

CASE NOTE

**ATTORNEY GENERAL FOR THE STATE OF NSW v X; JOHN FAIRFAX PUBLICATIONS  
PTY LTD v ATTORNEY GENERAL FOR THE STATE OF NSW**

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[145] Two recent decisions of the New South Wales Court of Appeal highlight the fundamental importance of the public interest in the freedom of communication in the context of the law of contempt.

**Attorney General for the State of NSW v X**

In *Attorney General for the State of New South Wales v X*,<sup>2</sup> the Court of Appeal was called upon, pursuant to s 101A of the *Supreme Court Act 1970* (NSW), to determine five questions submitted to it by the Attorney General which arose from or in connection with contempt proceedings in which the alleged contemnor (X) was found not to have committed contempt. Each of the questions concerned the scope and application of the so called 'public interest defence'. The foundational statement of the public interest defence is found in the following passage from the judgment of Jordan CJ in *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Limited*:

It is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a Court of justice from having his case tried free from all matter of prejudice. But the administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested; and if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of the law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be [146] suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant.

It is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public

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interest, by reason merely of the fact that the matter in question has become the subject of litigation, or that a person whose conduct is being publicly criticised has become a party to litigation either as plaintiff or defendant, and whether in relation to the matter which is under discussion or with respect to some other matter.<sup>3</sup>

What made the application of the public interest defence in the case at hand so significant (and which no doubt prompted the Attorney to submit the questions to the Court of Appeal) was that the trial judge applied the defence and acquitted the defendant notwithstanding that he had found that the publication contained seriously prejudicial statements which gave rise to an implication of guilt of a person facing trial for a serious offence.

The proceedings at first instance were commenced in the Supreme Court by the Attorney General filing a summons which sought a declaration that X, the publisher of a Sydney daily newspaper, was guilty of contempt for publishing certain material in that newspaper on 27 October 1998. The Attorney alleged that the material was likely or had a tendency to interfere with the trial in the District Court in Sydney of Duong Van Ia on charges of supplying heroin.

The impugned articles began strikingly with a banner headline across the top of the front page which read 'Unmasked: our new drug bosses' and a large colour photograph of Mr Duong below it with the caption 'The Top Heroin Distributor'. In the accompanying articles, Mr Duong was variously described as 'a drug dealer', 'the current drug czar', a 'drug boss', 'your classic criminal', 'the country's largest heroin distributor' and as a person who, together with another named individual, had 'carved out a giant portion of Australia's three billion dollar heroin trade, building a network from Southern China to Sydney'. At the very conclusion of the article, reference was made to the fact that Mr Duong had been charged with supplying heroin and that he was yet to face trial. At the time of publication, Mr Duong's trial had been fixed for hearing on 23 March 1998 — about six months after publication.

The trial judge found that 'there could scarcely be more prejudicial statements than

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<sup>2</sup> [2000] NSWCA 199 (2 August 2000).

those contained in the articles about a man facing charges concerning the supply of heroin' and that 'if any juror at Mr Duong's trial remembered any of them he would not in my opinion receive a fair trial'.<sup>4</sup> As a result, the trial judge was satisfied that as a matter of practical reality the articles had a tendency to interfere with the due course of justice at Mr Duong's trial.<sup>5</sup>

Yet the articles also had a broader theme and message. The trial judge summarised the content of the articles as follows:

[147] The persons controlling crime, particularly drug crime, were changing. The old controllers had passed on for various reasons. The new ones included Mr Duong and Duncan Lam. A cultural and financial revolution had taken place, resulting in that change. The Federal Police Commissioner estimated that between two and three thousand kilograms of heroin were imported annually, worth up to \$3 billion, and that only 220 kilograms had been seized in the last year. The Federal Police investigate only one in six or seven major heroin trafficking syndicates, the result of the size and worldwide nature of the drug trafficking industry and the inadequacy of law enforcement resources in Australia.<sup>6</sup>

It was on the basis of this discussion of this matter of great public concern, and the fact that the articles did not discuss the facts or circumstances of the charges pending against him, that the defendant based its public interest defence. Citing a passage from the judgment of Deane J in *Hinch v Attorney-General (Victoria)*,<sup>7</sup> the trial judge approached the defence on the basis that the ultimate practical question was whether it

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<sup>3</sup> (1937) 37 SR (NSW) 242.

<sup>4</sup> *Attorney General for the State of New South Wales v John Fairfax Publications Pty Limited* [1999] NSWSC 318, paras 105, 108 (Barr J).

<sup>5</sup> There are a number of interesting issues relating to this finding which ultimately were not considered by the Court of Appeal because the questions submitted by the Attorney General concerned the public interest defence and the respondent had no right of cross-appeal. For example, the evidence at trial established that by the time the Attorney had filed the Summons, Mr Duong had applied to have his trial vacated on the basis of the articles and the trial judge had rejected that application on the basis that he regarded it as being highly unlikely that any juror would link the publicity with the person appearing in the dock during the trial. Further, the respondent called expert evidence from a psychologist (who specialised in face and name memory) and an expert on jury behaviour and pre-trial publicity and tendered survey results, all of which evidence strongly suggested that after a five month delay prospective jurors would not have remembered Mr Duong's name and face and connected them with the articles. The trial judge largely dismissed this evidence.

<sup>6</sup> *Attorney General for the State of New South Wales v John Fairfax Publications Pty Limited* [1999] NSWSC 318, para 127 (Barr J).

<sup>7</sup> (1987) 164 CLR 15.

was reasonably open to say that the detriment to the trial was outweighed by the public interest in the freedom of communication.<sup>8</sup> His Honour found that it was.

The articles were part of a substantial series of articles dealing with subject matter of substantial broad public interest. The trial was likely to raise narrower issues which were only incidental to those canvassed in the articles. In view of these matters and the other matters I have dealt with I think that it is reasonably open to say that the detriment to the trial was outweighed by the public interest in the freedom of communication.<sup>9</sup>

In the Court of Appeal, there was an issue whether the questions submitted by the Attorney-General were questions of law as required by s 101A of the *Supreme Court Act*. Of the five questions submitted by the Attorney-General, the Court declined to answer four on the basis that they were infelicitously drafted, were not addressed directly in the Attorney-General's submissions or because they did not raise questions of law. The question which ultimately was addressed by the Court of Appeal was in the following terms:

- (v) Whether it was reasonably open to his Honour to find that the detriment to the administration of justice (which his Honour held to be present) was outweighed by the public interest in the freedom of communication of the material contained in the publication.

The applicant submitted that the balancing exercise in the public interest [148] defence itself was a 'legal exercise' and that therefore the issue whether it was reasonably open to reach the conclusion which the trial judge reached was a question of law. Reliance was placed on the judgment of Gaudron J in *Hinch v Attorney-General (Victoria)*,<sup>10</sup> where her Honour described the balancing exercise as a 'question of law'.<sup>11</sup> In the same case, however, Deane J characterised the decision based on the balancing exercise as 'one of fact'.<sup>12</sup>

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<sup>8</sup> *Attorney General for the State of New South Wales v John Fairfax Publications Pty Limited* [1999] NSWSC 318, para 126 (Barr J) citing Deane J in *Hinch v Attorney General (Vic)* (1987) 164 CLR 15, 51.

<sup>9</sup> *Ibid* para 134 (Barr J).

<sup>10</sup> (1987) 164 CLR 15, 85.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid* 50.

Spigelman CJ, with whom Priestley JA agreed, held that the process of balancing public interests and determining which should prevail in particular circumstances, was not itself the determination of a question of law.<sup>13</sup> His Honour referred by analogy to a line of authority which suggested that the determination of where the ‘public interest’ lies, in the context of a statutory power with a test so expressed, was a question of fact and degree.<sup>14</sup>

The Chief Justice held, however, that the submitted question was a question of law: the issue was whether or not the degree of interference with the administration of justice in the circumstances was of such a character that no other conclusion but that the defence was made out was open as a matter of law.<sup>15</sup> By reference to analogous bodies of case law, his Honour expressed the opinion that the test to apply to determine whether the conclusion was open was a stringent one: there must be ‘something overwhelming’.<sup>16</sup>

Mason P, on the other hand, considered that it was unnecessary to decide whether the balancing exercise is itself a question of law. He approached the matter on the basis that the jurisdiction of the Court under s 101A of the *Supreme Court Act* was attracted by errors of law exposed in the trial judge’s application of the public interest defence.<sup>17</sup>

In answering the submitted question (v) and addressing the trial judge’s application of the balancing exercise in the public interest defence, the Chief Justice and the President expressed divergent views about the whether in certain cases the public interest in the freedom of communication could ever outweigh the right to a fair trial.

In the view of Mason P, whilst the public interest defence could apply to cases involving the interference with criminal proceedings, the primacy of the right to a fair trial dictated that the defence cannot apply to some types of interference with criminal trials.

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<sup>13</sup> [2000] NSWCA 199, para 55.

<sup>14</sup> *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 61 ALJR 393; *Re Media, Entertainment & Arts Alliance; Ex parte Hoyts Corporation Pty Limited* (1993) 67 ALJR 389.

<sup>15</sup> [2000] NSWCA 199, para 62.

<sup>16</sup> *Ibid* paras 118–136.

There could be no doubt that the defence is not open to a person proved to have intended to interfere with the administration of justice. Mason P was also of the opinion that the defence cannot be invoked where the interference comprised an implication of guilt, a suggestion of guilt or a canvassing of matters directly related to the issue of guilt.<sup>18</sup> His Honour found authority for this proposition in the five separate judgments in *Hinch v Attorney General (Victoria)*. Having extracted various passages from the judgments in *Hinch v Attorney General (Victoria)*, Mason P said:

These passages show the justices to have been vitally concerned to demonstrate the limits of the *Bread Manufacturers* defence. In my view, they establish that the defence cannot be invoked to excuse a publication proved beyond reasonable doubt to have the requisite tendency to interfere with the fair trial of a pending [149] criminal charge where the interference consists of implication or suggestion of guilt or the canvassing of matters directly related to the issue of guilt ... In times of peace, there can be no justification for trial by media that trenches upon an accused person's right to a fair trial by the implication or suggestion of guilt in a manner and time that has the proven requisite tendency.<sup>19</sup>

Mason P also considered that nothing in any earlier decisions of the NSW Court of Appeal cut across this analysis. His Honour referred in particular to *Attorney General (NSW) v Willesee*,<sup>20</sup> *Registrar of Court of Appeal v Willesee*,<sup>21</sup> *Director of Public Prosecutions v Wran*,<sup>22</sup> and *Attorney-General for NSW v TCN Channel Nine Pty Limited*.<sup>23</sup>

Having reached the conclusion that in certain cases of interference with a criminal trial the public interest defence cannot apply, his Honour then analysed the trial judge's application of the defence and held that it was not reasonably open to the trial judge to say that the detriment to the trial was outweighed by the public interest in the freedom of communication. Particularly significant to Mason P was the fact that the articles at

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<sup>17</sup> *Ibid* para 176

<sup>18</sup> *Ibid* para 195.

<sup>19</sup> *Ibid*.

<sup>20</sup> [1980] 2 NSWLR 143.

<sup>21</sup> [1985] 3 NSWLR 650.

<sup>22</sup> (1986) 7 NSWLR 616.

<sup>23</sup> (1990) 20 NSWLR 368.

the very least suggested Mr Duong's guilt, canvassed matters central to the issues in the forthcoming trial and made highly prejudicial statements about Mr Duong's criminal propensity. His Honour also considered that the trial judge erred in regarding as determinative the fact that the harmful impact of the articles was incidental and unintended. In Mason P's view, such features are relevant but not determinative.<sup>24</sup>

Spigelman CJ agreed that the articles in question implied or suggested guilt and canvassed matters directly related to the issue of guilt, but disagreed with Mason P that the authorities supported the promulgation of a rule which prevents the conduct of a balancing exercise in the three circumstances identified by Mason P. In the opinion of the Chief Justice, there is no predetermined balance where there is an implication of, or suggestion of, or a canvassing of, guilt.

Spigelman CJ also considered it significant that in the years since the decisions of the Court of Appeal which both he and Mason P reviewed, the immunity in the Constitution of the Commonwealth with respect to freedom of communication on governmental and political matters had been recognised.<sup>25</sup> In the view of the Chief Justice, the law of contempt must adapt to the constitutional immunity. It is significant, for the purposes of the compatibility of the law of contempt with the constitutional freedom, that the Court is able to conduct the balancing exercise in each case. For this reason, the Chief Justice concluded that in the absence of binding authority, the Court [150] should be slow to develop a principle that there is a predetermined balance, other than where there is an intention to interfere with the administration of justice on the part of the contemnor.<sup>26</sup>

Having determined that there was no predetermined balance, Spigelman CJ analysed the trial judge's findings and concluded that, whilst other judge's may have balanced the conflicting public interests in a different way, 'the content of the publications to which his Honour referred, the context of the charges and the period before the trial, was such as to permit a conclusion in all the circumstances of the character to which his

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<sup>24</sup> [2000] NSWCA 199, paras 173–174 and 216–218.

<sup>25</sup> See in particular *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *John Pfeiffer Pty Limited v Rogerson* [2000] HCA 36.

<sup>26</sup> [2000] NSWCA 199, para 116.

Honour came.'<sup>27</sup> Spigelman CJ therefore answered question (v) in the negative.

Spigelman CJ's analysis of the public interest defence and his Honour's conclusion that there is no predetermined balance, even in cases where there are seriously prejudicial statements and implications of guilt, is significant. Whilst in such cases the scales may still be tipped in favour of the right to a fair trial, the fact that it is open to find otherwise demonstrates the importance attached to the right to freedom of communication.

### **John Fairfax Publications Pty Ltd v Attorney General for the State of NSW**

The decision of the Court of Appeal in *John Fairfax Publications Pty Limited v The Attorney General for the State of New South Wales*<sup>28</sup> also highlights the significance of the constitutional guarantee of freedom of communication in governmental and political matters in the context of the law of contempt.

In this case, the claimant, the publisher of the *Sydney Morning Herald*, the *Australian Financial Review* and *The Sun Herald*, sought declarations that each of subss (7), (8) and (9) of s 101A of the *Supreme Court Act* were invalid.

Section 101A of the *Supreme Court Act* provides that the Attorney General may submit questions of law to the Court of Appeal which arise from or in connection with contempt proceedings in which the alleged contemnor is found not to have committed contempt.<sup>29</sup>

Subsections (7), (8) and (9) of s 101A provide as follows:

- (7) Proceedings under this section are to be held in camera, except that a legal practitioner may be present at the proceedings for the purpose of reporting the case for any lawful purpose of the Council of Law Reporting for New South Wales.
- (8) A person:

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<sup>27</sup> Ibid para 148.

<sup>28</sup> [2000] NSWCA 198.

<sup>29</sup> Section 101A of the *Supreme Court Act* is akin to s 5A of the *Criminal Appeal Act 1912* (NSW) which provides for the Attorney General to submit questions of law to the Court of Criminal Appeal which arise in connection with the trial of a person on indictment where that person has been acquitted.

- (1) must not publish any report of any submission under subsection (1);  
and
- (2) must not publish any report of proceedings under this section so as to disclose the name or identity of the alleged contemnor.
- (9) Any publication in contravention of subsection (8) is punishable as contempt of the Court.

The claimant challenged these subsections in two ways.

Firstly, the claimant invoked the decision of the High Court in *Kable v the Director of Public Prosecutions for the State of New South Wales*.<sup>30</sup> Whilst it is not possible to distil the four judgments of the majority in *Kable* into a single principle, in general terms the decision is authority for the proposition that a State legislature may not invest the Supreme Court of the State with a function which is incompatible with the exercise by that Court of the judicial power of the Commonwealth. The claimant submitted that a [151] statutory obligation on the Court of Appeal of NSW to invariably sit in camera with respect to a particular category of proceedings was incompatible with the role of the Supreme Court as a court which exercises federal jurisdiction under Chapter III of the Commonwealth Constitution and from which an appeal lies to the High Court of Australia, or incompatible with the role of the Court in a case in which the Court was exercising federal jurisdiction.

Spigelman CJ relevantly formulated the test of incompatibility in the following way:

Do s 101A(7), (8) and (9) involve such an interference with the conduct of an appeal and a distortion of its predominant characteristics, as to involve the appellate court in the determination of questions otherwise than by the exercise of the judicial power of the Commonwealth?<sup>31</sup>

The Chief Justice answered this question ‘no’. Whilst there could be no doubt that the principle of open justice is one of the most fundamental aspects of the system of justice

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<sup>30</sup> (1996) 189 CLR 51.

<sup>31</sup> [2000] NSWCA 198, para 49. This formulation of the test was derived from the judgement of Gummow J in *Nicholas v The Queen* (1998) 193 CLR 173, paras 145–146.

in Australia and is of constitutional significance,<sup>32</sup> the Chief Justice nevertheless held that:

the specific measure under consideration did not represent an infringement which impinges on the 'integrity' of the Supreme Court as a repository of federal power. Nor does it impinge on the independence, or the appearance of independence, of the court. Nor does it constitute such a distortion of its predominant or essential characteristics as to involve the court determining the issues of law posed for its consideration, otherwise than by the exercise of the judicial power of the Commonwealth.

Meagher JA agreed with Spigelman CJ in relation to the challenge based on *Kable*. Priestley JA, on the other hand, held that the relevant provisions were beyond the power of the State's Parliament to enact on the basis that in his opinion:

the impugned provisions compromise the integrity of the Supreme Court and the appearance of independence of the Court ... It seems to me that the public can have little confidence in a system which compels a court of appeal to hear in secret arguments put on behalf of the government aimed at restricting freedom of speech.<sup>33</sup>

The second ground for challenging the relevant provisions was that s 101A infringed the constitutional immunity with respect to freedom of communication on governmental and political matters which was recognised in *Lange v Australian Broadcasting Corporation*.<sup>34</sup>

[152] The claimant put its case based on *Lange* in three different ways: firstly, that judges and courts are within the sphere of public officials and bodies about whom the freedom could be exercised and the conduct of the judiciary was itself a legitimate matter of public interest; secondly, that the exercise of statutory powers under a State Act which involves the responsibility of a State Minister, the Attorney General, to a State Parliament is within the scope of the constitutional freedom; and thirdly, that the subject matter of the articles which gave rise to the contempt proceedings themselves

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<sup>32</sup> *Scott v Scott* [1913] AC 417; *Dickason v Dickason* (1913) 17 CLR 50; *Russell v Russell* (1976) 134 CLR 495; *Coulter v The Queen* (1987–1988) 164 CLR 350.

<sup>33</sup> [2000] NSWCA 198, para 161.

<sup>34</sup> (1997) 189 CLR 520.

raised questions of a governmental and political character at the Commonwealth level.

Spigelman CJ (with whom Priestley JA agreed on this ground) considered that the constitutional immunity did not extend so far as to encompass the first two arguments.<sup>35</sup> In relation to the third argument, his Honour held that the articles the subject of the contempt proceedings which gave rise to the case at hand were illustrative of the potential application of the law of contempt, as may be elucidated by the Court upon an application to which the restrictions in s 101A apply. Spigelman CJ said:

The issues to be agitated under s 101A are legal issues one step removed from the direct application of the law of contempt in a way which impedes the freedom of communication. Nevertheless, in my opinion, the way in which the law of contempt is sought to be clarified in such proceedings, could impinge on matters of a governmental and political character in subsequent contempt proceedings.

The law of contempt as proposed to be clarified or determined by an application under s 101A applies to a wide range of conduct including communications about matters of major social and political significance at a Commonwealth level. The process of consideration of the applicable law is inextricably interconnected with its practical operation. In my opinion, such consideration falls within the scope of the constitutional immunity.<sup>36</sup>

Spigelman CJ also held that the institution and conduct of proceedings by the Attorney under s 101A falls within the ambit of governmental and political matters within the constitutional immunity, particularly as contempt proceedings instituted by the Attorney, and applications with respect to such proceedings under s 101A, may relate to the exercise by a State Court of federal jurisdiction. Spigelman CJ said (omitting citations):

The law of contempt is part of the common law of Australia, which is applicable in all courts including federal courts and State courts exercising federal jurisdiction. The role of a State Attorney in instituting and pursuing proceedings with respect to the law of contempt is one manifestation of the integration which exists between federal and state levels of government. The significance and integration of State courts in a national

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<sup>35</sup> [2000] NSWCA 198, paras 80–84 (the first argument) and 85–89 (the second argument).

judicial system was emphasised by McHugh J in *Kable*, supra at 114–115.

The role of the State Attorney under s 101A with respect to federal jurisdiction is indivisible from that role with respect to state jurisdiction. The common law which is to be elucidated impinges on both. Furthermore, the policy of a State Attorney manifest in the contentions put on her or his behalf may be relevant to decisions at a Commonwealth level on the exercise of such powers as the Commonwealth may have to affect the operations of State courts in the exercise of federal jurisdiction or, indeed, whether to modify the conferral of such jurisdiction.<sup>37</sup>

Having determined that proceedings under s 101A fell within the constitutional immunity, it was next necessary to consider whether the relevant subsections were reasonably appropriate and adapted to serve a legitimate objective; namely the protection from further adverse publicity of a person acquitted of a criminal charge.

[153] Spigelman CJ accepted that the purpose of subss (7) and (8)(a) was to ensure that the party found not guilty of contempt is not exposed to further public scrutiny, but found that it was possible to conceal the identity of the person acquitted without requiring the whole proceedings to be held in camera and without prohibiting the publication of any report of any submission. Accordingly the Parliament went well beyond what was required in order to serve the objective of the legislation and had intruded into the freedom of communication guaranteed by the Constitution in a manner not reasonably appropriate and adapted to achieving that legitimate objective.<sup>38</sup>

On the other hand, in relation to subs (8)(b), his Honour was of the opinion that the prohibition in this provision did not constitute a rule that is not reasonably appropriate or adapted to serve the legitimate end.

Each of subss (7) and (8)(a) of the *Supreme Court Act* were declared invalid, as was subs (9) insofar as it applies to a publication in contravention of subs (8)(a). The result is that, when the Attorney General submits questions of law arising from contempt proceedings to the Court of Appeal pursuant to s 101A of the *Supreme Court Act*, those

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<sup>36</sup> Ibid paras 101–102.

<sup>37</sup> Ibid paras 105–106.

<sup>38</sup> Ibid paras 127–129.

proceedings as a general rule will be held in open court and the proceedings will be open to the same public scrutiny as any other proceedings in the court.