A LOOK AT A DECADE OF CONTEMPT IN NEW SOUTH WALES

By

M. C. RAMAGE Q.C.

The State of New South Wales is a notoriously litigious State and some from outside that State may think somewhat corrupt. Corrupt Police and horse racing scandals have provided fertile areas for the newspapers and in turn the application of law of contempt. Inevitably there is a tug-o-war between the right to freedom of speech and the right to a fair trial.

There has been a fairly constant attempt in N.S.W. by the media to elevate the importance of freedom of speech and free communication and the public interest in the full discussion of matters of public interest to the position where it overrides any individuals interest during which the Courts have struggled to day down some rules and strike a balance. The media has sought to elevate the words of Jordan CJ. in a libel case, [Ex parte Bread Manufacturers Ltd re Truth and Sportsman Ltd (193) SR NSW 242 at 249/50 that the possibility of prejudice to a litigant may have to yield to other superior considerations, to a statement that ventilation of a matter of public interest is paramount. One attempt by the media was that of the Attorney General for N.S.W. v John Fairfax & Sons Limited [(1985) 1 NSWLR 402.] That case concerned one Sergeant Roger Caleb Rogerson who was charged with attempting to bribe another police officer. Before the committal was heard an article very damaging to him appeared in the National Times and the Attorney General issued a summons for a declaration that both the paper and the journalist were guilty of contempt. Rogerson was then committed for trial. The paper sought to argue that proceedings for contempt be either dismissed with an opportunity to bring the proceedings of the same kind later or that the contempt proceedings be brought on for hearing at the earliest possible date. It argued that its freedom to discuss and publish was of such importance that it should prevail notwithstanding that any individual awaiting trial might be injured by it. The Court came down, on balance, on the side of the individual in determining that charges of contempt based upon the publication of a material which may prejudice the fair trial of criminal proceedings should not (at least normally) be heard until after the conclusion of the related criminal proceedings. It also held that proper practice was for the Attorney General to initiate proceedings as soon as possible against the alleged contemnor and having regard to the dependency of the related criminal proceedings, to bring those proceedings to the notice of the Court, and to ask that the hearing of the contempt proceedings be adjourned until the criminal proceedings had completed.

When the case was actually heard [The Attorney General for New South Wales v John Fairfax & Sons Ltd and Bacon [the "Bacon" case] (1986) 6 NSWLR 695]] Rogerson was given fairly short shrift. The Court of Appeal of McHugh, Glass and Samuels JJA found that there was no contempt. It must be regarded as a great victory for the media as the articles referred to the "Lanfranchi: killing and implied grounds for suspecting that the accused was guilty of a number of serious offence including murder, supplying drugs and perverting the course of justice. The Court adopted the narrow test of whether as a matter of practical reality the publication had a tendency to interfere with the due course of justice in relation to the charges in question - They saidit had to have at some point a real and definite bearing on the guilt or innocence of some specific person on some specific charge. Despite the nature of the allegations made against Rogerson which Glass JA described as "which disparage the behaviour and character" and which Samuels JA found to contain much highly prejudicial and legally inadmissible material, the Court was impressed by the delay argument (17 months probable hearing time, 6 months with expedition), the publication of other prejudicial material elsewhere before the accused was charged and the effect upon juries of the coverage in the mass media of other sensational events. McHugh AJ also took into account the celebrated passage in Jordan CJ's judgment in the Breadmaker's case (supra) (714).

The balance can also be said to have swung in favour of free speech at least for the individual in the majority decision in The Prothonotary v Collins [(1985) 2 NSWLR 549]. That case concerned one Brett Collins, a well known prison activist, who with some others was speaking with a loud hailer on the subject of "police verbals" and handing out a copy of a pamphlet entitled "What is Verbal" to passers by and persons entering the Court complex at Darlinghurst in Sydney on a morning when a number of trials were being held. Some of the jury panel received these pamphlets. All the Court found that Collins went to the Darlinghurst Court complex with the definite intention of handing out the pamphlets to jurors and potential jurors in criminal cases with the object of influencing their verdicts. However, while McHugh AJ. with whom Kirby P. agreed, found that the distribution of the pamphlet to jurors or potential jurors in a case involving oral admissions would be a contempt, they also found there was no evidence that any such case was being heard that day; so there was no evidence it was likely to prejudice or embarrass any pending proceedings. The wider argument urged by the Prosecution that distribution of the pamphlet constituted an interference with the administration of justice as a continuing process was similarly rejected. The majority further found that whilst accepting that the Defendant did intend to influence the verdict of any jury which might be considering any of the matters to which the pamphlet referred, it was impossible to find that he intended to influence the outcome of any particular trial. Bare intention to interfere with the administration of justice as a continuing process is not a contempt.

In Waterhouse v ABC (1986) 6 NSWLR 733, an injunction was sought to restrain the" Four Corners "T.V. program from broadcasting a program on the ground that its publication would constitute a contempt as being an interference with the right to a fair trial. It was claimed by one of the applicants that the telecast might influence the committal proceeding in which one of the applicants was charged with 69 different offences and there was a possible impact on potential jurors if that person was committed for trial. The segment most objected to was the "Fine Cotton Incident". The Court of Appeal of Glass, Samuels and Mahoney JJ. in a judgment led by Glass J. refused the injunction for a number of reasons including the length of time before any possible trial hearing, the unlikelihood of influencing a judicial officer and other publications elsewhere of the same material or material of a like nature. This might be viewed as a victory for the media however one must have some concern for some of the bases for Glass' apparent opinion. He expressed the view, apparently based on his own expert opinion, that "any forecast as to the capacity of a potential juror to retain impressions over a 12 months period must allow for the ephemeral nature of television images and sounds as well as the viewer's scepticism and memory loss during that period". The learned Judge also announced that "There is a tendency for jurors heeding the warning of the trial judge and responding to the dynamic of the trial to banish from their mind any prior impressions and concentrate on the material before them" (736) which on its face sounds more like a pious hope than an established fact.

In D.P.P. v ABC [(1987) 7 NSWLR 589], the Commonwealth D.P.P. had instituted proceedings by way of summons charging the ABC Corporation, an editor and reader with contempt of Court involving a broadcast of a television program called "The National" that made specific reference to the "Age" tapes revealing the names of Justice Lionel Murphy and a Mr. Morgan Ryan and improper overtures alleged against Justice Lionel Murphy. The broadcast was four days before Mr. Justice Murphy's committal was to commence where he was charged with attempting to pervert the course of justice, by particularly trying to influence the outcome of committal proceedings against his friend, Morgan Ryan. A five member bench of the Court of Appeal of N.S.W. held that many listening to broadcasts would have concluded that the reference to Murphy having made improper overtures on behalf of a Sydney solicitor, Mr. Morgan Ryan meant the subject of the charges that were about to be heard and would further have wrongly concluded that the so-called "Age Tapes" verified the allegations. In the circumstances, the statements were clearly prejudicial to the future trial, they were directed to the issue of the guilt of the accused and the fact that they were made in the course of a public debate did not avail the defendants who were guilty of contempt. The Court further rejected the real basis on which the case was fought; that the opponents sought that the summons be struck out for want of power or standing in the claimants. The Court held that the Director of Public Prosecutions has a right to bring proceedings for contempt to ensure the integrity of the administration of justice and further that even assuming the contempt proceedings were for an

offence against State law, the power to bring the proceedings is necessarily incidental to the power to prosecute and falls within the statutory authorisation of the general law principle contained in the D.P.P. Act, 1983 (Cth).

In 1986 a 5 member bench of the Court of Appeal led by Street CJ. reaffirmed the protection the Court would provide against any attempts to interfere with the administration of justice when the D.P.P. (Com.) charged the then Premier of N.S.W. Neville Wran and Nationwide News Ltd. (publisher of the Daily Telegraph) with contempt arising out of his interview with a journalist after the Court of Appeal had granted Mr. Justice Murphy a new trial in respect of the charge of attempting to pervert the course of justice. In response the reporter's to questions Wran expressed his belief in the innocence of the accused and the expectations that a different verdict would be achieved at a fresh trial. The Court found both in contempt and imposed fines of $25,000.00 and $200,000.00 respectively. The unitary judgment referred particularly to the fact that the words were directed to the issue to be determined by the jury at the new trial, namely the guilt or innocence of the accused; that the statements were made to persons who might republish them to a large number of people and the standing of the person making the statement made it more likely that there would further re-publication; it was clear that the replication might reach persons who would become jurors. [Director of Public Prosecutions v Wran (1986) 7 NSWLR 616]

In The Attorney General for N.S.W. v TCN Channel 9 Pty. Ltd [(1990) 20 NSWLR 368], while the Court of Appeal recognised that the news broadcast involved a matter of public interest they determined that it was impossible to hold that in the circumstances the various considerations of public interest referred to on behalf of the broadcaster prevented the conclusion that the publications constituted serious and punishable contempts. The decision cannot really be said to have really helped the individual there as by the time that the proceedings were heard, the individual, a Mr Mason, had committed suicide. However, the Court laid down some important principles: "The principles of law in question do not exist merely to protect the private interests of a person such as Mr. Mason in securing a fair trial in respect of his alleged crimes. They protect the interest of the public in having persons who are accused of crime in our community dealt with by the system established for the administration of justice according to law. Trial by media has no place in that system" (at 384). The Court consisting of Gleeson CJ., Kirby and Priestly JJ. referred in particular to Wilson's remarks in Hinch v The Attorney General for the State of Victoria [(1987) 164 CLR 15, 41-42] (involving Hinch's broadcasts attacking the Catholic priest) that in dealing with the argument that there was a balancing exercise involved in weighing competing public interests "It is important to emphasize that in undertaking the balancing exercise the Court does not start with the scales evenly balanced. The law has already tilted the scales. In the interest of due administration of justice it will curb freedom of speech, but only to the extent that it is necessary to prevent a real and substantial

prejudice to the administration of justice". (at 384) The case is important for some other statements which have to be looked at in the light of the facts of the case. There had been an axe murder of a young woman at Gearys Gap near Canberra and two months later another at Pambula in N.S.W. Police believed that Mr. Paul Mason was responsible and there had been a widely publicised hunt for him. He subsequently gave himself up and was arrested and interviewed whereupon he allegedly made certain confessions. The Police had been in close touch with the media throughout and after the arrest of the accused gave out certain material to the effect that he confessed and then, with the media in company, the accused was taken by police to the scenes of the murders and this was televised; that evening a long report appeared as a news item including the televised footage and comments by police. It was sought to argue, relying on the High Court decision in James v Robinson (1963) 109 CLR 593 that there was no contempt because at the time the broadcast in question took place the accused, though arrested and charged, had not been taken before a court. The Court noted with approval the pronouncement of Windeyer J. in the same case at p.615-616 that it was the time of arrest when a court has become seized of the case and the time when the criminal law has been set in motion. It held that both authority and principle pointed to the conclusion that the time when the relevant rules as to contempt began to operate was when Mr. Mason was arrested - the time of the initiation of the criminal proceedings against him - from that time he was "under the care and protection of the Court" (378). In holding that there was a contempt the Court took particular note of the fact that "it has long been recognised as a general rule the publication of the fact that an accused person has confessed it likely to be prejudicial to a fair trial" (380) and "To say that a person has confessed is normally tantamount to a declaration that he or she is guilty" (380). It held that the endeavour to avoid this problem by using the words "allegedly" in relation to confession did not prevent it being a contempt of court. The Court further held that the right to a fair trial was nonetheless because the Prosecution case against him was very strong; an accused's right to a fair trial in the public interest and the due observance of a process of the criminal justice system did not vary with the weakness of strength of the defence case. (at 382) In passing it should be noted that the Court specifically condemned the manner in which the police and media had combined:- "As a general rule we regard it as grossly offensive to the principles embodied in this aspect of the law, and to the proper administration of justice, for police to display for the benefit of the media accused persons in the course of being questioned or led around the scene of the crime." (381C).

The Attorney General for N.S.W. v Dean, [(1990) 20 NSWLR 650] concerned the police officer, a Detective Dean, who had taken the interview with Mr. Mason in the above case and then conducted a press conference at Queanbeyan Police Station during which he told the media of the confessions and expressed the view that police were glad that "he did surrender himself and the fact that he hasn't committed any further crimes." Dean contended that he answered all questions put honestly, he expected the media or the police liaison officer to edit out anything unlawful and he had no

intention to interfere in the administration of justice. The Court held that he was guilty of contempt saying that the relevant test to be applied was whether the statements made in the particular circumstances <u>had the objective tendency and practical reality to interfere in the fair trial of the accused and the absence of specific intent to interfere in the administration of justice it was neither an answer or a defence to a charge of contempt; nor was ignorance of the law of contempt or reliance on third parties to edit statements to comply with the law of contempt either an excuse or a defence to a charge of contempt</u>.

It is of passing interest to note that the Court emphasized (p.653) the importance of the legal obligation where a person has been arrested and charged that he or she should be taken as soon as practicable before a Justice.

In <u>United Telecasters Sydney Ltd v Hardy</u> (1991) 23 NSWLR 323 the pendulum may be said to have swung back in favour of the media at least in its ability to rely on the limitations of the powers of inferior courts but there was some affirmation of an individual's rights. There Channel 10 opposed contempt proceedings brought by the Director of Public Prosecutions (Cth) and Hardy arising out of the running of a story on immigration rackets during the trial of Hardy who was charged with an offence involving the same kind of activity. The District Court Judge presiding over the trial made an order prohibiting a broadcast or otherwise publishing any material which directly or indirectly identified or tended to identify the accused in the trial or the nature of the charge to which he had pleaded not guilty. Then a solicitor appeared on behalf of the Channel and gave certain undertakings to the Court. However, thereafter "Eye Witness" news of the Channel broadcast a segment called "Marriage Rackets" which it was said made oblique references to the accused. The trial judge discharged the jury and the D.P.P. took out a summons seeking declarations against the broadcaster. Hardy also issued a summons (before the D.P.P. in time) seeking a declaration that the broadcaster had committed civil contempt of court and sought damages. That particular summons was declared to be hopeless and misconceived. However the Court dealt with the real thrust of the defence by the broadcaster which was a challenge to Hardy's summons on the grounds that it could not be maintained once the D.P.P. had instituted proceedings for contempt involving substantially the same matter. The N.S.W. CCA of Samuels, Clarke and Meagher JJA. determined affirming <u>D.P.P. v ABC</u> (supra) that the D.P.P. had standing to bring contempt proceedings in the trial of a federal offence prosecuted in a New South Wales court. However, it went on to declare <u>that any person had the right to bring proceedings for contempt in relation to proceedings in a court of the State at least where he or she had a personal stake or special interest in them</u>. The Court was of the view that clearly Hardy had a special interest in the outcome of his own trial in the District Court (328-329). Samuels AP, who gave the judgment, accepted that there was some force in the view that the institution of contempt proceedings by the Attorney General of the State should be

seen as operating to exclude the continuation of proceedings by a private person but was of the view that the D.P.P. was not in the same position as the Attorney General, and there was no basis upon which the D.P.P. had any superior right to maintain proceedings for contempt. The Court found in favour of the broadcaster, as apart from the procedural difficulties which lay in the way of the misconceived nature of Hardy's action, the Court held that there was no statutory or inherent power in a Judge in the District Court to make such an order i.e. it was beyond the jurisdiction of the District Court as an inferior court to order prior restraint of a threatened contempt by the media. Furthermore, that Court had no power to punish for contempt other then those committed in its face. Contempt committed in the face of State court, whatever jurisdiction is being exercised, they held to be a matter for State law.

Of some interest to those who do stray outside the criminal courts is the Court's finding that it was arguable that the law should recognise an action on the case to recover damages for loss occasioned to an accused by a criminal contempt of court causing a pending trial to be aborted.

In addition to what ever assistance may have been gained from Jordan's remarks in the Breadmaker's case (supra), the media have sought in more recent times to call in aid the High Court decisions involving freedom of speech/communication. This they did in the case of Attorney General for the State of N.S.W. v Time Inc Magazine Company Pty. Ltd (NSW CA unrep. 7 June, 1994)(The "Who" case). There, the New South Wales Court of Appeal had before it a summons brought by the Attorney General seeking an interlocutory injunction against the publisher of a journal, the "Who Weekly". That magazine had on 6 June, 1994 published an edition with the face of a certain Ivan Milat on its front cover together with text alleging that he had been charged with the "Backpacker Murders" in Bangalow State Forest in the southern highlands of N.S.W. and other material showing a photograph of him being led from his house handcuffed to one of the detectives and photographs of seven persons said to be victims of the "Backpacker Murders" etc. The injunction was sought on 7 June. Time defended its actions relying in part on Nationwide News Pty. Ltd v Wills (1992) 177 CLR 1 and Australian Capital Television Pty. Ltd & Ors v The Commonwealth of Australia (1992) 177 CLR 106) in asserting that in balancing the right of free expression and the right to fair trial of the accused, the balance in this case favoured free expression, Kirby P. with whom the others agreed firmly rejected, at that stage, any argument that the Constitution or any right of free communication which is implied in it diminishes the right of the accused to fair trial. Kirby P defined the right to a fair trial as follows:

> "There is another precious right which is at stake in these proceedings. It is the right of an accused person to a fair trial, on most serious charges now brought against him. It is a right to have that trial conducted before a jury and with witnesses uninfluenced by relevant matters which have been published and which may adversely affect that right of fair trial. The right to fair trial is one which inheres not only in the accused but in the community. It is a basis for the community's general

acceptance of jury verdicts affecting the liberty of accused persons. It is the duty of this court to defend this right to a fair trial." (pp. 6/7).

The test to be applied was whether there was a real risk that the material alleged to be a contempt would interfere with the administration of justice in pending proceedings or as expounded in Hinch (supra) that the particular publication presented a real risk of serious prejudice to a fair trial i.e. serious injustice". The Court rejected the argument that it was necessary for the Attorney General to demonstrate affirmatively that identity would be in question in the trial of the accused person. It was sufficient that there was a risk that identity might arise at some future time as an issue in the criminal trial. Furthermore, the Court stressed citing a long list of authorities that "A long series of decisions, both in England and in this country have made it plain that, to publish a photograph or photographic image of an accused person prior to the person's trial may constitute contempt of court in the sense of interference in the due administration of justice". (p.8)

Racing is never very far from the minds and pockets of the corrupt in N.S.W. It has recently, together with the doings of the N.S.W. Royal Commission into Police, featured in the N.S.W. media. Mr. Temby is to conduct yet another inquiry. Some interesting aspects of racing came to light, particularly, in the course of some 4,000 hours of conversation lawfully recorded by the A.F.P. and the N.S.W. D.E.A. who were allegedly listening in to the activities of an "international drug syndicate" whose alleged members were subsequently charged with importing 5 tons of cannabis resin into Australia. The material was leaked, presumably by police, to the Herald newspaper and this led to the most recent case to come before the Supreme Court of New South Wales, that of Doe v John Fairfax Publications Pty. Ltd (Spender AJ unrep. 21.4.95). It is an important case insofar as confirms that an accused is not powerless to protect his opportunity for a fair trial. The applicant in that case is in gaol awaiting the hearing of committal proceedings charged with conspiracy to import cannabis resin, a corruption charge and conspiracy to pervert the course of justice. Those committal proceedings are set down to commence in August this year and a trial, if there be a trial, is expected to commence in 1996. The Sydney Morning Herald published a series of articles firstly on 13 August, 1994 headed "Phones reveal drug deal Court told" to the effect that a large three pronged international drug syndicate responsible for importing 5 tonnes of cannabis resin to Australia had come undone because of phones being monitored. This was followed by articles involving race fixing which went on to set out that the biggest scandal in the 150 year old history of Sydney racing had been uncovered by the Australian Federal Police and New South Wales Drug Enforcement Agency through phone tapping of conversations between a leading jockey and a well known Sydney crime figure. Further articles referred to a Mr. C as organising one of Australia's largest biggest drug shipments and organising Sydney jockeys to fix races on a giant scale. The article that finally brought the proceedings was one which appeared on 7 April, 1995 headed "Revealed: How Sydney Races are fixed" referring to Police tapes and transcripts of those as "having revealed that alleged

conspirators and drug importation bribe jockeys in three cities - mainly in Sydney, but also in Adelaide and Brisbane - in one of the most expensive race fixing scandals Australia has seen." The applicant was not mentioned by name but specific reference was made to a "Mr. C" in specific conversations which the judge found were intended to be read as direct quotes from intercepts concerning race fixing. A further article in the Herald of 7 April under the heading "Race Fixing: What Police overhead on the phone" again purported to quote excepts of specific conversations relating to and featuring "Mr. C" as one of the parties. There was no allegation made directly that "Mr. C" had imported drugs or was guilty of the offence charged against him. However, the judge found that the following features concerning "Mr. C" emerged directly or by clear inference from the articles. (a) There had been police surveillance involving him and 4,000 hours of conversation recorded which revealed that alleged conspirators and drug importation bribed jockeys in three cities; (b) that "Mr. C" was now in prison awaiting trial for drug importation; (c) that he (one of the alleged conspirators) has bribed jockeys; (d) that he bet very heavily and made a great deal of money out of race fixing; (e) that he has fixed races and is on the jockey tapes as the principal fixer or organising mind in the corrupt enterprise; (f) no other co-conspirator was identified; "Mr. C" stood alone as the race fixer; (g) that "Mr. C's" activities have been established by police phone tapping legally carried out by them and that the Herald articles were based on accurate transcripts of those phone taps. Furthermore, he found that it was reasonably open to a reader of the article to reach the conclusion that "Mr. C's" capital that he used for betting and bribing came (aside from race winnings) from illegal activities and those were illegal drug related activities. There was no doubt, whatever the motives of those who leaked the material, that while it was originally lawfully obtained by the police, its communication to the Herald and the Herald's publication of the material was unlawful as being in breach of s.63 Telecommunications (Interceptions) Act, 1979 (the Commonwealth). The applicant brought the proceedings to restrain the further publication of material that would threaten his right to a fair trial and to restrain the use and dissemination of material that would be the subject of rulings if he went to trial and secondly to restrain the illegal use of material derived from interceptions that fell within the Act. The arguments were lengthy and the judgment was 44 pages (and the case is still under appeal) - I shall refer to only some of the arguments, submissions. The Herald opposing the injunction argued that what was sought was in fact a injunction to restrain an act which if done would amount to a criminal offence and that injunctions should not be used to restrain such acts except in exceptional circumstances confined to cases wherein offences were frequently repeated in disregard for a, usually, inadequate penalty or cases of emergency relying on The Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39. It was said that there was no evidence capable of establishing that the defendant intended to commit any offence against s.63 and because of the peculiar provisions of s.63 preventing a person giving the information in evidence "in a proceeding" therefore the court could not take account of the very publication that published the information. These arguments were unsuccessful. The defence further

argued that the applicant had no standing saying that the right to seek an injunction in such cases is usually regarded as that of the Attorney General quoting Commonwealth v John Fairfax per Mason J at 49/50. [The Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39] In conjunction with that, it was argued that if a person other than the Attorney General had standing to sue for an injunction to restrain the contempt of court, then that was subject to proof of a special interest in doing so and that there was in the present case no or no admissible evidence that the applicant was the same person as Mr. C". It was said that unless the applicant adduced such evidence either by himself or another witness, he failed in limine. Spender AJ looked at the common features between the articles and what was known about the Prosecution's criminal case against the applicant and decided that the sameness of identity might be established by inference from established facts; there was a very strong inference to be drawn that the applicant and "Mr. C" were one and the same person and he so found. Spender AJ. also found that for jurors to know that the applicant was said to be guilty of bribing jockeys and race fixing on a grand scale would be highly prejudicial to the applicant's fair trial. The newspaper further submitted that the applicant must fail as there was no evidence of a threat by the defendant to commit a contempt by publishing further material and no evidence of the content of any future article. Spender AJ. came to a different conclusion; after referring to the interest in racing and interest in the articles about racing in N.S.W. and the importance of a race fixing scam he reached the view that the defendant would continue to publish material based on or excepts taken from transcripts of the jockey tapes. He noted that on 8 April the paper had published in an article subtitled "AJC Acts. Top jockey suspected" which concluded that the Supreme Court had granted an interlocutory injunction preventing the paper from publishing any information derived from the "Jockey Tapes". He felt that the probabilities were that the content of any future article based on the jockey tapes would feature race fixing, jockeys and "Mr. C". A further submission of the defendant was a predictable one, i.e. that the public interest considerations of free expression and free communication said to be involved in the 4 "free speech" cases (Nationwide News v Wills (1992) 177 CLR 1; Australian Capital Television v Commonwealth (1992) 177 CLR 106; Theophanous v Herald and Weekly Times (1994) 124 ALR 1; Stephens v West Australian Newspapers (1994) 124 ALR 80 should override the prejudice to the applicant. Spender AJ expressed himself very firmly that where there was a striking of balance between those considerations and those relating to due administration of justice the latter considerations prevailed. He cited Attorney General of N.S.W. v TCN Channel Nine (NSW C.A. at p.380); [A-G for N.S.W. v TCN Channel Nine Pty. Ltd (1990) 20 NSWLR 368.]

> "Material regarding the alleged offences, or the proceedings concerning them may be highly newsworthy, and its publication may have the capacity to advance the commercial or other interests of various persons or corporations, including those who carry on a business of publishing interesting or entertaining information. In the context of the administration of criminal justice, so long as proceedings are pending however ... these interests, which may in themselves be perfectly legitimate, must yield to the higher interests of the due administration of justice." (p.38).

He also referred to the fact that there was no real attempt on the part of the defendant to argue that it engaged in lawful activities when it obtained the transcripts of intercepted communications and published material based on those transcripts and excepts from them. Thus, though the defendant had breached s.63 of the Act, yet it was advancing the claim of public interest. The judge felt there was no public interest in jeopardising or possibly jeopardising police investigations into suspected serious criminal activities and doing that in breach of the law by the unauthorised use of such material. Finally, he rejected an argument mounted on the basis of Bacon's case (A-G of N.S.W. v John Fairfax & Sons Ltd & Bacon (1985) 6 NSWLR 695) (supra) involving the delay between the publication of the article and the trial .... on the basis that further publication of the kind of material which had appeared would in his opinion have the tendency as a matter or practical reality to interfere with the due course of justice. Unlike McHugh JA and the other C.A.Judges, in that case he found that in the event that the applicant went to trial then such material would constitute a real or definite possibility that the administration of justice might be prejudiced. The order was that the defendant was restrained from publishing information obtained within s.63 of the Telecommunications (Interceptions) Act, 1979 (Cth) or material derived therefrom concerning the applicant or identifying the applicant in respect of any such material.

One must seriously wonder, despite the lip service to the principles of fair trial and administration of justice, whether these loom really large in the minds of the various judges as the penalties imposed on publishers appear to be almost uniformly fines which in view of the circulations of some of the papers involved would clearly be regarded as in the nature of a business operating expense. Of course, usually once the material is published. the damage has already been done. By contrast, whenever there seems to be a whiff of something insulting to the court or the upsetting of the dignity of the courts, courts have dealt with these quite harshly. A good example is the open ended gaoling of the judges of St. Clair county in Missouri for refusing to comply with the order of mandamus of the U.S. Circuit Court. [In re Nevitt 117 Fed. Rep 448], and 14 days for a wolf whistle from the gallery to a female juror in R v Powell [Reduced by the Vic. Court of Appeal on 3/6/93 to 1 day]. Examples of these abound and in particular in respect of journalists who refuse to disclose sources from The Attorney General v Clough (1963) 1 QB 773 (6 months gaol) onwards, that followed the Australian case of McInnes v The Attorney General of Victoria (1940) 63 CLR 873. (A-G v Mulholland & Foster (1963) 2 QB 477) (6 months and 3 months) Nicholls v D.P.P. the South Australian Full Court on 21 May, 1993. There are of course many examples of witnesses gaoled for refusing to give evidence.

Two recent cases demonstrate some principles in respect of punishment for contempt. In Independent Commission Against Corruption v Cornwall (No 2) (Abadee J. 8 September, 1993) Abadee J. exercising the power of the Supreme Court to punish for a contempt of ICAC, found a young female journalist guilty of two offences of contempt involving a refusal to answer questions

put to her by the ("ICAC") or to produce documents under her control. The information sought by ICAC was the name of a police officer who had, according to the defendant, given her information relating to the notorious criminal "Neddy Smith" which was the basis of her article. Abadee J. found her to be a person of excellent character who appeared to be a sincere, conscientious, experienced and dedicated journalist with integrity and otherwise a law abiding citizen. However, he said that what she had done was a conscious deliberate defiance of the law and constituted a serious interference with ICAC's investigation. The court he said could not condone or tolerate such conduct in any way. The punishment must be both appropriate to the offence and publicly to be seen as such. He gave fairly short shrift to the matter of honor or conscience saying " that when it had been clearly brought home to the defendant, as it was by the ICAC Commissioner, that her refusal to answer or produce documents could not be maintained against the interests or requirements of ICAC, in accordance with the law, thereafter the defendant's persistence in defying the law makes it difficult to attach much weight, in determining penalty to her claimed belief that her undertaking requires her to conceal the identify of the source". To the proposition that she was a prisoner of her conscience he said that it may be that the better view, that she is a "victim of adverse false doctrines promoted here and abroad". However, he rejected the submission of the Solicitor General for N.S.W., that he should order committal for an indefinite sentence to coerce the defendant to do the thing required by ICAC on the basis that there was no doubt about her position and that an exercise in coercion in the proceedings was a lost cause in that no punishment would cause the defendant to change her stance. In the ultimate, he imposed a sentence of imprisonment for two months in respect of each offence to commence from that day but suspended it upon her complying with certain orders and undertakings.

The use of the indefinite or open ended sentence as a coercive tool (though recommended against in the Law Reform Commission report on contempt No. 35 of 1987) is still alive and well in New South Wales as the case of Wood v Staunton confirmed in the proceedings brought by Justice Wood the Commissioner presiding over the Royal Commission into the New South Wales Police Service in the Administrative Law Division of the Supreme Court of New South Wales. (Wood v Staunton Dunford J. 8/6/95). Staunton had appeared before the Commission, and been sworn but apart from answering certain general questions relating to personal matters and his previous employment as a New South Wales Police Officer, declined to answer any further questions. No evidence or defence was adduced on his behalf before the Commissioner or Dunford J. on the charge of contempt and he was accordingly found guilty. On sentence, evidence was adduced by him denying any information concerning corruption or any arrangement with the police so the police might act corruptly to assist any client of his involving the procuring of false statement and claiming that in his professional career as a licensed private investigator he acquired information from a number of sources which he did not consider he had the right to divulge or to answer any questions

that might lead directly or indirectly to the divulging of the information or the sources or that he had the right to identify his clients or persons that he may have spoken to on their behalf; furthermore, that he believed that the questions directed would have the potential to compromise his ongoing relationships with clients in breach of the confidentiality reposed in him. Dunford J., (for reasons best beknown to himself) pronounced himself satisfied that it was not a mistaken belief genuinely held but merely a false excuse which the person knew to be false which he was using in a rather blatant attempt to avoid giving answers which might implicate his associates and/or himself in corruption or other criminal activities. He then adopted the classic rhetoric of the Courts in referring to his contempt being "wilful and contumacious and designed to frustrate the work of the Commission" ... "It amounts to public defiance of the Commission calls into play the penal or disciplinary jurisdiction to deal with criminal contempt". "If the number of witnesses before the Commission took the same view, the Commission would be reduced to a toothless farce." He specifically rejected the comparison with Cornwall's case above cited on the bases that (a) it was early days yet to test whether the defendant would not change his resolve particularly after some time in prison; (b) he was not defending a principle in which he genuinely believed; (c) there were probably a number of witnesses to be called before the Commission who might find themselves in a position similar to him to whom it was essential that a clear message to be sent as their obligation to answer questions; (d) he might change his heart if persons whom he was refusing to name were in the meantime named to the Commission by others. Staunton was committed to prison until further order. And there he at present remains. There is in this judgment more than a faint whiff of why the Law Reform Commission recommended against the open ended sentence. i.e. "There is a grave risk that, because a contemnor who stubbornly refuses to obey an order has provoked a direct confrontation with the Court, the judicial determination to "come out on top" may cause the contemnor to suffer a sentence which is manifestly out of proportion with the sentences actually experienced by major criminal offenders." [Law Reform Commission Report No. 35 1987 317/318).