitted. It is not, in our respectful submission, relevant to adduce evidence now, of what he was saying while the trial was going on in my respectful submission.
HIS HONOUR: How was it put, Mr Graham?
MR GRAHAM: Your Honour, we rely upon - we place this material before Your Honour because it is clearly relevant to the question of what penalty would be appropriate and how Your Honour should approach the sentencing process. The material that was placed before Your Honour, or sought to be placed before Your

Honour, goes firstly, we would submit, to the question of whether the first respondent has demonstrated any remorse whatsoever and we would draw this material to Your Honour's attention in order to suggest that Your Honour might conclude that there is a complete absence of remorse on the part of the first defendant in this case. The second way in which Your Honour may find this material of assistance, is on the question of specific deterrents, and Your Honour may find this material helpful in forming a few as to what penalty would be appropriate to achieve specific deterrents in this case.

HIS HONOUR: I gather from what was just said by Mr Maxwell that the material falls into two categories. Material which existed prior to the hearing and material which has come into existence post the hearing. Is that the case?

MR GRAHAM: Perhaps even three categories, Your Honour. Some material, prior to the commencement of the trial, some during the trial, and one on the day when Your Honour delivered judgment. One of the publications during the trial made observations concerning the no case submission.

In the course of the conduct of the trial proper, there may have been real questions as to whether on balance it was appropriate to challenge Mr Hoser in relation to what he was publishing on the web site before and during the trial, and questions of balancing fairness and prejudice might have arisen. Further, nothing much would perhaps have turned upon these extracts anyway. We don't suggest that for the purposes of proving guilt or innocence very much does. But we submit this material does bear upon the two questions, namely, remorse and specific deterrents, and do have relevance outweighing any possible prejudice at this stage.

It is clear, of course, that anything which bears upon those two issues which was published by Mr Hoser after Your Honour delivered judgment last week which bears upon those issues, clearly is not - doesn't fall within my learned friend's submissions about material which could have been put to Mr Hoser during the course of his evidence and cross-examination.

I should also indicate to Your Honour at this stage so I can alert my learned friend to this in case it comes as any surprise to him, in addition to the affidavits of Ms O'Brien, we wish to tender certificates of conviction in relation to Mr Hoser. One in relation to the perjury conviction about which Your Honour has heard and read a good deal, and one in relation to another matter which took place in July 1993, a summary matter, involving a recording of guilt without conviction and fine. It is perhaps necessary for me to tell Your Honour what that is about because it's having regard - the offence was an offence of assaulting - - -

HIS HONOUR: Before you do, I will need to hear whether there is any resistance to the tendering of certificates, if there is, I'd need to deal with that, if there's not, I'll deal with the substance.

MR GRAHAM: Yes, if Your Honour please.

HIS HONOUR: Is there?

MR MAXWELL: Your Honour, certainly not as to the perjury. I would've thought it was entirely redundant in view of Your Honour's careful treatment of that perjury matter in the judgment. We don't understand at all, why it's necessary to tender that certificate, the conviction is a matter of common ground in the proceeding. As to the other matter, my learned friend has just now informed me to what it relates and in our respectful submission there's no basis, whatever for that matter being referred to in this plea hearing.

HIS HONOUR: That's a different question. You might want to argue that it's got no bearing on the matters before me.

MR MAXWELL: Yes, Your Honour. Subject to that, Your Honour, the certificate itself, and subject to seeing it, I don't doubt that it is what my learned friend says it is.

HIS HONOUR: Yes, very well.

MR GRAHAM: Be it redundant or not, Your Honour, perhaps these things ought to be done with complete correctness and so I would tender a certificate given by the deputy registrar of the County Court on 18 October 2001 concerning the perjury conviction. That finds its way into evidence, Your Honour, under provisions of the Evidence Act with which Your Honour is no doubt familiar.
HIS HONOUR: I am, but I'm not sure that they apply to this case, do they?
MR GRAHAM: I think that they apply in any case, Your Honour, I've got them here.
HIS HONOUR: I thought they applied only in indictment and presentments.
MR GRAHAM: No, Your Honour, with respect, in any legal proceeding whatsoever.
HIS HONOUR: What is the section?
MR GRAHAM: That is s.87 of the Evidence Act 1958, and if I may say with respect, Your Honour, it is not surprising, because prior convictions sometimes have to be proved in
civil cases to impeach credit.
HIS HONOUR: I'm sorry, what was the sentence?
MR GRAHAM: Section 87 of the Evidence Act 1958.
HIS HONOUR: Yes, it refers to any indictable offence, I see.
MR GRAHAM: Your Honour had in mind what the conviction was for not what the proceedings were about.
HIS HONOUR: Yes.
MR GRAHAM: I'm sorry, Your Honour. I was going to say before Your Honour puts that volume aside, Your Honour also needs to have s.89 of the Evidence Act which deals with proof of summary convictions, and I would seek to tender the certified extract signed by the registrar of the Magistrates' Court dated 3 December 2001 concerning the offence to which I referred, of assault police or a person assisting police.
HIS HONOUR: Very well. I will receive both of those documents.

#EXHIBIT P1 - Certificate from County Court of 18/10/01.

#EXHIBIT P2 - Certificate of Magistrates' Court of 03/12/01.
MR GRAHAM: As Your Honour pleases. Should I go to the passages in the Exhibits AOB9 to AOB15.
HIS HONOUR: Are these the ones today, are they?
MR GRAHAM: Yes, Your Honour.
HIS HONOUR: Yes.
MR GRAHAM: To indicate what we say are the passages of relevance to Your Honour that perhaps will assist Your Honour in ruling upon my learned friend's objection, I think they start - perhaps I should start with AOB1 just to show Your Honour how the - or perhaps I should start with the affidavit and ask Your Honour to look through that if Your Honour hasn't had an opportunity of doing so, it makes more sense to those familiar with working web sites than those who are not. Perhaps I can draw Your Honour's attention particularly to paragraph 3 of the first affidavit - - -
HIS HONOUR: I've just put it down, I'm just trying to find it - yes, go on.
MR GRAHAM: Starting in paragraph 2, Ms O'Brien deposes as to a visit to the website address, www.smuggling.dot.com, that indicates that there are a number of clickable headings and indicates what one of those headings is, and that took her to another heading, which she sets out further down in paragraph 2, and she exhibits a printout of the first two website pages to which she has referred, and then she goes on to indicate what happened when she clicked on other headings on the same web page, which she sets out in chronological order, and Your Honour will see that paragraph 3 has a table, and the table finishes 29 November 2001, one free speech case final judgement and then she exhibits as exhibited on AOB3 to 15, what she has printed from the site.

In the absence of hearing any objection from my learned friend, I am assuming that there's no issue about the connection between the first respondent and these web sites. The identity of the web sites appears in the fly leaves of both the two books and referred to in the course of evidence before Your Honour more than once. At one point, p.408, Mr Hoser, in his re-examination, gave the full web site address, so we take it that's not an issue.

Can I then take Your Honour to Exhibit AOB3, that's headed, "Rob Hulls is now trying to gaol leading corruption author - for immediate release - May 27 2001." It starts with the line: "In an Australian first and in a step reminiscent of Stalinist Russian, Victoria's attorney-general has instructed his government to initiate proceedings against Australia's leading corruption author, Raymond Hoser, with a view to having him imprisoned."

Then about ten lines further down says: "The same allegation" - perhaps I should go back a line: "The charge of contempt alleges that Hoser and publisher have scandalised the Victorian courts. The same allegation was pursued unsuccessfully against Hoser in a related defamation action in April 2001 when Justice Bill Gillard ruled the application was improper and awarded costs in Hoser's favour." Your Honour will recall something about that.

HIS HONOUR: Yes. It's a complete mis-statement - - -

MR GRAHAM: Yes, it is, Your Honour.

HIS HONOUR: - - - of what occurred in that case.

MR GRAHAM: Yes. Then there is reference to, six months later: "Hulls has broken the agreement." Your Honour doesn't have evidence of the agreement referred to in the preceding sentence, so we haven't got the opportunity of exploring that if it matters.

MR MAXWELL: Might I just supplement my objection before my learned friend goes any further. Any letter (indistinct) is too late for this. It is that this has a release date of 27 May.

HIS HONOUR: Yes. I think that I should deal with that perhaps first. I will come back to you on that.

MR MAXWELL: Your Honour, might I just open it. My learned friend says we don't have information about the agreement, but that's classically a matter which could have been explored if it were relevant, and after all, my learned friends are instructed by the attorney-general who is said to have been a party to this agreement.

As Your Honour knows, this case was brought on, on the basis of tendering the books, that was the only work that was done to get this case ready for trial. There wasn't a writ of investigation of any of the matters, and this is just all of a piece with a case which was brought on under the misapprehension that if you tendered the books, you'd get a conviction.

This was available - I'm repeating myself - for months before the case began, and in our respectful submission, shouldn't now be brought in - - -

HIS HONOUR: Perhaps whilst you are on your feet, I can direct the question to you and you might wish to defer it until after Mr Graham has dealt with it.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: It seems to me there's at least a potential in a couple of relevant issues for the purpose of penalty, which I have now got before me. One is, if the material relating to the web site has any relevant information, relevant to such matters as you have raised yourself in your written outline which you tendered, which would seem to me to be factors both as to the income which has been raised in your outline.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: Also the extent of distribution might be a relevant factor as well. But it would seem to me that there might also be a relevance for material - I accept the force of what you say about material that was in existence at the time when the hearing was taking place - but material which has come into existence after the hearing had taken place, it would seem to me, potentially at least and subject to what the material had, to have relevance where the question of penalty arises because it is fundamental to the question of penalty and indeed fundamental to the submission which you're putting yourself in your written outline, that notwithstanding the express findings I made as to lack of good faith, I should otherwise generally accept the good faith, using that in the broad sense, of the author of the publication.
MR MAXWELL: Yes, Your Honour.
HIS HONOUR: If that is the case which has been put on penalty by the defence then it would seem to me that if the Crown is wanting to assert that subsequent to the hearing, material has come into existence which is inconsistent with those positions, is that not relevant?
MR MAXWELL: Yes, Your Honour. I make no submission about that.
HIS HONOUR: No.
MR MAXWELL: That, if I might, with respect, separate the two.
HIS HONOUR: Yes, I think probably it shiould be separated.
MR MAXWELL: I accept that - - -
HIS HONOUR: I think there's force in what you say about matters not being put to him at the time he was in the witness box.
MR MAXWELL: Yes, Your Honour. As I understand it, in this large exhibit, there is but one subsequently created document, and my submissions about failure to use at the time claim that it can't apply to that, and I'm not submitting that Your Honour should regard that as wholly irrelevant. I make submissions about what's to be drawn from it, but my submission is really directed to the balance of the material.
HIS HONOUR: Yes. I mean if I hadn't made it clear, what I'm saying is that - and again, subject to Mr Graham, it would seem to me that there's force in what you say about material which came into existence prior, unless it has got some direct bearing on the issues which are now before me, such as extent of publication or finances or matters of that sort.
MR MAXWELL: Yes, Your Honour.
HIS HONOUR: But if it is simply material which might have been the subject of cross-examination as to a defence of good faith et cetera, then it seems to me your point is well made.
MR MAXWELL: If Your Honour pleases. If I might then, just return to how my learned friend has put the material, he puts it on two bases. First, as to whether Hoser has demonstrated remorse - no, you've made your submissions and you moved on to a different matter being the certificates of conviction - - -
HIS HONOUR: I didn't take it that he'd finished, I've really interrupted because - in fact, you interrupted - - -
MR MAXWELL: So, with respect, have I.
HIS HONOUR: Yes.
MR MAXWELL: But only because in my respectful submission, this is prejudicial material, or it wants to be put prejudicially and before Your Honour is taken further through it, subject of course to Your Honour's direction, I thought it appropriate to make a point about that. But if I might then sit down, subject to anything further my learned friend says, his primary grounds for this material were to remorse and deterrents. As to remorse, Your Honour knows how the case was put and Your Honour will have to - - -
HIS HONOUR: It seems to me, these are matters you can deal with in response. I think that I should deal with the threshold issue which is how any of the material, prior to the conclusion of the hearing is being put.
MR MAXWELL: Yes, Your Honour.

HIS HONOUR: So if it comes into the categories that seem to me relevant directly then they arguably would be admissible, if it doesn't, and it's merely on the sorts of issues I've discussed, then on the face of it, it seems to me, not admissible.
MR MAXWELL: Yes, Your Honour. If I might, with Your Honour's leave, just say these two things. As to remorse, the witness could have been asked about remorse in the witness box, the web site material or not, he wasn't. He wasn't asked as Your Honour as noted, about any of his statements about intention, good faith, (indistinct) of the system, and so forth, surprisingly. Secondly, what he said before conviction is irrelevant to any state of remorse after conviction. He was putting a case as articulated by his counsel that he had acted in good faith, and was making fair comment on that as he believed to be true. Your Honour has taken an adverse view of that defence, but it would be odd to say at the time he was putting a case, which you've accepted would not have rendered remorse appropriate, it's difficult to say he wasn't expressing remorse at the time. Because of course, the case put forward on oath and - - -
HIS HONOUR: I think you should hear the submissions - - -
MR MAXWELL: If Your Honour pleases. As finally to circulation, that was a fact in issue in the proceeding.
HIS HONOUR: Yes.
MR MAXWELL: This bears on the evidence. Your Honour will recall we, in chief, filled in a gap which the prosecution had inadvertently left in their own evidence of publication, my client said as to the second book - - -
HIS HONOUR: You will get your chance anyway - - -
MR MAXWELL: - - - as to the CD, and if there was - if that was to be challenged - - -
HIS HONOUR: Mr Maxwell, you will get your chance.
MR MAXWELL: If Your Honour pleases.
HIS HONOUR: All right.
MR GRAHAM: If Your Honour pleases. It's probably best for me to say something about the timing of publication before I go on to the particular aspects.
HIS HONOUR: I want to deal with the threshold question.
MR GRAHAM: Yes.
HIS HONOUR: It doesn't seem to me, and as you have just heard me say, that material which was generated before the conclusion of the case, should be used or be relevant for the purposes of sentence, unless, it seems to me, they fell into some specific categories which have now become relevant. But if the point of using them is to simply demonstrate the attitudes of Mr Hoser et cetera, it seems to me that was all grist for the mill and the conduct of the hearing.
MR GRAHAM: If I can deal with that point directly. It was not part of the issue before Your Honour, prior to Your Honour's finding of guilt, to explore the questions of remorse or the need for specific deterrents. That would've been entirely an irrelevant pair of considerations and if I endeavoured to use those bases to support cross-examination, or Mr Langmead had, we would've been ruled out of order. I am putting this material only in relation to matters affecting penalty. The fact that we had the opportunity, or may have had the opportunity, although questions of relevance make this doubtful, doesn't detract from the need for Your Honour to look at this material if it be relevant on those two points.

My learned friend, as I noted something he said a moment ago, that remorse before conviction was irrelevant, it is only remorse after conviction that matters, and with respect to my learned friend, that has to be nonsense. And cases that Your Honour would be far more familiar with than I am, remorse demonstrated from either the person giving himself or herself up to the police, showing remorse upon apprehension, showing remorse before confession, showing remorse by pleading guilty before the magistrate, showing remorse in the

conduct of the defence at the plea hearing and pleading guilty, all those are matters which pre-date the finding of guilt.

HIS HONOUR: Yes, but you're starting with an assumption that, as part of the plea here, there is any suggestion of remorse. If that was the case, then your point might be well made, but the outline which is just the outline at this stage, doesn't suggest to me that it will be put to me that there is any question of remorse as to any of the publications, and if that is the case, then it's a non-issue, is it not, because I would start on the assumption that you don't need to prove what is accepted.
MR GRAHAM: I am just checking again, Your Honour.
HIS HONOUR: Subject to that, I might say, I agree with you. Obviously, the question of remorse, if it is an issue in sentence, can be put forward and be contradicted on the basis of whatever material exists, whether immediately after an event or after conclusion of the hearing.
MR GRAHAM: Yes. I think what caused me to make that submission is what appeared under the heading, "Mitigating factors" at p.3 of the submission and also and specifically what's in paragraph 14.
HIS HONOUR: I am sure I will be told by Mr Maxwell, but I didn't read any of his outline as indicating what remorse, as it would be understood in the law, was going to be a basis for the plea.
MR GRAHAM: If that is disclaimed, then I need go no further on that topic.
HIS HONOUR: Can I assume that - yes.
MR GRAHAM: I think that should be recorded, Your Honour.
HIS HONOUR: Mr Maxwell has conceded that - I put the question to him and he's conceded that remorse is not going to be argued before me, so that being so, it seems to me you don't need to establish any material which re-emphasises the fact.
MR MAXWELL: And, Your Honour, since it's important since the transcript is recording what I record, that that concession should be read subject to the submission that I'll make in - I'm not qualifying the concession - but it's important, in my respectful submission, that the singular nature of this proceeding be borne in mind in relation to - and the manner of the defence articulated, be borne in mind in relation to the question of remorse, and I'll develop that in submission. It won't be said that there is remorse in the sense - - -
HIS HONOUR: Remorse, you've either got it or you ain't - and you can put whatever submissions you like as to what sort of circumstances there might be. I understand what you are putting. But I am taking it as you made it clear, that as the question would be understood, for purposes of sentencing, you are not submitting remorse.
MR GRAHAM: Your Honour, perhaps I can proceed more easily and less contentiously to the remaining matter of specific deterrents. In that regard, it is probably then only necessary for us to - for Your Honour's assistance, to refer to the comments which were published on 29 November 2001, later on in the day when Your Honour gave judgment, that's Exhibit AOB15. What I want to say about that is that Your Honour would be assisted by that on the subject of deterrence because the publication represents what Your Honour might regard as a total misapprehension of what the proceedings were about, what Your Honour's findings meant, and what the significance of Your Honour's findings were and what the need for this type of proceedings happens to be.
In the absence of any such comprehension as demonstrated by what the first respondent has said following Your Honour's judgment, Your Honour might be assisted with forming a view on the question of whether there is a need for specific deterrents in this case.

So what I'll do, Your Honour, is to confine my tender of the exhibits to Exhibit AOB15, which was the media report - sorry, the Internet report of Your Honour's judgment of 29 November 2001.

As I understand my role here today, Your Honour, it is not for me to submit an argument, save to say that what appears in that exhibit indicates a state of mind and comprehension on the part of the respondent of the form that I have suggested.

Your Honour, I said something last time about the sentencing options available and the questions which had arisen concerning the availability under the Sentencing Act, of certain options. I referred Your Honour to what was said by the Court of Appeal in Rich's case. Rich has now found itself into a series of law reports, I don't know if these are any more accessible than the media neutral version, but Rich's case is a 1999 103 A.Crim.R. 261, and Your Honour will recall I said that the president in whose judgment at paragraphs 46 and 47 suggested that certain provisions of the Sentencing Act, namely ss.11, 15, were available in a contempt case, those sections - which I don't think we've brought with us - related, as Your Honour would know, to the fixing of a non parole period and the accumulation of head sentences for the purpose of the non parole period where more than one head sentence is fixed.

We should also refer Your Honour to something which we haven't touched on before. Rule 75 of this court contains its own set of provisions concerning penalties - - -

HIS HONOUR: Yes, I looked at those. It doesn't say much though.

MR GRAHAM: But it does overcome one possible problem, Your Honour, as well as indicating the availabilities of fine and imprisonment in the case of a natural person, Rule 75.11.4, enables Your Honour to impose a suspended sentence, and aside from anything in the Sentencing Act about suspended sentences, that may be a provision relevant to Your Honour's sentencing process, as there can be no doubt about the power. Those are the matters that we seek to place before Your Honour, in the course of this part of the proceeding.

HIS HONOUR: Just before you sit down, Mr Graham. You have seen the outline of submissions which has come in, raises the question of fines. Does the Crown have anything to say as to that, as to both my power, and as to the proposition which is put forward.

MR GRAHAM: The proposition in part being, Your Honour, inability to pay.

HIS HONOUR: Yes.

MR GRAHAM: Having regard to the restricted role that we occupy at this point, I am reluctant to go too far into this. If the fact of the matter is that a fine would be an empty exercise, that may be a reason for adopting that course. It may be that - - -

HIS HONOUR: I would want to know what the other course was because - - -

MR GRAHAM: Your Honour, I'm reluctant to urge a course upon Your Honour, but - - -

HIS HONOUR: Well, that's what I'm putting to you.

MR GRAHAM: - - - but if Your Honour asks, I would say that a suspended sentence would fill two aspects of the case. One would be that it would provide a form of deterrence, and two, it wouldn't be open to the objection that the fine wouldn't be paid and therefore it would have to be an actual imprisonment for non payment of fine.

HIS HONOUR: The provisions, as I understand them, for non payments of fine have ameliorated the situation where a person would be imprisoned, includes community-based orders and matters of that sort. So is the submission that you're making predicated on the fact that non payment of a fine would lead to imprisonment?

MR GRAHAM: May lead to imprisonment anyway, Your Honour. Again, leaving up in the air, a question of whether those alternative provisions in the Sentencing Act enabling those alternative types of infringement order for non payment of fine are available. I confess I haven't looked at them, but if President Winneke is right in Rich's case, there seems to be no reason for thinking the whole mechanism of the Sentencing Act wouldn't follow.
HIS HONOUR: I am not sure if I read that judgment or the other one you referred me to - - -
MR GRAHAM: Is Hinch's case.
HIS HONOUR: Yes, and this is rather saying that, and it seemed to me that - or tended to be rather saying the contrary.
MR GRAHAM: So far as there's a clear unanimous statement from the Full Court about this, it's the general powers under the Sentencing Act would not be available, there was the (indistinct) statement by President Winneke not supported by his two colleagues and not dissented from by his two colleagues. In Rich's case the two sections of the Sentencing Act are available. But I think there's nothing in the Sentencing Act beyond that which would indicate that Your Honour in default of a payment of a fine couldn't award a community-based order or one of those other - - -
HIS HONOUR: What do you say my powers are to fine and where do they come from?
MR GRAHAM: We say that they come from - the starting point is the common law. Fines have been imposed for as long as one can remember, as long as the reports go back, for contempts of court. I think Your Honour may recall the almost remarkable case of R v. Gray concerning Mr Justice Darling, the publisher of the newspaper in question was fine one hundred pounds in 1900, that seemed to be regarded by those concerned as an appropriate penalty.
HIS HONOUR: It's probably consistent with the view - and I didn't really make my question clear - that it's plainly the rules themselves give power for a fine in addition to or separate to imprisonment or other penalty, but they don't provide any figure. Fines under the Sentencing Act, do have a range which is set, but it's a range which is set by reference to the penalty which is capable of being imposed and given the statements that have been made in Hinch's case and in Rich's case, it would seem to me to be very doubtful that those provisions, as defined,

> apply to the contempt powers, which have been exercised as the traditional common law powers. In other words, it seems to me that the power of fine which is imposed under Order 76, is one in which the court is not restricted by any statutory requirement, obviously restricted by all the relevant common law principles that would apply to penalty in any case.

MR GRAHAM: Yes.
HIS HONOUR: And one might say, all of the relevant principles as to fines which are set out in the Sentencing Act, could be taken as being manifest good sense on sentencing anyway, even if those principles weren't statutory requirements for a contempt penalty.
MR GRAHAM: Certainly, Your Honour, I would agree with that and say that regardless of what the attitudes might have been a long time ago, a judge exercising the common law powers in the year 2001 should be guided by principles derived by analogy at least from the Sentencing Act. There would be no difficulty, I would submit, about adopting that submission.

The common law situation, as I have read it, over and over again, is that the penalty was a final unlimited amount and imprisonment for unlimited period. But as we know, those statements are subject to implied control as we can discern from Hinch's case itself, where the Full Court stepped in and reduced the sentence. I think it might've reduced the fines on the company as well. And so that there must be some limits even though they're not specified.

HIS HONOUR: I dealt with you specifically, and we've been discussing it upon all sides, specifically with respect, I suspect, to Mr Hoser without looking at the question of the second respondent here. Does the Crown - when the case was opened the Crown spoke in term of sequestration as far as the company was concerned, but is the Crown putting any submission to me as to what, if any, course should apply with respect to the company.
MR GRAHAM: Your Honour, given the identity between Mr Hoser and the company, there would seem to be little purpose in separately penalising the company as a matter of common sense, but if any order is to be made as to costs, a matter later to be discussed, one certainly would submit that there should be a conviction recorded against the company and any order for costs should go as against both respondents.
HIS HONOUR: It's probably relevant, I think, in advance of what has been foreshadowed in the outline by Mr Maxwell who is going to address, to know what the Crown's position would be on costs. I take it the Crown will be seeking costs.
MR GRAHAM: We do seek costs, Your Honour. I don't know if it's convenient to say more than that at this stage.
HIS HONOUR: I wanted to know if it's on the traditional basis or if you're seeking any variation for costs in this case.
MR GRAHAM: Your Honour, there is ample precedent in contempt cases for the court to award costs on a solicitor/client basis, and our application is that costs be awarded against both respondents on that basis. I can take Your Honour to some examples where that's been done.
HIS HONOUR: No, I don't think you need to. But that's sufficient for my purposes and no doubt for Mr Maxwell at this stage, to know what is going to be contended. It may be relevant to the other submissions that he will make.
MR GRAHAM: Yes. I also have to meet a submission based upon the dismissal of the second count.
HIS HONOUR: Yes.
MR GRAHAM: But I'll reserve that, I think, for a later time. If Your Honour pleases.
HIS HONOUR: Yes. Mr Maxwell.
MR MAXWELL: Your Honour has read the outline. I don't propose to read that or rehearse in any detail, the propositions that are made. We've endeavoured to put as shortly and clearly as we can, the matters which, in our respectful submission, justify Your Honour taking the view set out in paragraph 2 that is that a custodial sentence is not called for and that the appropriate disposition of the case is that each of the respondents be fined.

Your Honour has made serious adverse findings against Mr Hoser. Although, as we've pointed out, almost 80 per cent of the sub-counts have been dismissed, that is 18 out of 23, Your Honour has found in respect of the statements concerning Judge Neesham and Judge Balmford as she was, that Mr Hoser did intend to lower the reputation of the justice system and that contrary to his evidence and the submissions made on his behalf, he was not in good faith.

Nevertheless, there was an endeavour to convey in the written outline, in no way seeking to diminish the seriousness of those findings, it is submitted that for the reasons set out in the outline and some matters to

which I will now refer, it would not be an appropriate exercise of the court's sentencing discretion to send this man to gaol.

To summarise the submission, in the light of everything Your Honour has said about these publications, this conduct does not, in our submission, warrant imprisonment.
HIS HONOUR: And you're putting that as either by way of a suspended sentence or as a non suspended sentence.

MR MAXWELL: I'm putting it principally as an operative sentence, we recognise that if Your Honour was of the view that the seriousness of the matters warrant conviction, although defence has to be found to be proved, warranted - I will put that better - it was Your Honour's view that the court should mark its view of the seriousness of those matters by attaching what is in form and substance, a custodial sentence, that being the most severe sentencing option available, then it would be appropriate, and with respect, we don't disagree with what our learned friend said as to deterrents in that regard, for any such sentence to be suspended.
HIS HONOUR: The rules would, of course, provide for both, it could be both a suspended sentence and a fine, just as the rules provide expressly there could be an immediate sentence, imprisonment and the fine.
MR MAXWELL: Yes, Your Honour. We respectfully accept that. It should be said, and I'll come back to the question of the financial position later, that the material with respect to financial position - we should importantly say
it's incomplete - - -
HIS HONOUR: Yes, I - - -
MR MAXWELL: - - - (indistinct) has no figures with respect to the company, I do now have some figures and I will mention those to Your Honour in a moment.
HIS HONOUR: Yes. I was puzzled by - there's a footnote reference - I wasn't sure what it was a reference to where the income is given in paragraph 17.
MR MAXWELL: I do have copies of tax returns for that financial year, those being the most recent filed tax returns on my instructions. But before I come to the detail in that regard, the - it's important to acknowledge immediately that the trading position of the company shows a trading profit for that year of $62,734.
HIS HONOUR: Would you just excuse me one second. I am told there is a problem with the transcript at the moment. The transcript writers have asked for a short break.
MR MAXWELL: If Your Honour pleases.
HIS HONOUR: While they fix that up I will just leave the Bench.
(Short adjournment.)
MR MAXWELL: Your Honour, I was just mentioning that Katarbi in its accounts for 99/2000, which have been prepared by an accountant, had a gross profit on trading of $62,734, but its net profit after payment of salary was nil. And there is a long series of business expenses of the kind Your Honour would expect in the financial statements. I will come back to that later in the submission.
The point to correct is that it is not suggested that the fine would be an empty exercise, on the contrary. The material is put, as it is every day in the courts, as to capacity to pay. Your Honour ought - accepting our submission that a fine is appropriate - have regard to the financial position of the respondents.
HIS HONOUR: And what do you say that is with respect to Mr Hoser?
MR MAXWELL: Very low income on those figures. Your Honour will see that in the - I'll tender these documents. As you would expect, the company shows revenue for sales of the books, but there are of course costs of production, so that the accounts show wages of 10,000 and writer's fees of 25,000. So we're talking about at or below average weekly income.
HIS HONOUR: One of the documents which was tendered in the course of the case was the affidavit in the Zucoli matter. And in that Mr Hoser deposes that his profit from the sales - this was of the first book - was $20 for each book sold. I've been told that there's in the order of 7,000 copies of that book been sold, and in the order of five or five and a half thousand copies sold of the second book.
That would seem to suggest, if his statement is correct in that affidavit that he had been making fairly substantial profits from the sales of those books. Indeed the material which is before me seems to boast

that he's one of the greatest authors of publication distribution networks in Australia. It suggests he's got a very high income from the sale of books.

How am I to regard that sort of material with the suggestion that his income is apparently very low to negligible?

MR MAXWELL: Your Honour, without seeking to do a computation, in my respectful submission that is probably to be explained by the first figure I gave Your Honour that in the year to 30 June 2000, there was a gross profit on sales of nearly 63,000. That is to say, as these figures show, the proceeds of sale in that year were 112,000; the costs of sales was 50,000; hence the gross profit before other business expenses of 63,000.

If that reflected a sale of 3,000 books in the year to 30 June 2000, that would be a gross profit of $20 per book. And it would be as true to say what Your Honour's quoted from the affidavit, as it is true to describe that in this trading statement as a gross profit on trading.

In short, the person is saying "Well, it costs me $20 less to have each book printed than I can sell it for", as a matter of the cost of production, but that isn't a proper accounting of the expenses of running the business as the full profit and loss statement shows. Your Honour, my learned friend says he's going to raise a question of proof before I tender these.

The other way of describing what I've put to Your Honour is that $20 is the margin on the book. That is to say the difference between the cost of producing it and the sale price.

HIS HONOUR: That would be profit, wouldn't it?

MR MAXWELL: Yes.

HIS HONOUR: That's how he described it, as profit. And it sounds like profit to me.

MR MAXWELL: Yes, Your Honour. I'm only drawing the distinction between the notion of gross profit on the items, which is to subtract the cost of those items from

the revenue generated by them, which is the figure shown as gross profit on trading on the one hand and the actual position of the business at the end of the financial year, where a whole range of other expenses are taken into account.

HIS HONOUR: He dealt with expenses in that last occasion. It does seem to me that on that occasion it was in his interests to stress the loss in profit that he would suffer by virtue of what was then perceived to be an application to stop publication, or further publication of the books.

He appeared to have referred to costs, fuel, deliveries, et cetera on that occasion in giving his profit estimate at that time of 40 to $60,000.

MR MAXWELL: Yes, Your Honour. I don't have that affidavit in front of me. Your Honour is right to infer that the adverse impact on him and his company was something which he sought to emphasise. If my rough calculation is right, then he was correct to say every book which is enjoined from sale will cost us and the company, net revenue of $20. That's right. That is absolutely correct - assuming the arithmetic to be right - as a statement of the adverse impact of the injunction sought.

The fact that, as these accounts show - and subject of course to adjusting downwards the salary component which is - as in any small business, private company operation - determined by what's left after other expenses have been paid. Subject to that, if that revenue had not come in, then the cost of production would have already been incurred ex hypothesi, and the other fixed expenses of the business like insurance, telephone and so on would've been incurred such that the business goes into loss by virtue of the loss of that net revenue on sales.

So in my respectful submission there's nothing inconsistent with what was then said, and indeed these materials which I will

now, subject to my learned friend's objection, tender, provide important verification of this gross margin notion in support of what he was saying.

Your Honour, I propose to tender a copy of the - or the first respondent's copy of his income tax return for the financial year ended 30 June 2000, and the second respondent's copy of its tax return for that year, together with a copy of its financial statements for that year.

MR GRAHAM: There seems to be an issue between us, or in this court at the very least, as to what was the level of the respondents income. And to seek to prove matter relating to that topic simply by handing up tax returns without the assistance of any provision in an Evidence Act, for example, is not, in our submission, competent. There's a way of doing this, and it's not a difficult way. The person who knows about this is the first respondent.

This is not something that he would've been asked about and needed to have been asked about before, and if they wish to prove that the respondents are lacking in means, then that should be the matter of oral evidence.

HIS HONOUR: Yes.

MR MAXWELL: Your Honour, I'm content to call Mr Hoser, if Your Honour is otherwise minded to uphold the objection.

However, I sought informal advice from those who practise in the Superior Courts in criminal matters, and as I understand the position - Your Honour knows this far better than any of us at the Bar table - it's a matter for the court whether evidence on a plea is proved by affidavit or not. And as often as not, it isn't.

Your Honour would accept without question that I have instructions that these are what they purport to be - income tax returns in the standard form lodged. They are abundantly plain, in our respectful submission, and perhaps as my learned friend did, I'll hand up the documents before Your Honour rules on the objection.

HIS HONOUR: I can indicate to you that I think it would assist the cause of Mr Hoser if he was to give evidence with respect to these documents.

MR MAXWELL: If Your Honour pleases.

<RAYMOND TERRENCE HOSER, sworn and examined:

HIS HONOUR: Sorry, you want the witness to have them, yes, all right.

MR MAXWELL: Yes, just leave them for a moment, Mr Hoser. Mr Hoser, is your full name, Raymond Terrence, with two "Rs" Hoser?---Yes.

And your address is 488 Park Road, Park Orchards, Victoria?---Yes, Your Honour.

And you are by profession, an author and zoologist?---Yes.

Would you look at the three documents which are in front of you and tell His Honour, dealing with your own first and then the company's second, what those documents are?---Bear with me for a minute, I'll - - -

HIS HONOUR: I'm sorry, I can't hear you?---Sorry. They're tax returns. They came from my accountant, whose name is on their, Daniel Mann & Associates, and his office is actually just down the road in Lonsdale Street. He has a post office box in Mitcham, but his office is Lonsdale Street, and the first return in my hand is, I assume it's a copy that he gave me. The second document - - -

MR MAXWELL: Just before you move on to the others?---Sorry.

The first document is a copy of what?---Yeah - of, sorry, of a tax return.

And in whose name is the tax return, who is identified in the tax - - -?---It's got - me, me. It says, Mr Raymond Hoser.

And did you supply information to your accountant for the purposes of his preparation of those returns?---Yes.

And did you - were you asked to sign those returns before they were submitted to the tax office?---Yes, and I assume for the purposes of this court, I assume Your Honour, if you wish to check up the tax office of the accountant, you'll find originals, yes. And that would be the same as this - - -

And you provided, did you, the signed versions to your accountant?---Yes.

And is it your understanding that he was to lodge the signed versions with the tax office?---Well, I presume he has because first he told me he had, and my understanding is, is when you lodge a tax return, the tax office then send you a bit of paper that tells you whether you have to pay the money, or not.
And in relation to - you've mentioned the two tax returns, there is a third document under the name of Katarbi Pty Ltd?---Yes.

The front page of which has figures which include a reference to gross trading profit?---Yes.
Would you tell His Honour what that document is as far as you know?---Your Honour, just to qualify this, when we do the tax, I basically just give everything to the accountant and he does it, and he sends me the things and I put them in the filing cabinet and tend to forget about them until the time comes. This is the first time I've looked at them for a long time, but on the face of it, it's just a load of numbers and it says "Profit on trading. Cost of stock. Closing sales." It speaks for itself basically.
And was that provided to you as a - were you told by your accountant that that was a set of financial statements for the company for the '99/2000 year?---Yes, my accountant I've had for - - -
HIS HONOUR: I think that's the answer to the question, was yes?---Sorry, Your Honour, I was trying to elaborate for you.
MR MAXWELL: And to the best of your knowledge, is the information in the returns and the financial statements, true and correct?---Yes.
And while you're there, Mr Hoser, how many breadwinners are there in your family?---Essentially it's myself.
And do you have any children?---Two.
And what are their ages?---Six months and two and a half years.
HIS HONOUR: Do you tender those?
MR MAXWELL: I tender those if Your Honour please.
HIS HONOUR: Are there three or two?
MR MAXWELL: There were three, Your Honour. Two tax returns and one set of financial statements.

#EXHIBIT D3 - Income tax returns for the first and second respondents and financial statements for the second respondent.
HIS HONOUR: Yes, could you hand those down. You have a copy, do you?
MR GRAHAM: I haven't seen them, Your Honour.
HIS HONOUR: Hand those down. I'm told it's D3.
MR GRAHAM: Would Your Honour excuse me just a moment.
HIS HONOUR: Whilst Mr Graham is looking at that, Mr Hoser, have the taxation returns for the last financial year been completed?---I don't think so. With the tax return things, my wife usually handles that and the usual pattern is, is the accountant sends us material. We fit it all in, send it back. Do whatever we have to do and that's the end of it. I don't think they've been lodged. She said they haven't been lodged, I believe her. They sit in a filing cabinet with all the other documents, and Your Honour, in case you hadn't worked it out from reading the books, I deal with a vast amount of information. It is not within my capacity to recall every single thing, and I recall it on a need to know basis; those tax returns have sat in a filing cabinet with every other tax return I've done for my entire working life, and they've just gathered dust and it's the first time I've ever had to pull any out, and I just make that point that if you want a detailed cross-examination as to the tax returns - - -
Mr Hoser, the question I asked you was whether the tax returns had been done for the last financial year?---My apologies, Your Honour.
Have they been - - -?---No, my understanding is - - -
Just a second please. Have they been submitted to the Taxation Department for the last financial year?---My

understanding is, is we don't have them. I assume the accountant has not submitted them. Now I just say that as my understanding because I can't state that as an emphatic statement of fact, Your Honour, and I don't want you to say, Mr Hoser's misled me, because I don't know the answer to that question, Your Honour pleases.

<CROSS-EXAMINED BY MR GRAHAM:

Mr Hoser, would you look at - - -

HIS HONOUR: I don't think he has a copy.

MR GRAHAM: No, Your Honour, I'm going to have to hand this to him and hope that I can remember what it says and hope that Your Honour will follow the question put in that way.

MR MAXWELL: Another course, Your Honour, would be - I appreciate it's difficult for Your Honour as well as my learned friend, to simply defer this part of the proceeding while we have some copies made - - -

HIS HONOUR: I think that makes sense.

MR MAXWELL: Mr Hoser of course will remain in court and we'll - I'll sit down as soon as those copies come back.

HIS HONOUR: I will leave the Bench while that is done. I think we could get that done in a couple of minutes.

(Short adjournment.)

MR GRAHAM: Your Honour, I perhaps should say that I'm going to confine myself to this material rather than to embark upon cross-examination at large. I would expect Your Honour would confine me if I proceeded any further, but I say that in glance of any comment that I fail to go into areas that it might be said that I should have gone into. (To witness) Mr Hoser, would you go to the document forming part of the most recent exhibit, Exhibit D3, the one headed "Katarbi Pty Ltd" in largish print?---Sorry, the top one?

Yes?---Sorry - right, they're in different - I don't know which order you've got them in. You mean this one?

The one with "Katarbi Pty Ltd" on the top of it in large print?---Right, yes, got it.

That's the - starts with a trading statement for the second respondent for the year ending 30 June 2000; is that right?---Yes.

If you look at the first, and I think the second page may be identical to the first in my copy, do you see gross profit on trading for the year ended 30 June 2000 of $62,734?---Yes, yes.

That includes the cost of production of books, doesn't it?---I'm just thinking, gross profit on trading - that - I'll be quite frank with you, Mr Graham, is it - sorry, Your Honour, I don't know who I'm met to be addressing, sorry, those figures, look, I'll be quite frank, when I say they're gobbledy-gook, I don't handle that, I give my accountant all the certificates and stuff, and over the last couple of years in particular, my wife has tended to handle that - my role is merely paying bills, writing out cheques and collecting receipts - but if I can give you some perspective into - - -

No, I don't want perspective.

HIS HONOUR: Just listen to the question?---I'm trying to answer to the question.

MR GRAHAM: No you're not.

HIS HONOUR: Just listen to the question, Mr Hoser?---Okay, sorry, well - - -

MR GRAHAM: You're still not.

HIS HONOUR: Would you wait for the question please. Yes?

MR GRAHAM: If Your Honour pleases. (To witness) Do you see the bottom line on the first page, "Gross profit on trading", with the figure of $62,734?---Yeah.

Do you see the item immediately above it, "Cost of sales" $50,040, you see that?---Yes.

Does the figure in your understanding, cost of sales, represent the cost of producing the books that you publish?---I have no - sorry, Your Honour, I don't know what those figures specifically mean. They sound like accounting terms.

HIS HONOUR: All right, if you don't know you don't know.
MR GRAHAM: Does that mean then, that you signed and submitted to the Commissioner of Taxation of this country, a document that you didn't understand?---(No audible response.)
Yes or no?---To an extent, to an extent.
MR MAXWELL: Mr Graham, how could that be relevant on - - -
WITNESS: To an extent.
HIS HONOUR: I think that's relevant. If the witness is disclaiming any knowledge of it I think he's entitled to - - -
WITNESS: No, I'm not disclaiming knowledge of it.
HIS HONOUR: Just - could you wait please, Mr Hoser, for the questions, and when there's an objection could you please stop talking?
MR MAXWELL: With respect, he's not disclaiming knowledge, he's positively affirmed sine, the circumstance that a lay tax payer does not understand financial statements is common place.
HIS HONOUR: He's entitled to be tested on the matter, that's - you can make that comment if you wish. Whatever his answer might be, might go to the weight of the answer, but it's a perfectly legitimate question to put in cross-examination.
MR MAXWELL: If Your Honour pleases.
MR GRAHAM: Mr Hoser, did you sign and submit to the Commissioner of Taxation of this country, the two tax returns, copies of which you have in your hand, not knowing that the contents were true or false?---I don't think I can answer the question by the way it's put, if that helps you, Your Honour.
Did you - when you signed the document, the documents, did you believe that the contents were true?---Yes.
But you said a moment ago that you found the figures were gobbledy-gook, to quote you, didn't you?---That's also correct.
So how can you know that the contents are true at the same time finding the contents of the documents gobbledy-gook?
MR MAXWELL: I objection to the question, I object to the question. It was put on a false basis.
HIS HONOUR: Yes, the witness said he believed it to be true.
MR MAXWELL: Fundamental distinction, Your Honour.
HIS HONOUR: I understand, the objection is upheld.
MR GRAHAM: You believed the contents to be true, is that right?---Yes.
But you had no basis for that belief whatever, did you?---I most certainly did have a basis of belief, thank you very much.
But you found the contents of the documents to be gobbledy-gook, didn't you?---I still believe them to be true because I have used the same accountant for, I think about 11 years, I have complete faith in my accountant, and he submits the figures for me to look at, he says he has done them, and he says, "Within your ability tell me if there's anything you see that's right or wrong" and he is a very meticulous man, he's an Asian man, and like a lot of Asian people he is very particular, and if he says, "I have done your tax return properly" and he charges for it, I accept his word, and that's why, although I don't understand the document, just like a person would with an interpreter, they have their faith in me.
You said a moment ago in the course of that answer, that the accountant submitted the documents to you and asked you whether they were right or wrong, is that right?---Within the best of my ability.
Did you do that?---Within the best of my ability, yes.
What was the point of you going over them if you found them to be gobbledy-gook, Mr Hoser?---When I say I found them to be - not - it's like - if I can answer the question a bit long-windedly, Your Honour, it's like when you're in a foreign country hearing a person talking in a foreign language. You may understand some of the words, but you do not understand all of them. The words

that you understand you try to make sense out of and those that you don't understand, you, for want of a better purpose,

just overlook, and that's basically the relationship we had. By way of example, if I can be allowed to continue - - -

Your Honour, I submit the witness doesn't need to go to an example responding, or explaining.

HIS HONOUR: Yes, wait for the questions please.

MR GRAHAM: Mr Hoser, have you submitted the material necessary to prepare tax returns for Katarbi and yourself for the year ended 30 June 2001?---On the most recent financial year?

Yes?---That's a good question, I don't know.

You don't know?---No, my wife handles that.

I thought the accountant handled this?---No, my wife - as I said to you, the role over the last couple of years has been - my role has tended more so to be I sell the books, I pay the bills, I do all that side of the operation, and my wife tends to organise receipts - feed them into the computer, because of the GST and MYOB and all that sort of thing, which is a program I don't have a grasp on very well. And she sends it into the accountant and the accountant goes through it, and it goes backwards and forwards and when they've got their things right, they give them to me and I - well, the ones I have to sign - I assume she has to sign something as well for her - for herself, and the accountant notifies me when it's due, and the trend - I don't know if you know, but there's always extensions with GST, which we pay quarterly now.

I think the witness is going beyond his explanation, Your Honour?---I apologise, Your Honour.

Are you able to say one way or the other whether the gross profit of Katarbi Pty Ltd for the year ended 30 June 2001 ought to be greater than it was for the previous year?---No, it'd be substantially less, actually. Perhaps I could explain.

How are you able - you don't handle the books, do you?---I sell the books.

I'm sorry, the books of account. You don't look after the books of account?---No, I don't handle the intricacies of the accountant side of things, that's correct.

I'm putting it to you, Mr Hoser, you have no idea whether Katarbi had a better year than the most recent year than in the years shown in these documents?---He's wrong, I sell the books, I know exactly how many books we sell each year.

Are you saying that in the year ending 30 June 2000 you had an especially good year of selling books, did you?---Most certainly. The Victoria Police Corruption books came out in August 1999, and books always sell exceptionally well in their first year. The sales tend to decline after the second year, which is one of the reasons I'm perplexed I got the writ when I did. And having said that, in the second year we printed - it was released in October last year - two books called Taxi 1 and 2, which cost the same price as the Victoria Police Corruption books to produce, and they haven't sold anywhere near as well.

These were books published in your other capacity as a zoologist, are they?---The titles are Taxi, and they are published in my capacity as a former taxi driver.

Taxi driver, I'm sorry?---And I think I was charged with perjury in a red light case, as my capacity as a taxi driver as well.

I ask that the witness be shown Exhibit F to Mr Stephen Joseph Lee's affidavit of 18 May 2001. That was the affidavit of Mr Hoser sworn in the proceedings brought by Mr Zucoli.

HIS HONOUR: I've got - I think I actually have the affidavit here.

MR GRAHAM: Do you have that affidavit?---Yes.

Would you go to - let me ask you another question first. You're familiar with that affidavit still, are you not, Mr Hoser?---Not terribly familiar, but yes, I've seen it before. I have looked at it, I have read it, yes.

The purpose of filing it was to - - -?---Right. Sorry, I didn't even realise whose it was. But I saw all the affidavits in the case, yes, including my own, of course.
Your affidavit was designed to persuade the Supreme Court not to grant an injunction against the publication of the two books in question here. Is that right?---No, my affidavit, from my perspective, was to state the facts. And the lawyers that were briefed by the insurance company's role was to stop the affidavit.
HIS HONOUR: I think that was with respect to one book, was it not, just the first book?---That's correct, Your Honour.
MR GRAHAM: Your Honour is quite right, I was in error. (To witness) So you're saying that your purpose in swearing this affidavit had nothing to do with discouraging the grant of an injunction against publishing your books?---Well, I obviously had a vested interest, and I was opposing the application. So to that extent, yes. But if the - if the question is - and I suppose it's a legal thing - if your question is put that I have somehow framed it improperly - it's just a statement of facts in
terms of what I have stated. I don't dispute the factual basis of this. If I've said it's fact, it is.
If you would be kind enough to just read paragraphs 6, 7 and 8 to yourself, please, Mr Hoser, and I'll ask you a question about them?---Yes, that sounds - I don't see any problem with any of those ball park figures.
They're ball park figures?---I say ball park.
You swore to them, Mr Hoser?---Yes.
HIS HONOUR: You haven't been asked a question?---Sorry, I apologise, Your Honour.
MR GRAHAM: Are these figures your best estimates of what sales have been achieved and best estimates of the other matters deposed to? Or are they just ball park figures?---No, they're very reasonable estimates. I used the word "average" as a profit for each book sold, and if I'm allowed to elaborate - books are sold in different circumstances and they have different mark ups in different places.
So they're not ball park figures?---They are an average figure per book.
And they were your best estimates as at the time when you swore the affidavit?---Yes, most certainly.
I would suggest to you that what you are seeking to convey by your affidavit was that you and Katarbi Pty Ltd would suffer financial loss if an injunction were granted against further publication of Victoria Police Corruption. Is that right?---Most definitely.
Because the sale of that book was yielding substantial profits to Katarbi Pty Ltd, is that right?---Most definitely.
And did Victoria Police Corruption 2 yield substantial profits as well?---To a lesser extent, yes.
Is it still, those books still being sold as of today, 4 December?---People in this courtroom have approached me to buy them, yes.
That's not quite an answer, Mr Hoser?---Sorry, yes, in answer to your question, yes.
And you actively seek to sell copies of these two books at the present time, don't you?
MR MAXWELL: With respect, how does that go to any matter in the financial statements? It goes, in my respectful submission to a different matter altogether, which could well have been the subject of cross-examination at the time. There was, as I've already submitted, and Your Honour knows, evidence about what was being done.
HIS HONOUR: I presume it is being put to the question of what his source or range of income is at the moment.
MR MAXWELL: Your Honour please.

MR GRAHAM: Mr Hoser, are the two books Victoria Police Corruption and Victoria Police Corruption 2, still being actively marketed for sale at this moment?---Well - - -
Yes or no?---They are on the market and being sold around the place, yes. If you call that active, but most books are passively sold, they sit on shelves, people browse through them and decide if they want to buy them, but they are being sold. I would most certainly - I couldn't dispute that.
They are offered for sale via the websites that we know about on the Internet, aren't they?---They're sold all over the place, in the city bookshops - - -
Just a moment, Mr Hoser. One thing at a time?---Sorry, I apologise.
These two books, Victoria Police Corruption and Victoria Police Corruption 2, are available for sale through your site on the Internet, is that right?---Most definitely.
And I, or His Honour, or Mr Maxwell, could buy one by placing an order today, couldn't they?
MR MAXWELL: Your Honour, in my respectful submission it's become apparent that this is not about sources of income. It's about making and remaking a point that as at this date, those books are on sale. That's not about sources of income. It's about apparently some aspect of Mr Hoser's conduct on which the prosecution thinks Your Honour should - - -
HIS HONOUR: I'm only treating it as relevant and it must at least have, if you say there's a second purpose to it, I'm only treating it as relevant to the purpose which Mr Graham said it was being put; namely, as to the question of what his income is. If there's a subsidiary question, I can assure you, I'm not concerned about that.
MR GRAHAM: I'll with draw that question, because it probably was answered by the previous - answer to the previous question. (To witness) Mr Hoser, during the year ended 30 June 2001, both Victoria Police Corruption and Victoria Police Corruption 2, were being actively marketed and promoted for sale by you and Katarbi Pty Ltd, weren't they?---We were certainly selling them, yes. The word "active" I think is - implies that we're like running around bashing down people's doors and shoving them in their face, and to that extent the word is no. But we most certainly want people to buy them, that pays the bills, keeps the food on the table, feeds the wife and children, and does everything else that the normal
working class person does.
Mr Hoser, these books have been offered for sale by you at stalls in markets over the last couple of years, haven't they?---We have sold them everywhere.
By you?---I have personally sold them at markets on a few occasions, but decided there's better ways to sell them at markets, but we try various options, marketing options like any marketing publishing company would, make no bones about it. Pan McMillan do the same thing. And Labor members of Parliament even do it, Jim Cairns.
Looking now at the position as it stands in December 2001, it's your intention, and the intention of Katarbi through you, to continue to sell as many books as you possibly can, including copies of Victoria Police Corruption and Victoria Police Corruption 2, as long as you have stock available?---We sell seven different books and CDs on top of that. And - - -
That's not an answer?---Sorry, and obviously the Victoria Police Corruption ones, yes, we will keep selling them, indefinitely, I presume, until we run out.
And generate as much income as your stock of the seven titles available will yield?---Presumably, yes.
Your Honour pleases.
<RE-EXAMINED BY MR MAXWELL:
Mr Hoser, questions have been asked which you haven't been able to answer about whether financial statements and tax returns have been prepared for the financial year just ended?---I did actually - - -

Just a minute, let me ask the question. I want to ask you so you can tell His Honour direct; do you say to the court that if any such statements have been prepared, and/or

tax returns, you will authorise your accountant to provide them, so that the up to date financial position of yourself and the company can be demonstrated to the court?---I could make that undertaking, but if I can assist you, Your Honour, and I think I might have actually broken some court rule inadvertently. I did ask my wife the question, have this year's tax returns been done, and she said to me, no, we don't have to do them till next year. And I think that basically answered the question. But then she did say to me, Daniel will be in his office now, ring him up.

Now next question, Mr Hoser you were asked about the trading results of the company as the seller of the books in the financial year just ended, and you told my learned friend, Mr Graham, that the trading results had been significantly less positive - - -?---Yes.

- - - in this year. I want to ask you two questions, because you explained that you'd also incurred the cost of publishing the taxi books. Dealing with the Police Corruption books first, would you tell His Honour as best you can estimate it, what proportion - let's say the sales of those corruption books in the first year '99/2000, were 100; so we're talking percentages. What would be the corresponding figure in the year just ended?---Percentage wise we sell a lot less.

Have you sold half as many, a third as many, have you sold - - -?---No, we're probably down to - off the top of my head, and this is a guess, off the top of my head without the figures, I'm just trying to think - probably about a third - on a week to week basis, like it fluctuates, it goes up and down and all that, but on a week to week basis of the Police Corruption titles, we'd be to about a third and a quarter per week now, to what we were back in end of '99, early 2000, and that's excluding some of those weeks in 1999, especially when it first came out. We'd have some weeks where we'd sell like, you know, several thousand dollars worth of book, the demand was huge. And - - -

Just to make sure I understand you, you're telling His Honour that sales of those books in the financial year ended would represent approximately between 25 and 33 and a third per cent of the sales for the previous year?---Yes, but I don't - just - so I'm not accused of misleading anyone. We have also published the taxi books.

Yes, I want to ask you about that; again using 100, being the sales of the police books in the '99/2000 year, what corresponding figure in volume, would you give His Honour for the taxi books in the year just ended?---It's lower and it's substantially lower. I would suggest - - -

Well you provide a figure which reflects the proportions?---Proportions - probably 30 to 40 per cent, so when you add the two books together, we're probably running, sales wise, about 60 to 70 per cent what it was the year before. And just again so I'm not accused of misleading the courts. We do sell Smuggled, the Hoser Files, Smuggle 2 and the books on CD ROM, but relative to the sales of the other four books, they tend to be negligible because they are, with the exception of the CDs which we don't sell many of, those books are eight years old, seven years old, and five years old. I think my mass is out, but they're a lot older.

And just to be clear, you said in respect of the taxi books it was lower, but I think your - the figures you've given show that the volume of the taxi books is greater in the year just ended, than the volume of the police books?---In this current - we sell more taxi books now, yes.

And adding them together, we're looking at about 60 or so per cent compared to 100 in the previous year?---Yes, yes. And if I can just qualify it, I don't think it's necessarily a reflection on the title, The Taxi Book, in the last three years there's been a very strong shift towards Internet usage, and that

has really knocked the book market around big time because people when they want things they just click on the mouse they don't buy books the way they used to. When you were asked about the reference in your affidavit and defamation proceeding, you answered in terms of mark-up, different mark-up, depending on who you're selling to. Tell His Honour what you understand or mean by mark-up? What does the mark-up represent?---That's a question which I really haven't even turned myself to, but usually with a book actually it's a mark-down. If a book is - - -

Let me give you a couple of alternatives. Is it the difference between the cost of producing the book and the sale price, or something else?---That is a good question. Sometimes when you talk mark-up, you talk what you make as profit after you have actually paid your ongoing weekly running costs. Sometimes you talk mark-up as into the straight print - ink and paper cost versus the cost of selling, and other times you would talk the mark-up, what each book owes you in terms of the work and effort and all the stuff that went on beforehand in terms of your price. As most authors will tell you, Your Honour, you don't make - well, you'd probably know, Your Honour, most authors don't make a lot of money when they write books, and the work is usually a labour of love and so on a per hour basis, you don't make a huge amount of money. But in terms of the way I look at it, I tend to say, well, the Police Corruption books, the physical, excluding the time spent preparing them, the physical production cost is six or seven dollars per book unit cost, when the odds and sods are done, taken out of the factors in terms of printing. And then you've got other incidentals like paying for photos from photographers and newspapers, photocopying fees from government departments and whatever. So you say that just the physical production cost of the book is ten dollars, and then you - if you say you've got a profit of $20, it's reasonable if you're selling them at 30, because you have a situation where you have already bought the books and you've already paid those costs, even if you still have a loan out on them, because the Police Corruption books, we actually had no money in the bank when they were printed, and the printing company did it for us, I think on spec, that they would get paid - - -

Wind up your answer please?---Sorry.

I think you've answered the question?---All right, okay.

Your Honour, I have no further questions.

HIS HONOUR: Could I just ask you the - I know that you've said you don't know the books of account, but you might know the answer to this; the books for Katarbi show that the

profit and loss statements shows wages of 10,000 and writer's fees of 25,000. I think I understood - I might have misheard what was said earlier, but do I take it that that is income which comes to yourself, those two figures?---My understanding, and I could be wrong on this, the 25,000 or whatever it is, would go to me, and the other money would be my wife's, but I - I would assume that's the case. I could be wrong on that though. I could be wrong on whether - - -

Does your wife receive an income from Katarbi?---I think she does. I certainly know that currently that's the situation, but I can't answer whether that was in the previous year.

And the financials of Katarbi show additionally payments to related entities of $10,000; do you know what that

is?---Sorry, which page?

It's on the tax return for the company on p.3?---One, two - - -

Under paragraph 7?---I think I've lost it. Sorry, it's on the financial statements here?

No, go to the taxation return for Katarbi onto p.3.

MR GRAHAM: That figure of $10,000, Your Honour.

WITNESS: Pardon me, sorry, the question was - - -

MR GRAHAM: That's the figure of $10,000.
HIS HONOUR: Yes?---Item - - -
At the very bottom of paragraph 7, "Payments to related entities" - - -?---Right, yes - - -
- - - 10,000 - - -?---Yes, I see - I see the number - - -
Can you tell me what that is - - -?--I've got to say they're - they're all relatively meaningless to me all those numbers on the entire - - -
You are the sole shareholder and director, aren't you, of the company?---Yes.
Do you not know what $10,000 is being paid to as a related entity of the company?---I know it sounds like a stupid question - when you hit me with a question in court you say, "There's $10,000 on the statement, where's it from?" I would have to say I have no idea - - -
Where's it going to?---Where's it going to, sorry?
Who's the related entity?---That I have no idea. I - I assume it's probably my wife. I haven't looked at her tax return, but - - -
Well you'll see that above salary and wage expenses are shown in the immediate item above of $10,000?---So this is over and above that?
Yes, this is something else. Do you know what it is?---Not off the top of my head. It - it could be - it - it could be - and I say "could" - it could be part payment of a print bill that was owing, or something to that effect, but that's purely hypothetical.
Well, it's not an expense, it's a payment to a related entity?---I - 10,000 is - no, I was thinking maybe it was super but - - -
Well are there any related entities to Katarbi?---As in other companies?
Yes?---No. No, there's - there's no other like cross companies or anything like that. Katarbi is a standard loan, that's it. I - - -
So you've got no idea what related entity could be receiving $10,000 from Katarbi?---On face value no idea, no.
Yes, thank you, you may stand down.
MR GRAHAM: Might Mr Hoser be excused.
HIS HONOUR: Yes.
<(THE WITNESS WITHDREW)
(Witness excused.)
MR GRAHAM: Your Honour, with my learned friend's permission I want to cure an oversight that I made this morning, and I mentioned the Sentencing Act. I haven't looked closely at division 4 of part 3 dealing with fines. For completeness I should refer Your Honour to s.49 - - -
HIS HONOUR: Yes, that was the section I was referring to earlier.
MR GRAHAM: Yes, Your Honour was I think.
HIS HONOUR: And since there is no provision to which that can relate for this offence when it says: "If no maximum was specified that specified s.52" - well, I think 52 takes you back, doesn't it, to - - -
MR GRAHAM: Yes it does and as 52's not going to assist, Your Honour, but I think s.62 still will provide - I'm sorry - simply assuming that there's a power either at common law defined, then this Act is open to the interpretation that the procedural provisions which apply subsequent to the imposition of a fine are available and do apply.
HIS HONOUR: I think there's probably an argument for the procedural provisions applying in that way. What I'm not so sure about is whether the substantive provisions apply as to the imposition of fines which are plainly related to offences which are not of the type of common law offence, which is - - -
MR GRAHAM: Indeed - - -
HIS HONOUR: - - - involved in the Crimes Act or elsewhere. It would seem to me those cases that you referred to must raise a bit of a query as to whether those fine provisions, 49 in particular, do apply.
MR GRAHAM: But Your Honour the point that I was leading to is s.62, which deals with the enforcement of fines against natural persons certainly can be construed

as applying to a fine of any kind, and that would take you to sub-s.(10) which provides for the procedure to be followed where there's a default in payment of a fine - - -
HIS HONOUR: Yes.
MR GRAHAM: - - - and that brings you back within the statutory regime - - -
HIS HONOUR: Yes.
MR GRAHAM: - - - so a community based order - - -
HIS HONOUR: Yes, I would think that probably does apply.
MR GRAHAM: And an order for imprisonment under s.63(1) which I refer to, because it - perhaps not in this case, but certainly could be of assistance to a person facing a fine for contempt of court. It stipulates a maximum amount of length of imprisonment that might follow the non payment of a fine. I haven't done the calculation but it stipulates a maximum of 24 months no matter how large the fine is, and presumably service of that term would result in expiation of the fine, so that would be the end of the matter.
HIS HONOUR: Yes.
MR GRAHAM: I should have referred Your Honour to that before, I was error.
HIS HONOUR: Yes, thank you. Are you going to deal with the question of costs as well?
MR MAXWELL: Yes, Your Honour. It's my submission that there should be no order as to costs. That is put on two bases. The first is that as the Crown conceded from the outset, this is a criminal proceeding. It was conceded appropriately and unconditionally. In my respectful submission, Mr Hoser should stand in no different position from any other defendant in this court on a criminal charge as these are, this is a charge of criminal contempt albeit that it's brought under rules of civil procedure.
HIS HONOUR: You would accept though, would you not, that costs have been treated as an inevitable consequence of all contempt cases. In fact, I can't think of any contempt cases that I've looked at, which hasn't treated the order of costs as being a part and parcel of the feature of the offence of contempt. I mean, it doesn't mean it will necessarily always be granted but its exceptional first and foremost because the general rule is it's solicitor/client costs, indemnity cost, so it is always as different to the standard rule as to costs in criminal proceedings.
MR MAXWELL: Yes, Your Honour.
HIS HONOUR: That's its history.
MR MAXWELL: But in our respectful submission, just as Your Honour has very importantly addressed and developed the law on the defence of truth, so this is a matter in respect of which Your Honour's discretion should be exercised unconstrained by precedent, because as a matter - - -
HIS HONOUR: I should have added, I must say, not just precedent, the provision itself under which the contempt proceedings are brought, expressly provides for costs.
MR MAXWELL: Provides for costs to be awarded.
HIS HONOUR: Rule 74, 75.
MR MAXWELL: But here, as in every proceeding, Your Honour, it must ultimately be a matter of Your Honour's discretion.
HIS HONOUR: I accept that.
MR MAXWELL: It would lie on the party seeking the costs, to persuade the court that precedent notwithstanding, there is some logical basis as a matter of legal policy, for treating a defendant who, in every other respect, is vulnerable to the processes of the law and the punishment powers of this court to an order for costs, which if he'd been charged with armed robbery, for example, he would not be subject to, and in our respectful submission, to refer to the routine nature of an order for costs, is only to underline the anomalous nature of that precedent, in that Your Honour will sentence these defendants for the offences of which Your Honour has found them guilty and they face the full force of that

detriment whatever it is. How, in our respectful submission, could it be just, that they also pay prosecution costs which no other criminal defendant in Victoria pays.

If that alone weren't enough to persuade Your Honour to make no order as to costs, we do rely on the substantial failure of the prosecution and we've made that submission in writing and the arithmetic is, in our respectful submission, very powerful.

This case was in substantial part, misconceived. For 14 or 23 to be struck out without the defence going into its case at all, emphatically demonstrates that. I'm not, of course, and Your Honour will know this, endeavouring to submit out of existence the findings Your Honour has made, they've been made, and the Crown will say that vindicates the bringing of the proceeding and I can't be heard to say that that's not open to them to say.

Nor can I say that the defence has been put to greater difficulty or trouble because of the number of particulars, that took more time in submission naturally, but the case would have had to be run in essentially the same way, whether it had been the five that have succeeded or the 23 with which we started, but in my respectful submission, my client was entitled to defend the proceeding vigorously and has been vindicated by Your Honour's dismissal of nearly 80 per cent of, what we can call the charges, and having done so, it would be doubly unfair, in our respectful submission, for him nevertheless to be ordered to pay the costs of the prosecution. That's all we have to say on costs. If Your Honour pleases.

HIS HONOUR: All right, thank you.

MR MAXWELL: There are financial issues going to fine, they would also go to costs, naturally, the costs, even on the tax basis, of a four or five day hearing would be substantial, and if Your Honour was not persuaded to make no order as to costs, then we would ask Your Honour to take into account the likely quantum of the costs in fixing any amount of a fine.

HIS HONOUR: Yes. Yes, thank you.

MR GRAHAM: May I be heard on the subject of costs, Your Honour. My learned friend is wrong in his first submission in saying that because this is a criminal proceeding, there is a general rule, as it were, that costs are not to be awarded. The High Court in Hinch's case, 164 C.L.R and the passage at p.89, gave written reasons on the question of costs in that case in the High Court. If Your Honour goes to the bottom of p.89, Your Honour will see that an analogy had been attempted to be drawn about costs in criminal cases, citing R v. Martin, which I understand to have been a case arising from a trial on indictment. Their Honours went on: "However, in our view ... (reads) ... ex parte Roach." And then they go on to refer to a case in the Privy Council which was concerned with the distinction that when an appeal following a trial on indictment, that no proceeding for contempt of court, is the distinction we seek to draw.

I should say two things following my reference to that case, Your Honour. Firstly, the passage which appears in p.89, needs to be read, bearing in mind what the High Court later said in Witham v. Holloway. I haven't the reference to it, but Your Honour will recall that was what the court said that for certain purposes a distinction between criminal and civil contempts should no longer be observed in Australia, but it doesn't detract from the proposition which appears in the passage that I've quoted.

I suppose also I should refer to what the High Court said in Latoudis v. Casey concerning costs in criminal cases in summary jurisdiction. I haven't brought that reference either, and I apologise. And, finally, and perhaps most importantly, there is Order 75.14 to which Your Honour referred, where there is an express jurisdiction. It simply indicates as Your Honour instantly agreed that it's a matter of the discretion of the court.

It's true, as Your Honour observed, that costs are normally awarded against an unsuccessful party in contempt cases, whether it be the unsuccessful prosecutor or the unsuccessful defendant.

There are a host of cases, and I don't propose to take Your Honour through them, where costs have been awarded in this court and by other courts in Australia in contempt matters.

The only question which might exercise Your Honour in this case, leaving aside the question of the consequences of the Crown not having been totally successful, is whether costs should be on a solicitor/client basis or on a party/party basis, I've been provided with a reference to a case before Your Honour of R v. Spectator Staff Pty Ltd & Ors 1999 Victorian Supreme Court 107, where you awarded party/party costs following an admission of contempt, publication of an apology and other mitigating factors. Your Honour said, "There is no fixed rule or practice that costs be awarded on a solicitor/client basis," we accept that, but each case has to be judged on its own merits.

Another case not so long go involved the Herald & Weekly Times. Solicitor/client costs were paid, but by agreement. But it's difficult to discern a principle from the cases that we've looked at, Your Honour.

On the question of the degree of success or not, of the prosecution, we say, Your Honour that one doesn't add up the particulars, one looks at the whole picture. There weren't 23 charges, there were two. One succeeded, and one, a lesser charge, involving only one particular, failed, as did the related particular in the first charge. We submit that the Crown has enjoyed substantial success in the matters concerning Count 1 and costs should follow that event. If Your Honour pleases.

HIS HONOUR: Thank you.

MR MAXWELL: Your Honour, just briefly in relation to that. I overstated my learned friend's concession with respect to the criminal character of the proceeding. At p.6 in the opening, the learned solicitor said that we were agreed, as we were, that the contempt alleged was a criminal contempt and that the standard of proof was the criminal standard.

It is important, however, to note that those matters apart, the proceeding was conducted as a criminal trial before judge alone in these two additional senses. One, that the submission of no case to answer was treated in accordance with the principles applicable to that submission in a criminal trial, and secondly, notwithstanding that orders had been made that the respondents file affidavits if they propose to give evidence.

The Crown, properly, did not raise any objection to the defence, making the decision upon the conclusion of the no case submission and Your Honour's ruling about giving evidence and the affidavit was tendered then and there, that being consistent with criminal character rather than civil where the material would, in the ordinary way, have had to be filed in advance.

HIS HONOUR: Yes, thank you.

MR MAXWELL: And it's ultimately a matter for Your Honour, of course, how to view the apportioning of the charges, but the notion of the successful prosecutor or the successful defendant, in our respectful submission, doesn't readily apply in the events which have happened.

Your Honour, for someone like Mr Hoser whose currency is the written word, the judgment Your Honour has delivered is, in itself, a very significant punishment, because Your Honour has found - or the adverse findings which Your Honour has made, go to the heart of that by which Mr Hoser, as Your Honour has noted, sets great store, that is, that he is a genuine, sincere, well intention critic of the judicial and police system, who sees himself as acting for the betterment of those related systems or for the criminal justice system as a whole.

HIS HONOUR: Well, who says that he sees himself on that basis.

MR MAXWELL: Yes, Your Honour. He is someone, as Your Honour knows, who has made a virtue of supporting his claims by specifics, and a virtue of having those sources identified and unusually publicly accessible. Your Honour knows that footnotes in books are only a pointer to the library where material might be found. Your Honour has made a finding that it's unlikely that readers of these books would have occasion to check but the fact that the material is itself electronically accessible, puts it in a most unusual category compared to the ordinary run, as I say, footnoted material, where a much greater degree of diligence would be required.

Your Honour has said that Mr Hoser is selective and unfair in his accounts of events or the characterisations which he places on them. Your Honour has found that he makes exaggerated claims based on flimsy evidence, and that he is manipulative in his presentation of material.

The effect of Your Honour's judgment is publicly and authoritatively to discredit Mr Hoser in those very matters on which he has staked his reputation as an advocate of reform of those systems.

In that way, unlike the run of criminal matters that Your Honour would deal with, the nature of the finding, but more particularly the terms in which Your Honour's careful judgment has couched those findings, have their own punitive effect, and in a way which will continue indefinitely into the future. That is to say, every time in the future, Hoser says, "Believe me this is what happened," someone will say, "Well, the Supreme Court didn't believe you, why should we?"

We add by way of reinforcement of that, Your Honour will know that there has been and will continue to be, press reporting of the judgment and no doubt of the penalty, in which the adverse nature of the findings has been exposed far more widely through mass circulation tabloid newspapers than the books themselves.

A related point, Your Honour, is that what Your Honour has said in respect of the statements concerning Judge Neesham and Judge Balmford, is itself, to a very large extent, though naturally not entirely, but to a large extent, curative of any damage caused by the publication.

Your Honour, in our respectful submission, correctly, has drawn cautious views about the status of any damage and we've referred to those passages in the outline.

Your Honour has found that there has been no discernible damage to the system in the two years and likewise that it would be impossible to know in respect of any given reader, whether that reader would have had his or her view of the courts reduced, diminished, by virtue of these publications, and we do rely heavily on those findings in counterpoint to Your Honour's critical finding that the statements had the requisite tendency to cause such damage, but those other inconclusive statements about actual damage are relevant, in our respectful submission, to the seriousness or otherwise of the contempts.

In that area, which is unknowable, of the diminution of the court's reputation or the reputation of those judges, Your Honour's judgment, which is on Mr Hoser's web site as well as on this court's, has already begun to undo that damage to restore the balance, to say, or to record, as was the case, that it was not asserted in Mr Hoser and his company's defence that there was actual bias on the part of those judges as a matter of truth, but it was put as a fair comment case, that was how I saw it from my position as the defendant in the respective courts, and Your Honour has, in the findings, scotched altogether, any hint of a suggestion that the allegations of bias or pre-judgement were justified.

It might be said to be a bit circular that a defendant who has been convicted relies on the judgment convicting him in mitigation of sentence, but in our respectful submission, not so. The fact of prosecution and

conviction is powerful in itself. The fact of a judgment expressed in trenchant terms in respect of this individual's conduct, but as I am submitting more particularly in relation to the substance of the allegations made against those judges, is itself - the publication of the judgment is itself a factor in assessing what the consequences of the offending conduct are.

Your Honour has found that Mr Hoser did intend to bring down the reputation of the courts as part of his avowed objective of asserting that his conviction for perjury was unfair.

But, in our respectful submission, the fact remains that consistently with Your Honour's finding, his attacks were specific rather than general, and it is important in mitigation to draw attention again to the disclaimers made in the book and in his evidence, his evidence as Your Honour has noted, only implicitly challenged by the Crown not explicitly. And what he has said is, "The fact that I'm criticising some particular people in the system in these books, does not mean that I am attacking the system in its entirety, and I'm not."

Your Honour has found that those attacks in two of the instances, fell into the category of criminal contempt, but in our respectful submission, that doesn't wholly discredit his, or it doesn't necessarily discredit his statement that he has a belief in and a regard for the justice system, albeit that he has, in all the ways Your Honour has criticised, selectively, manipulatively, portrayed these particular events concerning him so as to show the judges in question in a dishonourable light.

That is, in our respectful submission, compatible with it being a true and sincere statement that he does not want others to experience the unfairness which he perceives he experienced and that is a prime objective apart from vindicating himself for the publication of these books.

It is at that point in the submission that we draw attention to what's in the section of the outline on mitigating factors, and Your Honour, in particular, paragraph 13 and 15 which I will come to - I am conscious of the time, Your Honour, I'll be about another 20 minutes.

HIS HONOUR: I think I will break and return at 2.15 in that case.

LUNCHEON ADJOURNMENT

(Eames J)

UPON RESUMING AT 2.15 P.M.:

MR MAXWELL: If Your Honour please. I was about to take you to paragraph 13, and this is a submission in mitigation, but also in support of the earlier submission about the sincerity of Mr Hoser's concern with aspects or elements of the criminal justice process.

In our respectful submission, what Your Honour has said in the judgment about the matters we have identified, in particular at (a) and (b), is of considerable public importance. That is to say in the course of considering the tendency of these passages in particular and the approach of the writer in general, Your Honour has accepted that there are real issues about, on the one hand, the tendency of certain things that lawyers take for granted to create serious misapprehensions in the ears and eyes of the lay observer and in particular the unrepresented defendant. And likewise, as to 13(a), what Your Honour has said in strong terms about the way that trial was conducted by the prosecutor on the material that Your Honour has seen, what Your Honour has said there is salutary and we trust that it will be read by all those who have that heavy responsibility of being prosecutors for the Queen.

In those two respects in particular, but also in relation to the tape recording of proceedings where Your Honour has described Mr Hoser's preoccupation with that issue as reasonable, what Your Honour has not accepted is the inference which he has drawn from the refusal of taping, but Your Honour has, as Your Honour did in argument, accepted the patent good sense

of having tape recording, but in particular in relation to (a) and (b), Your Honour has identified the kernel of truth which underlay the impermissible connotations, and it's the latter for which Mr Hoser has been found guilty. The former, which is the exposure of which, that is to say, the underlying unfairness as he observed it in the one case, because of the apparent cosiness between the prosecutor and the jury in the other, from the statement that the criminal trial is not a search for the truth, it was part of his avowed purpose to expose those matters, and Your Honour has vindicated that part of his exercise, in our respectful submission.

Likewise in relation to paragraph 15 which as a matter of the order should probably have followed 13, because it's a submission to the same effect, I've already referred to the significance of what Your Honour has said in the reasons about the defence of truth, the analogy drawn with the raising of a defence in an indictable criminal trial and the shifting of the burden to the prosecution, and in our respectful submission, implicitly what Your Honour has acknowledged there with the heavy qualifications that Your Honour has imposed about doubting or regarding the allegations of actual corruption as improbable, Your Honour has implicitly said this was a matter which merited investigation.

That is to say, if this - if the Crown wanted to convict these respondents of an offence in respect of those matters, then it fell to them to prove that what he had said was untrue. That's what Your Honour has found in terms. Not a task for the prosecution essayed as was candidly admitted in the evidence.

Your Honour, with respect, correctly applied what the learned solicitors aid that if the statement of taking bribes was true, then it couldn't be contempt. Your Honour gave this respondent the benefit of that doubt, not finding the corruption allegations proved in any way to the contrary, expressing the gravest of doubts about them, but implicitly saying as a mater of justice, this ought to have been investigated if it was to be said that he should be convicted of these matters.

It is, in our respectful submission, in the public interest that Your Honour has said that. Who knows how the Crown will react to what Your Honour has said about that. It may be that the allegations will again go uninvestigated. But Your Honour's highlighting of the sufficiency of the material in the unchallenged Hoser Files book, that is to say the unprocessed book, to shift the onus, is of great public importance and is again, in its own way, a vindication of Mr Hoser having raised that matter publicly.

As to the matters in paragraph 14, Your Honour will accord such weight to those as seems appropriate, having heard and seen Mr Hoser now on two occasions, and it is important, in our respectful submission, that he gave evidence in his own defence and he has again given sworn evidence today - this is 14(a) - in respect of the financial position.

14(c) is, it might be said, an equivocal matter in that it is not the submission for the respondents that if you have a preoccupation with a certain grievance that entitles you to a more lenient view of what you're entitled to publish.

Your Honour hasn't taken that view. Your Honour has said: "I accept that he is aggrieved and that he is entitled to proclaim to the world that he was wrongfully convicted and he is entitled for that purpose to be as selective as he likes. But," Your Honour then asks the, with respect, the only question which matters in this proceeding and that is whether, in so doing, he has crossed the line into criminal liability and Your Honour has found that he has. So the offence is committed, but in our respectful submission, it is a mitigating factor, that he has been writing in these books passionately about his own grievances.

We submitted that those self-evident attributes of the book would reduce the impact on the sensible reader, and Your Honour has expressed views about that, but we do, for the purpose of mitigation, reiterate that submission that Your Honour has concluded as a reader of this book, that he has a highly developed belief that he is the victim of multiple conspiracies. He is, to a degree, paranoid. He believes - I think Your Honour put the question to him in the witness box: "Isn't the difficulty that you see things through this perspective that they're always out to get you and everything has a hidden intent which is antagonistic towards you?" And that's what Your Honour has found, that he does have that distorted view of the world. It is not the fact that he is the victim of multiple conspiracies, but Your Honour has found that he believes he is, and this is a highly developed belief, and we use the phrase, "can't take a trick" and in our respectful submission, it's a belief which is not without some reasonable foundation, given his run abouts in proceedings at almost every level.

But the character of the writing in that sense is, in our respectful submission, relevant to the degree of opprobrium which the court would attach to writing which had crossed the line.

The crossing the line when you are passionately advocating your own cause is less deserving of censure than crossing the line in a cool, dispassionate, academic article about somebody else's trial, and that leads me, Your Honour, to the matter of remorse, and the concession unconditionally made before.

Your Honour, the nature of this case is that in view of the evidence which Mr Hoser gave and the submissions which I made, Your Honour would appreciate that remorse is both - an expression of remorse now would be implausible. This would have been an entirely different case if, and there are some in the authorities that Your Honour has had, if this was something said hastily and later regretted, and then a defendant might say, "I'm sorry that I said that, I meant no offence," or some such.

This case has been conducted for the respondents on the basis that they meant what they said, it was a deliberate publication, and the defence was that it was within the range of criticism which the cases permit, criticism made, so it was contended, in good faith on the basis of events which had occurred and giving expression to Mr Hoser's perception of those events.

Your Honour has found against him as to good faith, but he swore before Your Honour that he was in good faith, that he had checked the facts, that he based his opinions on those facts, that he did honestly hold those opinions.

If I was to stand up now and say, "Well, Mr Hoser now admits that he didn't really believe any of that and is sorry for having said things which he didn't mean," Your Honour would look askance.

A different matter as to what his future intentions are, that's an altogether different question which I will come to, but Your Honour would not find it credible in our submission, for a man of this degree of commitment to his task, that he would publish two times 700 pages on topics of this kind. The fervour is only too evident in the pages and in the answers he gives in this court. So he's not saying through me that he regrets having published those books, he doesn't. And for the reasons we've already submitted, Your Honour should be satisfied that some good has come of their publication. And that there is a public interest served by those who regard the system as having malfunctioned saying so.

The system, in our respectful submission would be aided if others who bare grievances - and there are plenty - had the time or the sources, or the articulateness to do so. None of which is to say that someone who does that is entitled to cross the line. But his evidence was that he held those beliefs and opinions, and he believed the factual material to be accurate,

that was his position at trial, and it is his position now. Again, to avoid a misunderstanding, that does not mean that my clients don't accept Your Honour's findings, they do.

Your Honour has made those findings, not satisfied that this was in good faith and for all the reasons that I highlighted earlier, took the view that this was done selectively, manipulatively and so on. The other aspect of this, Your Honour, is the quantitative point of about 18 out of 23 having been dismissed is that there are only very small portions of one very long book, and no portions of the other very long book which are the subject of conviction.

Mr Hoser would have said at the start that he meant to be highly critical of those judges that he criticised for the reasons he gave. He would say that now. Your Honour said, no, that was not - unlike some of the ones where the particulars were dismissed, that was across the line. But that's a view going to - and he didn't disavow any intention to be critical. He wanted to argue, as the books made clear, that these decisions against him were wrong and unfair.

So Your Honour would not expect him to have changed his view of that. What Your Honour has found him guilty of is expressing that himself, unfairly - attributing unfairly improper motives to the two judges. But with those exceptions, these books can continue to be sold. That question was asked in cross-examination and answered affirmatively, that is to say these books will continue to be sold.

But since it was not apparent to Your Honour from that evidence what the status of the offending passages would be in the future, I'm instructed to give an undertaking to the court on behalf of the respondents who are aware of the significance of an undertaking by counsel to the court, that is to say breach of it carries its own contempt consequences. That future copies of book 2, that which contains the five offending passages will have those passages blacked out. That of course, Your Honour, is subject to the steps being put in train upon the conclusion of this hearing for that to occur, but Your Honour understands the tenor of that undertaking. It is not to be thought that the books will continue to be sold with the offending passages in them.

Now, Your Honour, our learned friends have tendered some documents from Mr Hoser's web site, and as we would understand it, in view of the position on remorse, the only document relied on is the Exhibit AOB15, being the remarks published on 29 November. Your Honour will of course read that and see that Mr Hoser has expressed in strong terms, criticisms of the judgment. Your Honour will, in our respectful submission, conclude that there as in other respects in relation to the offending passages, it was at best for Mr Hoser poor judgment to publish any criticism of the judgment, and Your Honour would be entitled to form that view.

HIS HONOUR: (Indistinct) of the judgment. (Indistinct) of course can deal with that if they will, or he can publish what he likes about the judgment. What troubles me is, the demonstration yet again of an incapacity to read the written word and accurately convey what it says.

MR MAXWELL: I accept that, with respect. And what's important, Your Honour - - -

HIS HONOUR: Which rather suggests that one would have to be expecting that the sort of publications that got him into trouble on this occasion are of great risk of being repeated.

MR MAXWELL: Yes, Your Honour, I'm about to address that matter. I understand Your Honour's concern. What Mr Hoser wrote on that day is to be categorised in the same class as things said on the steps of the court, that is to say, remarks made in the heat of the moment and what Your Honour would understand is the shock of conviction. Remarks made without - just as a matter of the time - the

benefit of a careful review, let alone, and in this sense, poor judgment again, the benefit of considered legal advice about the judgment.
HIS HONOUR: Well, in fact it rather demonstrates the contrary, I think, that he had good legal advice to avoid doing the very thing that he done, and rather than it being material written off - or a statement made in the heat of moment, which as you say, is the door stop interview type which has got people into trouble before even in those circumstances. This is one which is much more calculated, you have to sit down and do some typing. And when you sit down and do some typing and say, "Now, I'm going to say more later on. This is as much as I can get away with in effect at the moment, because of my legal advice."

It doesn't fill me with a lot of confidence. I'm not troubled about the fact that he's referring to me. My concern is the administration of justice - - -
MR MAXWELL: Yes, Your Honour.
HIS HONOUR: - - - it carries a very strong suggestion that even with the best of advice - as I'm sure he got - he's incapable of listening to it.
MR MAXWELL: Well, Your Honour, the fact is that it wasn't - I withdraw that. The advice to which I was referring, that is to say advice which Mr Hoser hadn't had, was advice which none of us was in a position to give him on that day, because of the length and details of Your Honour's reasons. Yes Your Honour can infer from what's been published that interim advice had been given with respect to public comment.

But Your Honour can, I trust, accept from me that at the time of that publication he had not had the benefit of considered, or advice from advisers who had had a chance to - - -
HIS HONOUR: I accept that - - -
MR MAXWELL: - - - (indistinct) Your Honour's reason - - -
HIS HONOUR: - - - obviously so.
MR MAXWELL: And that is - it's therein, in our respectful submission, that Your Honour can derive some assurance, no guarantee, plainly, but Your Honour knows that on Mr Hoser's behalf his legal representatives have attended carefully to the issues in the case, and are in a position to explain to Mr Hoser in very clear terms what our view is of the judgment, and what our view is of the criticisms made in that document. Plainly it's not appropriate for me to canvass any of those matters in this submission, but Your Honour must, in our respectful submission, allow as a real probability, not a certainty, that Mr Hoser - who is, as Your Honour noted in the judgment - is an intelligent man, will attend closely to what we tell him about the basis of Your Honour's judgment, findings, consideration, expressions of view

and so on.

I can't make the point any better than that, but the risk of which Your Honour speaks is in our respectful submission, not nearly as great as Your Honour might be entitled to infer if I hadn't said what I've just said about what is to occur between the respondents and his legal advisers, myself included, in the days which follow. Viewed objectively, whatever - let me put that differently - Your Honour would not be surprised that someone who's been criticised - in the way Your Honour has found it necessary to criticise Mr Hoser in the judgment - would be upset by that.

That's an altogether different thing from saying that the findings were without justification. I don't of course wish to debate those, we accept Your Honour's findings. But for the reason I mentioned at the beginning of my submission, Your Honour's judgment goes to the heart of what Mr Hoser stands for, and what he put himself forward in the witness box as standing for, and has discredited him and Your Honour would not be surprised that he would have felt that keenly on the day on which that judgment was published.
HIS HONOUR: Well, he might have, but it didn't appear to trouble him so far as those persons who are referred to in his book. I mean, there may be passages in

there which didn't amount to contempt, but they certainly were passages which were put into sting I would have thought.
MR MAXWELL: Yes, Your Honour, there is a sting in the language on any view. But accepting that, the point I simply wish to make in seeking to mitigate the adverse effect of the publication of last Thursday is that it was at a time when the sting was at its most acute for my clients.

Your Honour, might I then move on to sentencing options. Does Your Honour have - - -
HIS HONOUR: Can I just ask you about the personal circumstances which are referred to - I'm not sure that I've ever been told how old Mr Hoser is?
MR MAXWELL: In time honoured fashion I should have begun the plea by saying my client is 47 years and - 39, Your Honour.
HIS HONOUR: Thank you.
MR MAXWELL: And as Your Honour can see, and as he verified in the witness box, he is married with two small children. He is the sole breadwinner as Your Honour has had clarified through the financial statements, his wife is the recipient of income from the business, but - and so to that extent, paragraph 16 should be qualified, but Your Honour has heard the nature of Mrs Hoser's employment; that is as providing administrative services and those services, it would seem, are ancillary to a publishing business which if the writer is not himself active in the business, will not itself function as a business.

And Your Honour will know that paragraph 16 is directed principally at the question of imprisonment because if Mr Hoser were to be gaoled for any period, his wife would be left in the position of caring for the two children on her own, and with the business itself stalled, although again one would concede that the books which are already on sale, would presumably continue to be sold at some rate.

Your Honour, Gallagher v. Durac - I don't have the tab number, it was in this folder - Your Honour there's a useful discussion at p.245 in the joint judgment of the reasons, or permissible reasons for imposing a sentence of imprisonment.

Your Honour will see, in the second paragraph, an independent ground on which special leave to appeal was sought. And the point taken for Mr Gallagher was that a sentence of imprisonment had been imposed, not because it was merited, but because of a belief that Mr Gallagher would not pay a fine out of his own funds, because the Union would pay, and Their Honours say the present case was one whose circumstances were most exceptional. "The applicant in the course of the interview made it clear that the Federation would not pay the fine." And it can be inferred from these further remarks that moneys to pay that fine would be provided by employers. "The Full Court did not rely on later circumstance, although it was entitled to do so," and then follows the passage we rely on as of general application. "The object of the imposition ...(reads)... and will not be repeated."

"In the present case the applicant, who - " I interpolate, unlike Mr Hoser, "Did not go into the ...(reads)... but has chosen not to do so."

And then again we rely on the next sentence as of general application. "If the court comes to ...(reads)... only an additional consideration."

Now as to those matters, Your Honour, it is our respectful submission that Mr Hoser will personally suffer and will be deterred by a fine. He has given evidence that the publishing business, putting it generally, does not return a large income.

Your Honour has seen the figures, with the exception of the unexplained extra amount to a related party entity, Your Honour should accept the financial material, financial information, as giving a fair picture of the financial circumstances of this family, and the family company.

And there is a substantial sum shown for sale proceeds of the books in the first year of their sale. And the figures, in our respectful submission have a ring of truth about them, both because of their content, and because - that is to say the figures look exactly as you would expect a set of figures for a small trading company to be, but also because on the face of them, they are copies of tax returns and copies of accounts prepared as the witness said, in the course of a relationship of more than a decade with an accountant.

A question was raised about a possible inconsistency with the affidavit in the defamation proceeding; I ventured an explanation for that, and Mr Hoser, Your Honour will have noticed, a conniving witness might have said, "Well, I heard what Mr Maxwell said, and that was right." But he gave a fuller and candid answer, in our respectful submission, by saying, "Well, when I use 'margin' it might mean one of several things, but - " which he explained, and then - "But when I'm talking about a profit of $20, I mean, well, the printing's $8, and there's $2 for photographs and so on, which is 10, and I sell them for 30, so it's a margin of 20." Which is what he put in the affidavit in the other proceeding. And that as I had speculated, is what Your Honour would see in the raw gross profit figures on the front page of the financial statements. That is, cost of publication and proceeds of sale, giving you that $60,000 gross profit. Then you work out whether there's any net profit, by bringing in all the other business expenses which appear in the profit and loss statement.

So there is in our respectful submission, a corroboration, that it's possible to have no net profit and say truthfully to a court, "We make $20 on each book," because that's exactly what they do make. But as I tried to explain to Your Honour before, that's the net revenue against which all the costs of the business have to be set, and once a salary notional or otherwise, is paid to husband and wife, then there's no net profit, though there was a gross trading profit of a substantial amount.

And if Your Honour accepts those figures, then as I submitted earlier, this is a low income family. The combination - let's assume the 10,000 - there's a total of 45,000 - 25,000 for the writer's fee, 10,000 to Mrs Hoser, 10,000 to a related entity; 45,000 before tax.

And that is a modest family income on any view, in our respectful submission. So that a fine will directly and seriously penalise this family, punish these respondents, and those who - and the dependants of Mr Hoser. No question of anybody else stepping in and paying it, or any refusal to pay. This will be - this will hurt.

And Your Honour's entitled to assume that a fine fixed so that it does hurt in that way, will be a very effective deterrent. Because however much of a crusader Mr Hoser may perceive himself as being, it's a very quick way to go out of business to publish books in respect of which substantial fines have to be paid.

And Your Honour has defined very clearly in the judgment, what the line is, though in every instance there will be a judgment about whether it's been crossed or not, but that - the combination of a financial penalty and that definition of what's permissible, and what's not, will work in our respectful submission, subject to the kind of advice that I foreshadowed, a very effective deterrent.

Your Honour had an opportunity to observe Mr Hoser in the box this morning, visibly upset. Your Honour makes your own judgment about Mr Hoser, as Your Honour has, having seen him, but that in my respectful submission is to be taken as an indication that already this has had a very significant impact on him.

Your Honour will know that confronting the possibility of going to gaol and leaving wife and children on their own, has a very powerful

effect in concentrating the mind, and Your Honour would be entitled to say to me, "Well, that's just the way it goes," but I'm conveying to Your Honour that even having come this far, Mr Hoser has had to learn a very salutary lesson about these kinds of publications.

Your Honour please.

HIS HONOUR: Yes, thank you.

MR GRAHAM: Your Honour, I don't wish to be heard in reply and I don't think I'm entitled to be heard, but there is one matter that catches me totally by surprise, and that concerns the profit undertaking.

I would simply say to Your Honour that that position should be rejected at once. A last minute proffer and something which cannot be - and is unlikely at least to be implemented.

It was imprecisely formulated. It deals with books that are no longer being printed, with books which are out in the public domain as we know; whether they're on bookshelves for sale or not, we don't know.

HIS HONOUR: I might say, Mr Graham, just by looking at the books, it's apparent that there's been other occasions on which sections have been deleted and blacked out. I'm perfectly prepared to proceed on the assumption that the undertaking has been given with advice that as was said to me and that I should take it on face value that it will be - the extracts will be deleted.

I mean, perhaps more significant in some ways, something which might be taken as reflecting that Mr Hoser has the courage of his convictions, even if they're pointed out to him repeatedly that he appears to be incapable of relating facts to statements which are read. But it might have been if he wanted to go further and away, which might have gained him rather more kudos would have been to say, "Well, as to those other passages, which weren't contempt, but which are nonetheless plainly been regarded as being on their face, defamatory, wrong and having no basis whatsoever, I'm prepared to go further and remove all of those as well."

Now, he's not saying that, and given that he's not saying that, I will take it on face value that he will have removed those passages and the line in the sand as it were is, "Until a court tells me that it's in fact contempt, then - " which he's perfectly entitled to do - "Then it's not contempt." And the only relevance of that factor, it seems to be, is the question which I discussed with Mr Maxwell, and that is the question of how confident can I be that if he is choosing to run that very narrow line in future, with the best advice in the world, he is not going to fall over it.

MR GRAHAM: Your Honour, I don't need to say that. It was the last point that I wished to add, that one can have, with respect, little confidence, despite the quality of the advice that Mr Hoser has undoubtedly received, and the confidence that one would have, and the quality and accuracy of that advice; all we can say is that we can have no confidence that it would be taken into account or implemented.

That's all we wish to add, Your Honour.

HIS HONOUR: Yes, all right. I'll consider the matter. I won't be able to give a decision today, or for that matter, tomorrow now, but I will give my decision to you on Thursday. I was about to say Thursday at ten o'clock. Is that a difficulty?

MR GRAHAM: It is, Your Honour, yes. I have a matter starting at 10.15.

HIS HONOUR: I'll make it earlier if that's convenient.

MR GRAHAM: Yes, Your Honour, would 9.30 be convenient.

HIS HONOUR: I think that's okay, yes. I'll make it 9.30 Thursday.

MR GRAHAM: Indebted to Your Honour.

MR MAXWELL: My learned junior will be here, Your Honour.

MR GRAHAM: I'm indebted to the court for that indulgence.

HIS HONOUR: 9.30 Thursday I'll give my decisions then.

ADJOURNED UNTIL THURSDAY 6 DECEMBER 2001

TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF VICTORIA

COMMON LAW DIVISION

MELBOURNE

THURSDAY, 6 DECEMBER 2001
BEFORE THE HONOURABLE JUSTICE EAMES
No 5928 of 2001
B E T W E E N: THE QUEEN (ex parte ATTORNEY-GENERAL FOR THE STATE OF VICTORIA)
Applicant
V.
RAYMOND TERRENCE HOSER
First Respondent
- and

KOTABI PTY LTD
Second Respondent

MR H.JOHN LANGMEAD, SC, appeared on behalf of the Applicant.

MR C.M. MAXWELL, QC, with MR D. PERKINS, appeared on behalf of the Respondents.

S E N T E N C E
HIS HONOUR: I have found both respondents, Raymond Terrence Hoser and Kotabi Pty Ltd, guilty on one count of contempt by scandalising the court. It is now my task to impose sentence upon them.
The contempt in this case relates to the book titled "Victoria Police Corruption 2", written by the first respondent and published by the second respondent. The Particulars of contempt relate to statements made concerning two County Court Judges before whom the first respondent appeared in criminal proceedings. The details of the statements published and the circumstances in which they were published are fully set in my written Reasons for Decision given on 29 November 2001, and it is therefore unnecessary that I deal with them again now.
I conclude that, as to both Judges, the published statements did not constitute fair comment made in good faith. The comments amounted to serious and baseless allegations of bias and impropriety against the Judges, the material being published with malice.
These proceedings were brought pursuant to r.75 of the Supreme Court Rules. Punishment is prescribed by r.75.11 which prescribes that for a natural person the sentence may be by way of imprisonment or a fine, or both. In the case of a company punishment may be by way of a fine or sequestration, or both.
The Crown has proved two prior offences against the first respondent: a conviction for Perjury in the County Court on the 4 October 1995 at which time he was sentenced to six months' imprisonment with two months suspended for two years; the second prior offence was at Melbourne Magistrates' Court on 9 November 1994 when, without proceeding to a conviction, he was fined $400 with costs on a charge of assaulting police.
In his submissions on penalty Mr Maxwell QC, Senior Counsel for the respondents, stressed the fact that many of the passages which had been relied on by the Crown as Particulars of the offences were found by me not to constitute contempt, and that in the course of examining the Particulars I had identified a number of important issues concerning the administration of justice. Thus, he

submitted Hoser's criticisms had served a public interest in this way. Mr maxwell submitted that whilst I found that the publications had a tendency to undermine the administration of justice, there was no evidence that they had actually done so.

Counsel submitted that the first respondent had been penalised to a significant degree by the mere fact of my adverse findings as to the credibility and integrity of the published statements in his book. He submitted that the contempt was committed in circumstances where Hoser felt a deep sense of grievance as to the convictions which led to the publication of the criticisms which constituted. the contempt.

The instances of contempt in this case are serious, in my opinion. They were calculated, and were widely. disseminated, and Hoser and his company earned substantial profits from publication of the book in which they were published.

Contempt proceedings are not brought in order to soothe hurt feelings of judges or magistrates. The enforcement of the contempt power is for the benefit of the community, not the judges or magistrates. The rule,of law depends, to a substantial degree, on public trust in the integrity and impartiality of its judicial officers.

Prom time to time judicial officers may make decisions which are wrong or unfair, and the appeal system is intended to correct injustice. No-one would pretend that the appeal system is infallible, and the system of law in a democracy must allow for close scrutiny and robust criticisms of the failings of the system. But no system of justice can be unaffected by baseless and malicious allegations of bias and impropriety made against judicial officers who, by virtue of their position, are unable to respond to the criticism. People who make such baseless criticisms are not performing a public service. They are undermining a vital public institution.

In this case, I have concluded that Mr Hoser's primary motive in making these baseless comments was not the public interest, but self-interest, in seeking to cast doubt on his conviction for perjury.

There are a number of reasons why a sentence of imprisonment would seem appropriate in this case. The Solicitor-General submitted that this was a case where personal and general deterrence were important considerations, because of the risk of there being re-offending behaviour by these respondents and to discourage any other persons tempted to commit such contempt.

The first respondent does not offer any apology for his contempt. He makes no claim of remorse. He maintains the position that his comments were made in good faith and were fair comment. Through his counsel, however, Mr Hoser has given an undertaking to the court that he will ensure that the five passages to which this offence relates will be blacked out in any future copies of the book before it is sold. He did not offer any undertaking to remove those other passages which I identified as being untrue or unfair statements, but which did not cross the line from defamatory abuse into contempt of court.

It seems to me that, notwithstanding what I am sure will be good legal advice, Mr Hoser may continue to publish material in the sort of reckless manner that has brought him to court an this occasion, and will be at risk of committing further contempts.

I had tendered before me statements made by Mr Hoser on his Internet site on the day I gave my Reasons for Decision. As he there made clear, he had received legal advice not to publish such statements about the case in that way; but he chose to do so and in the process demonstrated, once again, his inability to accurately report the findings or rulings of courts, which displease him, and his willingness to employ ill-considered language to make those inaccurate points. Such a response gives me very little confidence that he will avoid committing further acts of contempt in the future.

The Solicitor-General submitted that the first respondent should be sentenced to imprisonment, but that such a sentence might appropriately be wholly suspended.

He submitted that upon such a sentence for Hoser and upon an order for costs being made on an indemnity basis as against both respondents, the company should be convicted without further penalty. Mr Maxwell, for the respondents, submitted that there should be no order as to costs, and that both defendants should only be fined.

Notwithstanding the risk of further offending, and those aggravating factors which I have identified, the factors identified by Mr Maxwell in mitigation persuade me that imprisonment is not the appropriate punishment in this case. The principle that imprisonment be a last resort is no less important with respect to contempt than with respect to other offences, in my opinion. That being my conclusion, I also do not consider that it would be appropriate to impose a sentence of imprisonment even if I intended to then wholly suspend that sentence, and whether or not that suspended sentence was to be imposed in addition to a fine. I have concluded that as to both defendants a fine is the appropriate punishment.

The first defendant is aged 39 years and is married with two small children. The respondent's taxation returns for the financial year 1999/2000 disclose that Kotabi had income from sales of books of $112,775, and gross profit after deduction of costs of sales of $62,734. The taxation return for the company lists expenses which reduce that gross profit to a zero net profit.

When questioned, Mr Hoser claimed a total lack of knowledge of the accounts of his company, even being uncertain initially whether his wife drew a wage from the company in that financial year. The records show that Mr Hoser drew a salary of $25,000 per annum from his company, Kotabi, and that an employee (whom I conclude was his wife) earned a salary,of $10,000 from the company. In addition, there was an unexplained sum of $10,000 shown as having been paid to a "related entity". Notwithstanding the fact that he is the sole director and shareholder of the company, Mr Hoser professed that he had no knowledge of any related company or of the circumstances of such payment.

I was not shown any financial records for the financial year 2000/2001. Mr Hoser claimed that the income at Kotabi will be substantially reduced in that financial year, with sales of books being in the order of 30 to 40 per cent less than in the previous year. In the absence of any records, I place little weight on his assertion in that respect. I was given no information as to any significant debts which he might have, or as to his asset situation. In my view, Mr Hoser should be regarded as being a successful author and publisher of books, and to have a family income of not less than $45,000 per annum.

I do not consider that he has provided me with a full and frank disclosure of his financial situation.

In my view, whilst punishment by way of fine rather than imprisonment is the appropriate penalty, any fines must be of such severity as to provide strong discouragement for repetition of such an offence. In imposing fines on both respondents I will take into account that I propose to make an order of costs as against both respondents.

The usual order as to costs where contempt is established is that costs be awarded on a solicitor/client basis. The Solicitor-General sought costs on that basis.

Mr Maxwell submitted that I should treat this case in the same manner as any other criminal case, where costs would not usually be awarded against the accused person upon conviction.

In my view it has long been held (and r.75 expressly provides for it) that costs are appropriate where contempt of court has been proved, as the prosecution is brought in the public interest to protect the administration of justice. In my view it is appropriate that costs be awarded in this case.

As to the level of costs, Mr Maxwell stressed that one count of contempt was dismissed, and that I had ruled that there was no case to answer on many of the

Particulars of contempt included in the first count. Those are relevant factors in determining what order of costs should be made.
However, I do not accept the contention that the Crown has failed to a significant extent in its prosecution. In my view, serious contempt has been proved and costs should follow that event. In the circumstances, however, costs should be limited to party/party costs.
0 R D E R

My orders will be as follows
.#(1) On the count of contempt:
the first respondent, Raymond Terrence Hoser,
will be convicted and fined $3,000;
the second respondent, Kotabi Pty Ltd, will be
convicted and fined $2,000.
.#(2) I order that the respondents pay the plaintiffs
costs to be taxed as between party-and-party.

HIS HONOUR: Is time sought as to payment of the fines
Mr Maxwell?
MR MAXWELL: Would Your Honour just permit me to get some instructions in that regard?
HIS HONOUR: Yes.

MR MAXWELL: Would Your Honour be minded to provide a period of

three months for payment?

HIS HONOUR: Yes. Any objection?
MR LANGMEAD: No, there is no objection.

MR MAXWELL: If Your Honour pleases.

HIS HONOUR: Yes.
#(j) I will grant a stay of three months to pay.
That is as to both respondents.
MR MAXWELL: If Your Honour please.

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
No. 5928 of 2001
BETWEEN:

THE QUEEN
(Ex parte the Attorney-General for the
STATE OF VICTORIA)
Applicant
-and-

RAYMOND TERRENCE HOSER
First respondent
and

KOTABI PTY LTD
(ACN 007 394 048) Second respondent

OUTLINE OF REPLY SUBMISSION ON BEHALF OF THE RESPONDENTS

No case to answer

1. The test to be applied is whether there is evidence which, if accepted, would provide evidence of each element of the charge.1

2. A person can only be convicted of contempt by scandalising if - "the matter published has, as a matter of practical reality, a tendency to interfere with the due course of justice".2

3. There is no evidence before the Court from which it could be concluded that the relevant books had that tendency, as a matter of practical reality.

"As a matter of practical reality"

4. The Crown has led no evidence, and addressed no argument, directed to the question of the effect of the publications as a matter of practical reality. This is evidently because the Crown contends that the Court should - "determine the tendency of the publication by looking at the publication itself, not its impact".

5. So to formulate the test is to misstate the applicable law in a critical respect. The point relied on by the respondents is made abundantly clear by the approach of Ellis J in Colina v Torney.

6. What is important about the decision in Torney is not the decision on the particular (very different) facts but the two-step approach which his Honour adopted3. That is, the first question was whether the words themselves had a tendency to bring a judge or judges into disrepute. A second, and necessary, question was whether there was the requisite tendency, as a matter of practical reality, to harm the administration of justice. In most of the instances referred to, his Honour concluded that the words had the requisite tendency, but in each case dismissed the charge on the ground that there was insufficient proof of any real risk of damage to the system of justice4.

7. The Crown contends that the charges in Torney were dismissed on the issue of "publication" and that it was otherwise held that "all the other elements of the offence had been made out". It is apparent from the Reasons for Judgment of Ellis J that the charges failed precisely because the critical element - the likely practical effect on the administration of justice - was not made out5.

8. It is not necessary, and in some instances will be impossible, to prove actual damage to the administration of justice. Indeed, in cases where a real threat to the administration of justice is apprehended, the urgency of the consequent court action will of necessity prevent any such examination (as a matter of fact) of actual impact on the justice system.

9. But, equally, an examination of that kind is unnecessary where, as in Gallagher, the circumstances of the publication and its content are sufficient, without more, to enable the Court to be satisfied that the publication has the requisite tendency, as a matter of practical reality.

10. Thus, in Gallagher, the statement was made by a highly prominent union official to representatives of the mass media, and it was inevitable that the remarks would receive the widest circulation. Likewise in the case of Borowski, where the remarks were made by a Minister of the Crown to media representatives and included an actual threat of dismissal.

11. In a case such as the present, where considerable time has elapsed since the publication, the Crown could prove actual damage, or threat of damage, to the system of justice if any evidence existed. There being no such evidence before the Court, the Court is entitled to infer that there has been no such damage and that the publications did not have, as a matter of practical reality, the

requisite tendency. The Court is in a better position than usual, because of the lapse of time, to make that judgment.
12. Nothing said by the Crown rebuts the inference to be drawn from the delay in the commencement of these proceedings. It cannot be seriously suggested that there was any difficulty in discovering the identity of Mr Hoser (whose photograph appears in each of the books) or his connection with the company. Indeed, the Crown has put into evidence the company search, which has been available at all relevant times and which is relied on by the Crown to show Mr Hoser's connection with the company.
13. Nor is there any evidence before the Court of any action taken by the Attorney-General to stop publication. The evidence merely discloses that Mr Lee of the Victorian Government Solicitor sent letters in July 2000 directed to ascertaining the extent of publication.
14. The prosecution asserts that it need not be concerned with the truth or falsity of the matters relied on by the author. Yet, at the same time, the Solicitor-General made the following important concession in argument:
"Let it be assumed that a publication alleges that Judge X had received bribes in brown paper envelopes. If that was true, I could not suggest it was contempt".
15. The Crown has thus acknowledged - as it should - that there is a question which arises before an allegation of contempt is made, namely, whether the criticisms are founded on fact. Yet, as Mr Lee acknowledged in evidence, there has been no investigation of the truth of the factual matters upon which Mr Hoser bases his criticisms.
16. The submissions for the respondents do not assert that the books themselves are evidence of the truth of the matters stated in them. Rather, it is the submission of the respondents that the books are to be taken at face value, in the absence of any basis for a suggestion that they should not be so treated.
In good faith
17. Where, taken at face value, a publication presents as criticism in good faith on the basis of facts and matters identified therein, then - notwithstanding that derogatory language may have been used - no contempt of court is committed unless it is shown by the prosecution that the author/publisher was acting maliciously, dishonestly or in bad faith.
18. In the present case, it is not reasonably open to a person reading the books, with ordinary good sense, to conclude that they were published otherwise than in good faith.
The relevance of context (primary submission paras 16 &17)
19. It was submitted for the respondents6 that the propositions in paragraph 16 of the Outline were uncontentious. It is apparent from the Crown's submission that this is so.
20. In response to a formulation by the Court, the Crown did not dispute that context is a matter to which the Court should have regard.
21. The Crown calls in aid authorities which demonstrate that the purpose of a publication is always relevant.7
22. Likewise the status, purpose and content (in particular, reasons) of criticisms by superior courts are said to be relevant to considering their likely effect.
23. Furthermore, the prosecution relies on what is to be inferred from the books themselves about -
(a) the expertise or otherwise of the author ("I know what I write about and I put forward the facts");
(b) his "unbalanced and obsessed" view of the police and certain judges;
(c) the reliability or otherwise of statements made by persons quoted in the books eg. policeman Bingley.

24. No challenge was made to subparagraphs (a), (e) or (f) of paragraph 17 of the Outline. Moreover, it appeared to be conceded that the author did have a (self- proclaimed) commitment to investigating and exposing improprieties.
25. As to circulation (Outline para 17(b)), the only evidence is that 4,500 copies of Book 1 were sold. There is no evidence whatever about the circulation of Book 2, and no basis to draw any inference about the extent of its circulation.
26. In a city of more than 3 million people, and by contrast with the daily newspapers8, a circulation of 4,500 is fairly described as "limited".
The particulars
27. The respondents' submission sought, at some length to place each of the passages complained of in its proper context. The Crown's cursory response is evidently to be explained by the contention that it is the words alone to which regard should be had, regardless of their impact.
28. Some specific matters are to be noted:
* it was asserted that Mr Hoser's belief that the jury would be provided the transcript was a "complete misunderstanding". His inference was, nevertheless, a reasonable one for a lay person to draw;
* the reader of ordinary good sense would recognise immediately that references such as "(grudgingly)" in the transcript extracts were added by the author. Those additions hardly demonstrate that the transcript extracts are false, let alone wilfully false;
* in relation to Magistrate Adams, the Crown apparently accepts that the reader would ascertain that the "1995 publication" referred to was "the Hoser Files". Reference to the front cover clarifies that the "confession" of Bingley occurred after, rather than during, a court proceeding.
Dated: 25 October 2001

C M Maxwell

Peter Nicholas

David Perkins

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
No. 5928 of 2001
BETWEEN:

THE QUEEN
(Ex parte the Attorney-General for the
STATE OF VICTORIA)
Applicant
-and-

RAYMOND TERRENCE HOSER
First respondent
and

KOTABI PTY LTD
(ACN 007 394 048) Second respondent

OUTLINE OF RESPONDENTS' SUBMISSIONS

Summary

1. The publication of the books did not constitute the offence of scandalising the Court.

2. Alternatively, if the conduct of the respondents would otherwise contravene the law of contempt, then that law is invalid pro tanto since it -

(a) impairs freedom of communication on matters of government and politics;

(b) is not "reasonably appropriate and adapted" to achieving the legitimate object of protecting the administration of justice; and

(c) accordingly, infringes the implied constitutional freedom of communication, and is therefore invalid.

The offence of "scandalising the Court"

3. The offence of scandalising the Court is, or should be, narrowly defined.9

4. The very notion of "scandalising" is archaic. According to The Australian Concise Oxford Dictionary,10 "scandalise" means -

"offend moral feelings, sense of propriety, or ideas of etiquette".

5. The law of contempt is, of course, not concerned with hurt feelings. That is the province of the law of defamation. Rather, contempt is concerned with the protection of the administration of justice.11

6. In the United Kingdom, as long ago as 1899 the offence was said to be obsolete.12 In 1999, the House of Lords, while recognising the existence of the offence, noted that such proceedings were rare and that none had been successfully brought for more than 60 years.13

7. The offence is, or should be, confined to those cases where the publication has a clear tendency to damage the administration of justice and where, as a result, immediate protection is required.

8. The test developed in the United States, albeit in a different constitutional setting, is of assistance. A publication should not be punishable unless it creates-

"a clear and present danger [of damage to the administration of justice] of high imminence".14

9. The entire rationale for the availability, and utilisation, of the summary procedure is that the publication is such as to create an urgent need to protect the administration of justice.15

10. The test of "impairing" or "undermining" public confidence in the administration of justice is unacceptably imprecise, subjective and uncertain.

There is no damage

11. Robust criticism of particular courts, judges and magistrates is a commonplace.16

12. Some of the most trenchant criticism comes from within the justice system itself.17

13. There is nothing to suggest that criticism of this kind damages the administration of justice, in the sense of impairing the ability of judges and magistrates to carry out their duties in accordance with law. Nor is there any basis for asserting that public confidence is affected.

14. The same applies to the criticisms contained in the relevant books.

15. The books were published in August 1999, more than two years ago.18 The delay in the bringing of these proceedings bears eloquent testimony to the lack of any relevant impact on the administration of justice.

The tendency of the publication

16. Whether or not a publication is calculated to cause damage of the requisite kind to the administration of justice must be judged by reference to all of the circumstances, in particular -

(a) the form, content, presentation and circulation of the work;

(b) the status of the author in relation to the subject-matter;
(c) the purpose of the publication.
17. In the present case, the following circumstances are relevant:
(a) the work is self-published;
(b) its circulation is limited;
(c) the author is writing not as an expert on law or criminal justice but as someone who has been subjected to its processes;
(d) the author has a long-standing, demonstrated commitment to investigating and exposing what he perceives to be improprieties in the administration of justice;
(e) the work makes clear the perspective from which the author writes;
(f) his expressed intent is to secure improvements in the administration of justice, by drawing attention to its perceived deficiencies.19

Criticisms of the courts is necessary in a democracy
18. It has long been recognised that -
"it is in the public interest, and particularly in the interest of the administration of justice, that members of the public should have the right publicly to criticise the public acts of judges and courts".20
19. Moreover -
"Criticism does not become contempt because it is 'wrong-headed' or based on the mistaken view of the facts or of the law. Nor... need it be respectfully courteous or coolly unemotional. There is no more reason why the acts of courts should not be trenchantly criticised than the acts of other public institutions, including parliaments."21
20. The law of contempt of court will only be attracted where it is shown, beyond reasonable doubt, that the criticisms were made otherwise than in good faith.
21. The prosecution must fail on this ground. No such proof has been established. On the contrary, it should be concluded that the respondents were acting honestly and in good faith in making the criticisms.
The implied freedom of communication
22. Alternatively, if the respondents would otherwide be liable to conviction at common law for the offence of scandalising the court, then the law of contempt is in its application to the respondents invalid.
23. Since Lange v Australian Broadcasting Corporation,22 the scope and operation of the law of contempt are subject to the implied constitutional freedom of political communication.
24. The question is whether the law of contempt - in its present application - is reasonably appropriate and adapted to achieving its object, being the protection of the system of administration of justice.23
25. Care must be taken in defining the end to which the law is directed. Protecting the administration of justice means to protect it against actual damage, that is, against conduct calculated to -
(a) inhibit the ability of judges and magistrates to decide cases fairly and free of external pressure; or
(b) reduce the level of community obedience to orders of the courts.
26. The conduct in question here has no such tendency. Accordingly, an application of the common law of contempt in relation to that conduct is not "appropriate and adapted" to the legitimate end which that law exists to serve.
Dated: 23 October 2001
C M Maxwell

D A Perkins

P D Nicholas

J Manetta

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE

COMMON LAW DIVISION

BETWEEN
No. 5928 of 2001
THE QUEEN
(Ex Parte THE ATTORNEY-GENERAL for the STATE OF VICTORIA)
Applicant - and -

RAYMOND TERRENCE HOSER
First Respondent - and -

KOTABI PTY LTD (ACN 007 395 048)
Second Respondent
APPLICANT'S AND RESPONDENTS' LIST OF AUTHORITIES
Ambard v Attorney-General for Trinidad and Tobago [19361 AC 322 Anissa Pty Ltd v Parsons [1999] VSC 430 (8 November 1999)
Attorney-General New South Wales v Mundey [1972] 2 NSWLR 887
Attorney-General v Times Newspapers Limited [1974] AC 273
Bell v Stewart (1 920) 28 CLR 419
Colina v Torney (Family Court, Ellis J, 2 March 2000)
Davis v Baillie [1946] VLR 486
Exparte BreadManufacturers Ltd,. re Truth and Sportsman Ltd (1937) 37 SR (NSW) 242
Gallagher vdurack (1983) 152 CLR 238

Gilbert Ahnee vdirector ofpublic Prosecutions [1999] 2 AC 294; [1999] 2 WLR 1305
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Hammersley Iron Pty Ltd v Lovell [1998 19 WAR 316
John Fairfax and Sons v McRac (1 954) 93 CLR 3 51

2

John Fairfax Publications Pty Ltd v Attorney-General (NSW) [2000] NSWCA 198

John Fairfax Publications Pty Ltd v Doe (1995) 37 NSWLR 81

Keeley v Brooking (1 979) 143 CLR 162
Lange v Australian Broadcasting Corporation (1 997) 189 CLR 520
Levy v The State of Victoria (1997) 189 CLR 579
Lewis v Ogden (1984) 153 CLR 682
Magistrates' Court at Heidelberg v Robinson [20001 VSCA 198

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Nationwide News Pty Ltd v Wills (1 992) 177 CLR 1

Pennekamp v State offlorida (1946) 328 US 331
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R v Gray [1900] 2 QB 36
R v Kopyto (1 987) 47 DLR (4th) 213; (1987) 62 OR (2d) 449

R v Nicholls (1 911) 12 CLR 280
Rann v Olsen [2000] SASC 83
Re Borowski 91971) 19 DLR (No.3d) 537
Re Colina & Anor,. Ex Parte Torney [1999] 200 CLR 386

Re Perkins (unreported, Victorian Court of Appeal, 3 April 1998)

Re: Special Referencefrom Bahaman Islands [1 8931 AC 138

Registrar of the Court ofappeal v Willesee [1984] 2 NSWLR 378

Saltalamacchia v Parsons [2000] VSCA 83 (15 May 2000)

Solicitor General v Radio Avon Ltd [1978] 225
Stephens v West Australian Newspapers Ltd (1994) 182 CLR 211

3
Theophanous v Herald and Weekly Times Ltd (1 994) 182 CLR 104
Witham v Holloway (1 995) 183 CLR 525

ATTORNEY-GENERAL v. HOSER
RESPONDENTS' LIST OF AUTHORITIES
1 R v. Nicholls (1911) 12 CLR 280.
2. R v. Fletcher,. ex parte Kisch (1935) 52 CLR 248.
3. R v. Dunbabin; ex parte Williams (1935) 53 CLR 434.
4. Ambard v. Attorney-Generalfor Trinidad and Tobago [19361 AC 322.
5. Pennekamp v. State of Florida (1 946) 328 US 33 1.
6. Maslen v. Official Receiver (1947) 74 CLR 603.
7. R v. Brett [19501 VLR 228.
8. John Fai@ & Sons v. McRae (1955) 93 CLR 351.
9. Attomey-General (NSW9 v. Mundey [19721 2 NSWLR 887.
10. Gallagher v. Durack (1983) 152 CLR 238.
11. Registrar of Court of Appeal v. Willesee [19841 2 NSWLR 378.
12. Lewis v. Ogden (1984) 153 CLR 682.
13. R. v. Kopyto (1987) 24 OAC 81; 39 CCC (3d) 1.
14. Nationwide News Pty Ltd v. Wills (1992) 177 CLR 1.
15. Witham v. Holloway (1995) 183 CLR 525.
16. Lange (1995) 182 CLR 104.
17. Anissa Pty Ltd v. Parsons [1999] VSC 430 (8 November 1999).
18. Re Colina; exparte Torney (1992) 200 CLR 386.
19. Ahnee v. Director of Public Prosecutions [19991 2 AC 294.
20. Saltalamacchia v. Parsons [20001 VSCA 83 (15 May 2000).
21. Magistrates' Court at Heidelberg v. Robinson [20001 VSCA 198.
22. Colina v. Torney (Faniily Court, Ellis J, 2 March 2000).

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23. R v. Crockett [20011 VSCA 95.

24. Giffillan v. County Court of Victoria [20011 VSC 360 (13 September 2001).

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GilbertAhneevDirectorofPublicProsectaions[1999]2AC294at306E; cf.Nationwide News Pty Ltd v Wills at 3 1.

· Oxford University Press, 1987 p 994.

· McLeodvStAubyn[1899]AC549at561; secalsoBrettat228.

· Ahnee (supra) at 305H.

5 Pennekamp v State of F7otida (1946) 328 US 331 at Ahnee (supra) at 306B.

6 Pennekamp (supra).

9. The entire rationale for the availability, and utilisation, of the summary procedure is that the publication is such as to create an urgent need to protect the administration of justice.'

10. The test of "impairing" or "undermining" public confidence in the administration of justice is unacceptably imprecise, subjective and uncertain.

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14. The same applies to criticisms contained in the relevant books. The books were published in August 1999, more than two years ago."

15. The delay in the bringing of these proceedings bears eloquent testimony to the lack of any relevant effect on the administration of justice.

7 Attorney-General New Sotah Wales v Mundey [19721 2 NSWLR 887 at 912A-B; Maslen v. The Official receiver (1947) 74 CLR 602.

Mundey (supra) at 910.

· See eg. Crockett; Giffillan v County Court of Victopla and anor [20011 VSC 360 at Magistrates' Court at Heidelberg v Robinson [2000] VSCA 198 at para 12 per Brooking SA; Suttin(?) at paras 6 & 7 per Tadgell JA.

The tendency of the publication

16. Whether or not a publication is calculated to cause damage of the requisite kind to the administration of justice must be judged by reference to all of the circumstances, in particular -
(a) the form, content, presentation and circulation of the work;
(b) the status of the author in relation to the subject-matter;
(c) the purpose of the publication.
17. In the present case, the following circumstances are relevant:
(a) the work is self-published;
(b) its circulation is very limited;

(c) the author is writing not as an expert on law or criminal justice but as someone who has been subjected to its processes;

(d) the author has a long-standing, demonstrated commitment to investigating and exposing what he perceives to be impropriety in the administration of justice;

(c) his expressed intent is to secure improvements in the administration of justice, by drawing attention to its perceived deficiencies."

Criticisms of the courts is necessary in a democracy

18. It has long been recognised that -

"it is in the public interest, and particularly in the interest of the administration ofjustice, that members of the public

should have the right publicly to criticise the public acts of judges and courts"."

19. Moreover -

'criticism does not become contempt because it is 'wrong-headed' or based on the mistaken view of the facts or of the law. Nor, in my opinion need it be respectfully courteous or cool the unemotional. 7here is no more reason why the acts of courts should not be trenchantly criticised than the acts of other public institutions, including parliaments. ""

20. The law of contempt of court will only be attracted where it is shown, beyond reasonable doubt, that the criticism was made otherwise than in good faith.
21. The prosecution must fail on this ground. No such proof has been established. On the contrary, no other conclusion is open but that the respondents were acting in good faith in making the criticisms complained of.

The implied freedom of communication
22. Alternatively, if the respondents would be liable to conviction at common law for the offence of scandalising the Court, then the law of contempt is in its application to the respondents invalid.

23. Since Lange v Australian Broadcasting Corporation, 14 the operation of the law of contempt is subject to the overriding operation of the implied constitutional freedom of political communication.
24. Since the law burdens the freedom of such communication, the question is whether the law is reasonably appropriate and adapted to achieving its object, being the protection of the system of administration of justice."

12 Mundey (supra) at 908A; Nicholls at 286; R v Dunbabin (1935) 53 CLR 434 at
13 Mundey (supra) at 908B.
14 (1997) 189 CLR 520.
is ibid at 561-2.

6
25. Care must be taken in defining the end to which the law is directed. The object of protecting administration of justice means to protect it against actual damage, in the sense of -
(a) inhibiting the ability of a judge to decide a case fairly and without external pressure;
(b) producing the level of obedience to orders of the Court.
26. The conduct in question creates no risk of any such damage. Accordingly, an application of the conunon law of contempt in relation to that conduct is not "appropriate and adapted" to the legitimate end which the law exists to serve.

Dated: 23 October 2001

C M Maxwell

D A Perkins

P D Nicholas

J Manetta

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
BETWEEN
No. 5928 of 2001
THE QUEEN
(Ex Parte THE ATTORNEY-GENERAL for the STATE OF VICTORIA)
Applicant - and -

RAYMOND TERRENCE HOSER
First Respondent - and -
KOTABI PTY LTD (ACN 007 395 048)
Second Respondent

APPLICANT'S AND RESPONDENTS' LIST OF AUTHORITIES

Ambard v Attorney-General for Trinidad and Tobago [1936] AC 322
Anissa Pty Ltd v Parsons [1999] VSC 430 (8 November 1999)
Attorney-General New South Wales v Mundey [1972] 2 NSWLR 887
Attorney-General v Times Newspapers Limited [1974] AC 273
Bell v Stewart (1920) 28 CLR 419
Colina v Torney (Family Court, Ellis J, 2 March 2000)
Davis v Baillie [1946] VLR 486
Ex parte Bread Manufacturers Ltd,. re Truth and Sportsman Ltd (1937) 37 SR (NSW) 242
Gallagher v Durack (1983) 152 CLR 238
Gilbert Ahnee v Director of Public Prosecutions [1999] 2 AC 294; [1999] 2 WLR 1305
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John Fairfax Publications Pty Ltd v Attorney-General (NSW) [2000] NSWCA 198
John Fairfax Publications Pty Ltd v Doe (1995) 37 NSWLR 81
Keeley v Brooking (1979) 143 CLR 162
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Magistrates' Court at Heidelberg v Robinson [2000] VSCA 198
Maslen v The Official Receiver (1947) 74 CLR 602
Nationwide News Pty Ltd v Wills (1992) 177 CLR 1
Pennekamp v State of Florida (1946) 328 US 331
R v Brett [1950] VLR 226
R v Crockett [2001] VSCA 95
R v Dunbabin (1935) 53 CLR 434
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R v Gray [1900] 2 QB 36
R v Kopyto (1987) 47 DLR (4th) 213; (1987) 62 OR (2d) 449
R v Nicholls (1911) 12 CLR 280
Rann v Olsen [2000] SASC 83
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Re Colina & Anor; Ex Parte Torney [1999] 200 CLR 386
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Solicitor General v Radio Avon Ltd [1978] 225
Stephens v West Australian Newspapers Ltd (1994) 182 CLR 211
Theophanous v Herald and Weekly Times Ltd (1994) 182 CLR 104
Witham v Holloway (1 995) 183 CLR 525

1 Wilson v. Kuhl [1979] VR 315 at 319 per McGarvie J, applying May v O'Sullivan (1955) 92 CLR 654 at 648; Zanetti v Hill (1962) 108 CLR 433 at 442, cited with approval by the Full Court of the Supreme Court of Victoria in Attorney-General's Reference (No.1 of 1983) [1983] 2 VR 410 at 414.
2 John Fairfax & Sons Pty Ltd v. McRae (1955) 93 CLR 351 at 370. This passage was described by the Solicitor-General as the "locus classicus".
3 As stated at T110 in the present proceeding.
4 Paras 48-9, 57-9, 63-4, 72-4 and 83-4.
5 ibid.
6 T101.
7 Fairfax v. McRae at 371.

8 "The Age" asserts a weekday circulation of 190,000, the "Herald-Sun" 554,000.
9 Gilbert Ahnee v Director of Public Prosecutions [1999] 2 AC 294 at 306E; cf. Nationwide News Pty Ltd v Wills at 31.
10 Oxford University Press, 1987 p 994.
11 Pennekamp v State of Florida (1946) 328 US 331; Ahnee (supra) at 306B.
12 McLeod v St Aubyn [1899] AC 549 at 561; see also Brett at 228.
13 Ahnee (supra) at 305H.
14 Pennekamp (supra).
15 Attorney-General New South Wales v Mundey [1972] 2 NSWLR 887 at 912A-B; Maslen v. The Official receiver (1947) 74 CLR 602.
16 Mundey (supra) at 910.
17 See eg. R v Crockett [2001] VSCA 95 at paras 6-9 per Ormiston JA; Gilfillan v County Court of Victoria and anor [2001] VSC 360 at paras 21, 22, 26 and 28-9 per Nathan J; Magistrates' Court at Heidelberg v Robinson [2000] VSCA 198 at para 12 per Brooking JA; DPP v Suckling [1999] VSCA 190 at paras 6 & 7 per Tadgell JA.
18 Hoser affidavit para 5.
19 Victoria Police Corruption - 2 p.18.
20 Mundey (supra) at 908A; Nicholls at 286; R v Dunbabin (1935) 53 CLR 434 at 442.
21 Mundey (supra) at 908B.
22 (1997) 189 CLR 520.
23 ibid at 561-2.

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