SENTENCING FOR CONTEMPT OF COURT

NATIONAL JUDICIAL COLLEGE OF AUSTRALIA AND THE AUSTRALIAN NATIONAL UNIVERSITY SENTENCING CONFERENCE, 29 FEBRUARY 2020

Justice Natalie Adams[1]
Belinda Baker[2]

INTRODUCTION[3]

1. Although most lawyers are aware of the power to punish for contempt in the face of the court in a general sense, the law of contempt goes far beyond that power and is a surprisingly misunderstood area of the law.

2. Part of the reason for this misunderstanding is the way in which contempt subverts many legal principles which are considered to be basic or fundamental in other areas of the law. For example:

   (i) 'Offences' for contempt are brought within the civil jurisdiction of the court;

   (ii) Despite being brought in the civil jurisdiction of the court, the standard of proof for all contempts (both "civil" and "criminal" contempt) is beyond reasonable doubt;

   (iii) Contempt is the only area of the law in which it is possible for the judge to be the witness, the prosecutor, the victim,[4] and the judge;

   (iv) Although the penalty for contempt includes, at least in theory, imprisonment for life, the determination of liability for contempt is always determined by a judge rather than a jury.

3. Further, despite the relative infrequency with which contempt cases are considered by the High Court, the law of contempt has undergone fairly significant common law development over the past century. This development has merged many aspects of concepts that were previously foundational to the law of contempt, such as notions of "civil" contempt, and "criminal" contempt.

4. As a result, there are a number of interesting issues that remain uncertain in the area of contempt. Some examples of such issues are:

---

[1] Justice of the Supreme Court of New South Wales.
[2] Barrister and Crown Prosecutor (NSW).
[3] The authors are grateful to Jacqueline Krynda for her assistance in the preparation of this paper.
[4] Of course, as discussed below, it is not the judge personally who is the victim of a contempt. Rather, it is the administration of justice (as represented by the judge) that is the victim of a contempt.

(i) What, if anything, is the difference between civil and criminal contempt, and what does that mean for the way in which contempts are dealt with?

(ii) When, if ever, should the summary procedure (when the judge acts as witness, prosecutor and judge) be utilised?

(iii) Should State sentencing legislation apply to the imposition of a punishment for contempt?

(iv) When can a contempt be purged?

5. In this paper we propose to achieve two aims: to provide a summary of the relevant procedural and legal aspects of the law of contempt and also to explore some of these more difficult issues, including the question of whether the relevant sentencing legislation in each State should apply to the punishment of a contemnor for contempt.

6. To this end, we will first outline the general principles in the law of contempt. In doing so, we will outline the procedural aspects of contempt and address the two fundamental dichotomies in this area: that between "civil contempt" and "criminal contempt" and that between the power to punish contempt summarily as opposed to by other means such as referral to the Supreme Court. We will then deal specifically with sentencing principles, focussing particularly on the arguments concerning the applicability of sentencing legislation to the law of contempt.

Terminology

7. From the outset, there are some terms you ought to be aware of in this area:

8. A "**contemnor**" is someone who has committed a contempt.

9. The words "**contumacious**" and "**contumelious**" are used interchangeably but have slightly different meanings; they both mean broadly the same thing: wilfully disobedient.

10. In *Grocon v Construction, Forestry, Mining and Energy Union (CFMEU) (No 2)*,[5] Cavanough J undertook an extended discussion of the requirements for contempt to be "contumacious". As his Honour noted at [86], a significant issue in dispute was whether the CMFEU's conduct could be classified as such. Citing Bromberg J in *Vaysman v Deckers Outdoor Corporation Inc*,[6] his Honour noted that a contumacious breach is more than a mere wilful breach. A defendant is also not contumacious if they only behave in a way that is insulting.

[5] (2014) 241 IR 288; [2014] VSC 134.
[6] (2011) 276 ALR 596 at 640 (Bromberg); [2011] FCAFC 17.

11. His Honour then considered the cases which hold that contumacious conduct is conduct that is "deliberately defiant", quoting *AMIEU v Mudginberri Station Pty Ltd*: "where the conduct amounts to public defiance, involves a public injury and this calls into play a penal or disciplinary jurisdiction to deal with criminal contempt".[7] However, his Honour considered that the weight of authority was in favour of *deliberate* defiance rather than *public* defiance, or an "obstinate disregard" of the obligation imposed by or owed to the Court.[8]

12. In support of this conclusion, his Honour cited cases from a range of jurisdictions, including *Mosman Municipal Council v Kelly (No 3)*[9] (where Biscoe J defined contumacious as "conscious defiance") and *Pelechowski v Registrar, Court of Appeal (NSW)*[10] (where Kirby J used the language of "deliberate defiance").

13. In *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd*,[11] the Victorian Court of Appeal noted that the appellant did not challenge his Honour's findings as to the meaning of these terms.

14. Further, in C*ommissioner for Fair Trading v Voulon*,[12] a contempt case decided in the Supreme Court of Western Australia, Miller J noted (at [121]):

> "…the word 'contumacious' means what has been termed 'a perverse and obstinate resistance to authority'. The following passage from the judgment of Sir John Megaw in *Re Jokai Tea Holdings* sets out the meaning of the word "contumacious" for the purpose of these proceedings:
>
> > The noun '"contumely", as defined in the Shorter Oxford English Dictionary reflecting, I believe, the sense in which it would ordinarily be understood, is "Insolent reproach or abuse". The conduct of the defendants, having regard to all the circumstances, could not be described as "contumelious". With all respect, it seems to me that the word "contumacious" would be more apt than "contumelious" in the passages in Lord Diplock's discussion of the effect of failure to comply with a peremptory order in *Allen v Sir Alfred McAlpine & Sons* , and in *Birkett v James*. "Contumacy" means "Perverse and obstinate resistance to authority". Surely it is that characteristic, not "insolent reproach or abuse", which is a frequent hallmark of a litigant's failure to comply with a peremptory order?"

15. As noted, this would appear to classify "contumacious" as wilfulness but "contumelious" as being something more "insolent" and "abusive".

---

[7] (1986) 161 CLR 98 at 108 (Gibbs CJ, Mason, Wilson and Deane JJ); [1986] HCA 46 ("*Mudginberri*").
[8] *Seymour vs Migration Agents Registration Authority* [2006] FCA 965 at [107] (Rares J).
[9] [2009] NSWLEC 92.
[10] (1999) 198 CLR 435; [1999] HCA 19 at [147]-[148] (Kirby P).
[11] (2014) 47 VR 527; [2014] VSCA 26.
[12] [2006] WASC 261.

16. **Contempt in the face of the Court**: Criminal contempts include contempts "in the face of the court", such as insulting the presiding judicial officer, or refusing to answer questions. As will be seen below, it is only contempt *in the face of the court* which permits a judge to deal with a criminal contempt summarily.

17. There is no clear authority that determines what "in the face of the court" means in this context. In *Fraser v R*,[13] Moffitt P held that the relevant conduct must have been seen or heard by the judge. An alternate view is that in order for a contempt to be "in the face of the court" it must be "sufficiently proximate in time and space to the trial of proceedings then in progress or imminent so as to provide a present confrontation to the trial".[14]

18. Obviously, there can be no contempt in the face of the court when the conduct occurs *after* the proceedings are completed.

19. Other criminal contempts *not* in the face of the court include interfering with witnesses, *sub judice* contempt (publishing material that has a real prospect of interfering with the administration of justice in a matter before the court), scandalising contempt and contumacious disobedience of court orders.

A Brief History

20. It has long been recognised that the courts have a power to punish as contempt any act which disrupts the trial process by defying the court's authority. The use of the term "contempt" in this context can be traced back to the twelfth century. The concept of "contempt of the King" was referred to in the early Anglo-Saxon laws of penalties or "Oferhyrnes".[15] "Contempt of justice" was also an offence in the *Laws of Edwards the Confessor* and the *Laws of William the Conqueror*.[16]

21. In the thirteenth century, the jurist and scholar Henry de Bracton wrote in *De Legibus et Consuetunidibus Anglae* ("*On the Laws and Customs of England"*) that there "is no greater Contempt and Disobedience, for all persons within the Realm ought to be obedient to the King and within his Peace". As Fox notes in *The History of Contempt of Court*, the acts of contempt contained in the early statutes are still contemptuous today.[17]

22. By way of example of early reported cases of contempt, in a noted case in the fourteenth century in England, Prince Hal, annoyed by the fact that one of his

[13] (1984) 3 NSWLR 212; (1984) 15 A Crim R 58.
[14] *Court of Appeal, Registrar of the v Collins* [1982] 1 NSWLR 682 at 708 (Moffitt P).
[15] Fox, *The History of Contempt of Court* (Clarendon Press, Oxford, 1927) 45.
[16] Ibid 46**.** See also *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445 at 453 (Kirby P).
[17] Fox, above n 15, 41-56.

favoured servants had been arraigned before the Court of the King's Bench, armed himself and appeared before the bar of the court in an attempt to secure his release. Gascoigne CJ committed the Prince to prison. Later, in 1631, a condemned felon is reported as having "ject un Brickbat a le dit Justice que narrowly mist." The contemmor's offending hand was cut off as punishment for the contempt. The hand was then affixed to a gibbet on which he was immediately hanged as punishment for the earlier felony.[18]

23. As for the mode of trial, according to Fox, before the eighteenth century, contempt was "proceeded against like any other trespass in the common law courts, with the assistance of a jury, unless the contempt was confessed".[19] By 1821, courts were primarily hearing criminal contempt summarily, as occurred, for example, in *Rex v Clement*.[20] This form of contempt is what is now known as "criminal contempt".

24. The second type of contempt, which is now described as "civil contempt", had its origin in equity. In *Arlidge, Eady & Smith on Contempt*, the authors write that, at the end of the seventeenth century, one particular aspect of the Court of Chancery's jurisdiction was clear: it was "ready to compel obedience to its orders and decrees, and indeed its general process, by imprisonment".[21] Those who disobeyed were brought before the court by writ of attachment and were regarded as contemnors.

25. In Australia, the law of contempt was received into colonial law along with the rest of the common law. In *Re Bunn*,[22] Dowling J explained that the power arose from the inherent power of the court to control its own proceedings: "this is the King's Supreme Court. It is a necessary incident of a Supreme Court of Record that it should have power to punish for contempts."[23] Indeed, the first reported case of contempt had occurred in the previous year and concerned a complainant's failure to give evidence in a rape trial.[24]

CRIMINAL CONTEMPT V CIVIL CONTEMPT

26. In *AMIEU v Mudginberri Station Pty Ltd*, [25] the High Court (Gibbs CJ, Mason, Wilson and Deane JJ) said this about the emergence of a distinction between civil and criminal contempt (at 106):

---

[18] Ibid.
[19] Ibid 3, such as occurred in *Rex. v Paty* (1704) 2 Lord Ramon, 1115.
[20] (1821) 4 Barn & Ald 218.
[21] Patricia Londono, *Arlidge, Eady & Smith on Contempt* (5th ed, 2017, Sweet & Maxwell)1-47.
[22] [1832] NSWSupC 13.
[23] Ibid.
[24] See *R v Foley* [1831] NSWSupC 75; Suzanne O'Toole, *Contempt in the Face of the Court* (Doctoral Thesis, 2016) 14.
[25] (1986) 161 CLR 98; [1986] HCA 46.

> "The distinction, not recognized in Scotland, which has often been made between civil and criminal contempt seems to have originated in the seventeenth century (Report of the Committee on Contempt of Court (1974) Cmnd. 5794, at par.22)."

27. Their Honours went on to observe this about the two types of contempt (at 106):

> "Punishment for contempt serves two functions: (a) enforcement of the process and orders of the court, disobedience to which has been described as 'civil contempt'; and (b) punishment of other acts which impede the administration of justice, such as obstructing proceedings in court while it is sitting or publishing comments on a pending case, which have both been described as 'criminal contempt'."

28. Given the different historical origins of the two forms of contempt, and the different purposes of the two forms of contempt, it would seem that there are two quite different types of contempt with different functions: one civil and one criminal. But the position is far more complex. Over the past century, many of the historical differences between civil and criminal contempt have been eroded.[26] The rationale and, indeed, the distinction between the two classes of contempt have also been the subject of sustained criticism.

What are the differences, if any, between civil contempt and criminal contempt?

(a) Elements

29. Whilst the procedural aspects of contempt are provided for in most jurisdictions in the relevant court rules (see further at [69]-[76] below), the elements of both civil and criminal contempt are derived from, and remain governed by, the common law.

30. A civil contempt is a breach of a court's order or an undertaking. The elements of the offence of a civil contempt were set out by Perram J in *Re Group Pty Ltd v Kazal (No 4)*[27] as follows:

> "In a case of civil contempt, the Plaintiff must prove that:
>
> (i) an order was made by a court;
>
> (ii) the order was sufficiently clear such that one can be sure beyond reasonable doubt that the order was not complied with;
>
> (iii) the order was served on the alleged contemnor or that service was for some reason dispensed with under some lawful order;
>
> (iv) the alleged contemnor had knowledge of the terms of the order;

[26] Fox, above n15,1.
[27] [2017] FCA 1084 at [73] (Perram J).

(v) the alleged contemnor breached the order; and

(vi) the alleged contemnor took a deliberate step which, even if not intended to, breached the order. What is necessary is not that the alleged contemnor intended to breach the order but rather that the order was breached and that the action constituting the breach was intended. Hence, casual, accidental or unintentional acts which breach an order are excluded."[28]

31. Whilst there is only one form of civil contempt, namely disobedience to court orders, there are many forms of criminal contempt. Some examples include refusing to answer questions, threatening judges and legal practitioners, scandalising the court and sub judice contempt. Each of these forms of contempt share the same elements, namely, that:

(i) An act is done;

(ii) Which (objectively) has the tendency to interfere with the administration of justice.

32. In *Parashuram Detaram Shamdasani v King-Emperor*,[29] the test was stated in this way:

> "[f]or words or action used in face of the court, or in the course of proceedings, for they may be used outside the court, to be a contempt, they must be such as would interfere, or tend to interfere, with the course of justice. No further definition can be attempted."

33. It is important to be aware that the mental element for committing a criminal contempt is an intention to do the act; the contemnor does not have to *intend* to interfere with the administration of justice.[30]

34. As Deane J observed (in relation to proceedings for *sub judice* contempt) in *Hinch v Attorney-General (Vic)*:[31]

> "While the act of publication must be intentional, an intention or purpose of prejudicing the due administration of justice is not an essential ingredient of this type of contempt of court (John Fairfax & Sons Pty. Ltd. v. McRae [1955] HCA 12; (1955) 93 CLR 351, at p 371). The "critical question is whether the act is likely to have that effect, but the intention with which the act was done is relevant and sometimes important" (per Gibbs C.J., Mason, Murphy, Wilson and Brennan JJ.,

[28] In relation to elements (i)–(v), his Honour relied upon *Advan Investments Pty Ltd v Gleeson Motor Sales Pty Ltd* [2003] VSC 201 at [31]–[32] (Gillard J). In relation to element (v), his Honour relied upon *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98;[1986] HCA 4 at 106–107 (Gibbs CJ, Mason, Wilson and Deane JJ).. As to 4 his Honour relied on *Kazal v Thunder Studios Inc (California)* [2017] FCA 111 at [105] (Besanko, Wigney and Bromwich JJ) and also *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527; [2014] VSCA 261 at [299] (Ashley, Redlich and Weinberg JJA).

[29] (1945) AC 264, 268.

[30] *Ex parte Tuckerman; Re Nash* [1970] 3 NSWR 23.

[31] (1987) 164 CLR 15; [1987] HCA 56.

> Lane v. Registrar of Supreme Court of N.S.W. [1981] HCA 35; (1981) 148 CLR 245, at p 258 and see, generally, Registrar of the Court of Appeal v. Willesee (1985) 3 NSWLR 650, at pp 658 (Kirby P.) and 673-676 (Hope J.A.)."

(*Hinch,* of course, concerned a contempt committed by Derryn Hinch in disclosing a priest's prior sexual convictions before his pending trial. In upholding the finding of contempt, Mason CJ held that the primary judge was "fully entitled to reach the clear conclusion that the broadcasts constituted a substantial risk of serious interference with the fairness of the trial").

35. Justice Toohey observed (at 69):

> "Proceedings for contempt of court are proceedings for a criminal offence. It might be thought therefore that such proceedings cannot succeed unless they establish an intention on the part of the person charged to interfere in the administration of justice. But the weight of authority is now firmly against such a view. The conduct of the person charged must be deliberate in the sense that he must have intended to publish what he did. But that is a far different thing. Intention to interfere in the administration of justice has been held to be a relevant consideration, but its existence unnecessary for a conviction."

36. Similarly, Gaudron J referred (at 85) to the "established principle that intention is never decisive of whether or not a contempt is committed".

37. Whilst *intention* to interfere with the administration of justice is not an element of contempt, if a contemnor *does* intend to interfere with the administration of justice that can be a significant matter on the question of penalty.[32]

38. A civil contempt (a breach of an order or undertaking) can "become" a criminal contempt (after it has been proved beyond reasonable doubt) for the purpose of punishment if the contempt involves deliberate defiance (or is "contumacious" in nature).

39. An example of the consideration of whether civil contempt proceedings commenced *inter partes* during a hearing should be sentenced as a criminal contempt can be found in *Re Group Pty Ltd v Kazal (No 5)*.[33] In that matter, Perram J was satisfied beyond reasonable doubt of the elements of civil contempt. In determining the appropriate punishment for the contempt, his Honour then had to determine whether the actions of the contemnor were contumacious such as would warrant punishment for criminal contempt rather than civil contempt. His Honour was satisfied that the charged contempts were not wilfully disobedient and sentenced the contemnor for civil

[32] *Lane v Registrar of the Supreme Court of NSW* (1981) 148 CLR 245 at 258; [1981] HCA 35 at 258.
[33] [2018] FCA 546.

contempt rather than criminal contempt. Ultimately, his Honour imposed a fine and ordered indemnity costs.

(b) Commencement of proceedings

40. A second difference between the two forms of contempt is the manner in which the two forms of contempt are commenced. A civil contempt is usually (although not always) commenced by way of Notice of Motion by one of the parties in the proceedings in which the other party has failed to comply with an order. On the other hand, a criminal contempt (unless it is a contempt in the face of the court which has been dealt with summarily) is usually (although not always) commenced by way of summons with the Prothonotary as plaintiff. (The Prothonotary is just another name for the Registrar of the Common Law Division: s. 119(2) of the *Supreme Court Act 1970* (NSW)). As will be seen below, the exception to the Prothonotary (or the Attorney General) bringing proceedings for criminal contempt would be when a contumacious civil contempt (in other words a "criminal" contempt) is commenced by one of the parties in extant civil proceedings.

41. The reason for the difference in procedure between the two types of contempt is that civil contempts are usually left to the offended party to enforce as they arise when one party takes up the issue against its disobedient opponent. With a criminal contempt, it is the Court (via the Prothonotary) or (in some cases) the Attorney General) that typically brings the proceedings.

(c) Purpose

42. As stated above, the two forms of contempt have different origins. Civil contempt arose out of Equity and was historically concerned with the enforcement of court orders or undertakings, whereas criminal contempt is of longer standing and was historically concerned with punishing conduct that impedes the administration of justice.

43. However, this clear historical delineation of purpose has become progressively blurred over time. In *Witham v Holloway*[34] the High Court held the standard of proof for contempt, regardless of whether the contempt was described as criminal or civil, is beyond reasonable doubt. In so holding, the Court noted that the distinction between civil and criminal contempt was "*longstanding*" and that whilst civil contempt involves a disobedience to a court order or breach of an undertaking, where the contempt involved "deliberate defiance" or was "contumacious", the disobedience constitutes criminal contempt.

[34] (1995) 183 CLR; [1995] HCA 3.

44. The Court noted that the distinction was described as "arbitrary" and "unsatisfactory" in *Mudginberri,*[35] and that the Court there had said that there was "much to be said for the view that all contempts should be punished as if they were quasi criminal in character." The Court also noted Deane J's statement in *Hinch*,[36] that, as both civil and criminal contempts may result in a fine or imprisonment, "a finding of contempt … must realistically be seen as essentially criminal in nature", whether the proceedings were brought by the Attorney General, another public official or by a private individual for coercive purposes. Their Honours concluded (at 532):

> "The distinction between proceedings in the public interest and those that are coercive or remedial in the interest of the private individual is not, in our view, a satisfactory basis for the distinction usually made between civil and criminal contempt. Even allowing for those orders which, if breached, involve criminal contempt and for contumacious breach, the distinction does not support the general proposition that breach of an order in civil proceedings is a civil contempt. That is because there are some circumstances in which the breach simply cannot be remedied. That can be illustrated by reference to the orders in this case. The order that the appellant not deal with his assets in a way that reduced their value below $200,000 could not be remedied once his assets were reduced in such a way that he was in no position to raise that, or any lesser sum of money, to satisfy the judgment debt. And when the contempt proceedings were commenced, ie after judgment had been entered and the appellant's total inability to satisfy the judgment ascertained, the purpose of the disclosure order could no longer be achieved.
>
> At best, the distinction between proceedings in the public interest and proceedings which are coercive or remedial in the interest of the private individual supports a separate category of civil contempt to the extent that it clearly appears that the proceedings are remedial or coercive in nature. If that approach were to be adopted, it would follow that the contempt alleged in this case should have been classified as criminal, not civil, with the consequence the criminal standard of proof should have been applied. However, in our view, there are fundamental problems even with that approach."

(d) Appeal provisions

45. A third and important difference between the two forms of contempt are the provisions relating to appeal. For example, in New South Wales, s 101(5) and s 101(6) of the *Supreme Court Act* provides that:

> "(5) An appeal lies to the Court of Appeal from any judgment or order of the Court in a Division in any proceedings that relate to contempt (whether civil or criminal) of the Court or of any other court.
>
> (6) Subsection (5) does not confer on any person a right to appeal from a judgment or order of the Court in a Division in any proceedings that relate to criminal contempt,

[35] (1986) 161 CLR 98; [1986] HCA 46.
[36] (1987) 164 CLR 15; [1987] HCA 56.

being a judgment or order by which the person charged with contempt is found not to have committed contempt."[37]

46. This provision was considered by the High Court in *Hearne v Street.*[38] The contempt in that case was a breach of an implied undertaking not to use documents prepared in those proceedings for a collateral purpose. A question arose as to whether the contempt proceedings were punitive and, if so, as criminal proceedings, whether the plaintiff had a right if appeal against a finding that there had been *no* contempt. The Court of Appeal (Ipp, Basten JJA, Handley JA in dissent) held that the allegations were of breaches of an implied undertaking that were wilful but had not been shown to be contumacious and thus constituted allegations of civil contempt.

47. The High Court held at [132] (footnotes omitted):

> "It is necessary, however, first to put aside a suggestion by the appellants that all proceedings for contempt "must realistically be seen as criminal in nature". The quoted words were used to support a conclusion by this Court that all charges of contempt must be proved beyond reasonable doubt. The reaching of that conclusion eliminates one possible difference between civil and criminal contempt. It does not affect the question of appellate rights. Section 101(6) assumes that there is a difference, in relation to appellate rights, between civil and criminal contempts. A legislative assumption about the general law can be ignored on the ground that it is wrong, but the conclusion that it is wrong is not lightly to be reached. The appellants accepted that in relation to rights to appeal against the dismissal of contempt proceedings the distinction remained."

Commonalities shared by civil and criminal contempt

48. Despite the above (merging) differences, there are two significant similarities between civil and criminal contempts.

(a) Standard of proof

49. As outlined above, the standard of proof for both civil *and* criminal contempts is the criminal standard: beyond reasonable doubt.

50. In *Witham v Holloway*,[39] proceedings for civil contempt brought by a party in civil proceedings in the Equity Division of the NSW Supreme Court against another party had been found to be committed on the balance of probabilities. The Court (Brennan, Deane, Toohey and Gaudron JJ) held (at 534):

---

[37] See also s101A of the *Supreme Court Act 1970* (NSW).
[38] (2008) 235 CLR 125; [2008] HCA 36.
[39] (1995) 183 CLR; [1995] HCA 3.

> "The differences upon which the distinction between civil and criminal contempt is based are, in significant respects, illusory. They certainly do not justify the allocation of different standards of proof for civil and criminal contempt. Rather, the illusory nature of those differences and the fact that the usual outcome of successful proceedings is punishment, no matter whether primarily for the vindication of judicial authority or primarily for the purpose of coercing obedience in the interest of the individual, make it clear as Deane J said in Hinch, that all proceedings for contempt 'must realistically be seen as criminal in nature'. The consequence is that all charges of contempt must be proved beyond reasonable doubt."
>
> (Emphasis added.)

51. In this respect, it is of interest to note that s 140 of the *Evidence Act 1995* (NSW), which was enacted on 1 September 1995, provides that "in a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities". Given that proceedings for contempt are civil proceedings, the terms of s 140 would suggest that the statutory standard of proof is on the balance of probabilities. *Witham v Holloway* was decided on 11 October 1995, about six weeks after the *Evidence Act* was enacted and the decision contains no reference to s 140 of the *Evidence Act.*

52. In *ASIC v Sigalla (No 4)*, [40] White J (as his Honour then was) considered this issue and was satisfied that although the *Evidence Act* "displaces" the decision in *Witham v Holloway* (see at [92]-[94]), [41] the uniform practice in both the Supreme Court and the Federal Court ever since *Witham v Holloway* was decided has been to apply the criminal standard to both civil and criminal contempts. Although not expressly referred to by White J, the tension between s 140 and *Witham v Holloway* may well be resolved by s 9(1) of the *Evidence Act* which provides that:

> "This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment."

53. In *CFMEU v Boral*, [42] the High Court confirmed that the standard of proof in all contempts was beyond reasonable doubt with no reference made to ss 9 or 140 of the *Uniform Evidence Act*. [43]

[40] [2011] NSWSC 62.
[41] [2011] NSWSC 62.
[42] (2015) 256 CLR 375; [2015] HCA 21 .
[43] (2015) 256 CLR 375; [2015] HCA 21 at [23] (French CJ, Kiefel, Gageler and Keane JJ). (It was said that the "starting point" of the appellant's submissions was that the standard of proof is beyond reasonable doubt.)

(b) Jurisdiction of the Court

54. Although both forms of contempt must be established beyond reasonable doubt, all proceedings for contempt are heard in the civil jurisdiction of the court.

55. In *Re Colina; Ex parte Torney*,[44] the High Court considered the question of whether s 80 of the Constitution required contempt charges to be heard by a jury. The High Court held that it did not. Contempt charges derive from Chapter III and thus do not arise under a "law of the Commonwealth". Moreover, a contempt charge is not charged on indictment. In the context of considering this issue, Hayne J observed the following (at 428):

> "Although I accept that it is right to speak of an "offence" of contempt, the use of that term should not be permitted to obscure the significant differences between the powers that are invoked against an alleged contemnor and those that are set in train under the criminal law. As was said in Hinch v Attorney-General (Vict):
>
> 'Notwithstanding that a contempt may be described as a criminal offence, the proceedings do not attract the criminal jurisdiction of the court to which the application is made. On the contrary, they proceed in the civil jurisdiction and attract the rule that ordinarily applies in that jurisdiction, namely, that costs follow the event.'"

56. In *Boral*,[45] the High Court (French CJ, Kiefel, Bell, Gageler and Keane JJ) considered whether an alleged contemnor can be compelled to produce documents that might incriminate him or her. Orders for contempt were sought against the CFMEU for establishing a blockade in breach of court orders. Boral sought an order for discovery under the Court Rules. The Union argued that the Rules did not apply as the contempt proceedings were criminal in nature.

57. The Court confirmed that such proceedings are civil in nature and that the Court Rules relating to discovery apply "according to their tenor". The Court acknowledged at [61] that the "fundamental principle of the criminal justice system that the onus of proof beyond reasonable doubt rests on the Crown" and "the companion rule that the accused cannot be required to assist in proof of the offence charged" are "expressions of the basic accusatorial nature of the criminal justice system." However, their Honours emphasised (citing *Witham v Holloway*)[46] at 393 that:

> "[T]o say that proceedings for contempt are essentially criminal in nature is not to equate them with the trial of a criminal charge. There are clear procedural differences,

[44] (1999) 200 CLR 386; [1999] HCA 57.
[45] (2015) 256 CLR 375; [2015] HCA 21.
[46] (1995) 183 CLR; [1995] HCA 3.

> the most obvious being that criminal charges ordinarily involve trial by jury, whereas charges of contempt do not."

58. In this respect, their Honours also referred to:

> "… other differences in addition to those referred to by their Honours, not the least important of which is that contempt proceedings are initiated, not by the executive government, but by private parties to an indisputably civil proceeding. A party to a civil proceeding who wishes to complain that the other party has breached an order of the court is not in the same position as a prosecuting authority, which can gather evidence by compulsory processes of search and seizure before making a decision to charge the defaulting party with contempt. Further, in the contempt proceeding, the spectre of oppression by the executive government in requiring the accused to assist it in the prosecution of a criminal charge against the accused, especially one launched without adequate investigation by the agents of the state, does not arise. In any case, where an application for discovery in contempt proceedings did give rise to such a concern, the more fundamental concern for the liberty of the subject would be a powerful consideration in the exercise of the discretion whether or not to make an order for discovery."

59. The reasoning of the plurality in the above passage is, with respect, not entirely clear. In particular, as outlined above, it is only "disobedience contempts" (that is, contempts by way of disobedience to court orders or failures to comply with court undertakings) that are initiated by private parties. Other criminal contempts, including contempts in the face of the court (such as refusals to give evidence, or other acts interfering with the administration of justice) and *sub judice* contempts are commenced by the Registrar of the Court or the Attorney General, or, where the summary procedure is invoked, by the Court itself. It is not clear whether the Court's reasoning applies in such cases, or whether, in those such cases, the liberty of the subject is simply a consideration (albeit a powerful consideration) as to why discovery would not be ordered.

60. It may be noted that the plurality in *Boral* did not address the question of whether the contempts in question were civil or criminal in nature. However, this issue was addressed by Nettle J who, in a separate judgment, held (at [67]) that:

> "A proceeding for punishment for contempt constituted by disobedience of an injunction granted in a civil proceeding is not part of the criminal justice system in the sense essayed in Caltex, X7 or Do Young Lee v The Queen. Although "all proceedings for contempt 'must [now] realistically be seen as criminal in nature'", not all contempts are criminal. Failure to obey an injunction is not a criminal offence unless the failure to comply is defiant or contumacious. A proceeding for contempt is not a proceeding for criminal contempt if the proceeding appears clearly to be remedial or coercive in nature as opposed to punitive. A criminal contempt is a common law offence, albeit not part of the ordinary common law. But even a proceeding for criminal contempt is not a criminal proceeding." (footnotes omitted)

Vive la différence?

61. In *Mudginberri*,[47] the High Court considered whether the Federal Court had power to impose a fine for a civil contempt. It was argued that, because the purpose of civil contempt was coercive in nature, to ensure compliance with the orders of the court, there was no power to impose a fine for a civil contempt, the purpose of a fine being entirely punitive in nature.

62. In rejecting this argument, and holding that the Court did have the power to impose a fine for civil contempt, their Honours considered the distinctions and similarities between criminal and civil contempts. In particular, Gibbs CJ, Mason, Wilson and Deane JJ observed (at 106) that:

> "The principal theoretical basis of the distinction is that disobedience to the process and orders of the court in civil proceedings is said to be a civil wrong, a matter between party and party, enforcement being for the private benefit or interest of the party seeking enforcement, whereas impeding the administration of justice is a public wrong. A secondary basis for the distinction is that the main purpose of sanctions for disobedience in civil proceedings is coercive rather than punitive (Ansah v. Ansah (1977) Fam. 138, at p 144)."

63. However, their Honours observed that there were deficiencies in this theoretical distinction, noting (at 108) that:

> "The theoretical distinction between the two classes overlooks the underlying rationale of every exercise of the contempt power, namely that it is necessary to uphold and protect the effective administration of justice. Although the primary purpose in committing a defendant who disobeys an injunction is to enforce the injunction for the benefit of the plaintiff, another purpose is to protect the effective administration of justice by demonstrating that the court's orders will be enforced. As the authors of *Borrie and Lowe's Law of Contempt* (1983) 2nd ed. say, at p.3:
>
> > 'If a court lacked the means to enforce its orders, if its orders could be disobeyed with impunity, not only would individual litigants suffer, the whole administration of justice would be brought into disrepute.'"

64. As for breaching of orders, their Honours stated (at 108):

> "When the defendant's disobedience is casual it may readily appear that the primary purpose of exercising the power is to vindicate the plaintiff's rights. On the other hand, when the disobedience is accompanied by public defiance it may as readily be seen that the primary purpose of exercising the power is vindication of the court's authority. But the classification in terms of primary purpose is a more complex and artificial undertaking when the punishment is for wilful disobedience unaccompanied by defiance. There is, accordingly, much to be said for the view that all contempts should be punished as if they are quasi-criminal in character, notwithstanding the

[47] (1986) 161 CLR 98; [1986] HCA 46.

> adoption of the contrary view by some members of this Court in the decisions to which we have already referred."

65. It is to be remembered that *Mudginberri* was determined nine years before *Witham v Holloway*, where it was confirmed that the standard of proof was the same for both criminal and civil contempts.

66. Ultimately, their Honours described the distinction between civil and criminal contempt as "unsatisfactory" (at 107) before observing (at 108):

> "… very great difficulty has been experienced in maintaining the distinction between civil and criminal contempts and, in particular, in elaborating a precise and certain criterion which divides one class of contempt from the other. The extremities to which the distinction has sometimes driven the courts is strikingly illustrated by the absurd proposition, which derives some comfort from Seaward v. Paterson (1897) 1 Ch 545, that the defendant who disobeys an injunction granted against him commits a civil contempt whereas the stranger who aids and abets him is guilty of criminal contempt (see the criticisms of this proposition by Lord Atkinson in Scott, at pp.456-457, and by Cross J. in Phonographic Performance, at pp.200-201). The concept that disobedience to an order becomes criminal when the primary purpose of exercising the power changes from vindication of the rights of the plaintiff to vindication of the authority of the court is both complex and artificial. Salmon L.J. was right when he said in Jennison v. Baker, at p 64, speaking with reference to the enforcement of an injunction generally, that '(t)he two objects are, in my view, inextricably intermixed.' When the defendant's disobedience is casual it may readily appear that the primary purpose of exercising the power is to vindicate the plaintiff's rights. On the other hand, when the disobedience is accompanied by public defiance it may as readily be seen that the primary purpose of exercising the power is vindication of the court's authority. But the classification in terms of primary purpose is a more complex and artificial undertaking when the punishment is for wilful disobedience unaccompanied by defiance."

67. In summary, the clear historical differences between civil and criminal contempt have substantially merged over the past century of common law development. There is now no difference in the standard of proof that applies and no difference in the orders that may be made. Further, whilst it remains the case that the different forms of contempt have different purposes, those purposes are not clearly delineated, but intertwined, particularly in the case of contempts arising from a disobedience to court orders.

68. Nonetheless, the distinction remains. Importantly, in New South Wales at least, appeal rights are vastly different as between civil and criminal contempts. Further, the imposition of punishment will be informed by the nature of the contempt. As outlined further below, the imposition of punishment for criminal contempt will need to give particular weight to matters such as specific and general deterrence and denunciation, which do not assume such significance in civil contempts. For these

reasons, when imposing punishment for contempt, judges should make clear findings as to whether the contempt is civil or criminal in nature.

CONTEMPT PRACTICE AND PROCEDURE

69. As the history above indicates, the power to punish contempt in the face of the court is part of the inherent jurisdiction of the Supreme Court. This power is, as Latham CJ observed in *R v Metal Trades Employers Association; Ex p Amalgamated Engineering Union*,[48] a "most important attribute of a superior court".

70. In New South Wales, Part 55 of the Supreme Court Rules 1970 (NSW) ("SCR") provides for the procedural rules for contempt. Division 2 deals with summary disposal and Division 3 deals with referral from another court or division or the Prothonotary.

71. As inferior courts of record do not possess inherent jurisdiction, they have no inherent power to punish for contempt. In the absence of legislation, it could be argued that inferior courts of record would have implied power to deal urgently with a contempt in the face of the court: *Grassby v R*.[49] In New South Wales, the District and Local Courts are conferred by statute with a limited power: to punish summarily for contempt in the face of the court.

72. Section 199 of the *District Court Act* 1973 (NSW) confers a statutory power upon the court to punish contempt committed in the face or hearing of the court or in the hearing of the court. Section 199 is in these terms:

> "199 Contempt
>
> (1) In this section, contemnor means a person guilty or alleged to be guilty of contempt of court committed in the face of the Court or in the hearing of the Court.
>
> (2) Where it is alleged, or appears to the Court on its own view, that a person is guilty of contempt of court committed in the face of the Court or in the hearing of the Court, the Court may:
>
> (a) by oral order direct that the contemnor be brought before the Court, or
> (b) issue a warrant for the arrest of the contemnor.
>
> (3) Where the contemnor is brought before the Court, the Court shall:

[48] (1951) 82 CLR 208; [1951] HCA, 241–243 (Latham CJ).
[49] (1989) 168 CLR 1; [1989] HCA 45.

(a) cause the contemnor to be informed orally of the contempt with which he or she is charged,
(b) require the contemnor to make his or her defence to the charge,
(c) after hearing the contemnor, determine the matter of the charge, and
(d) make an order for the punishment or discharge of the contemnor.

(4) The Court may, pending disposal of the charge:

(a) direct that the contemnor be kept in such custody as the Court may determine, or
(b) direct that the contemnor be released,

and such a direction is sufficient authority for the contemnor's being kept in custody or released, as the case may be.

(5) The Court may give a direction under subsection (4) (b) on terms, which may include a requirement that the contemnor give security, in such sum as the Court directs, for his or her appearance in person to answer the charge.

(6) A warrant for the arrest or detention under this section of a contemnor shall be addressed to the Sheriff or a bailiff and may be issued under the hand of the Judge constituting the Court.

(7) The Court may punish contempt by a fine not exceeding 20 penalty units or by imprisonment for a period not exceeding 28 days.

(8) The Court may make an order for punishment on terms, including a suspension of punishment or a suspension of punishment in case the contemnor gives security in such manner and in such sum as the Court may approve for good behaviour and performs the terms of the security."

73. The District Court also has the power to refer allegations of contempt (whether or not in the face of the court) to the Supreme Court. Section 203 of the *District Court Act* provides:

"203 Power to refer allegation etc of contempt to Supreme Court

(1) Without prejudice to the powers of the District Court under section 199, where it is alleged, or appears to the District Court on its own view, that a person is guilty of contempt of court, whether committed in the face or hearing of the District Court or not, the District Court may refer the matter to the Supreme Court for determination.

(2) On any matter being referred to the Supreme Court under subsection (1), the Supreme Court shall dispose of the matter in such manner as it considers appropriate."

74. The Local Court has the power to punish a contempt of court committed in the face or hearing of the court: Section 24 of the *Local Court Act* 2007 (NSW) is in these terms:

"24 Contempt of court

(1) The Court has, if it is alleged, or appears to the Court on its own view, that a person is guilty of contempt of court committed in the face of the Court or in the hearing of the Court, the same powers as the District Court has in those circumstances.

(2) Without limiting subsection (1), the Court may vacate or revoke an order with respect to contempt of court.

(3) For the purposes of this section:

(a) sections 199, 200 and 202 of the District Court Act 1973 apply to the Local Court and a Magistrate in the same way as they apply to the District Court and a Judge of the District Court, and

(b) a reference in section 200 of that Act to a proclaimed place is taken to be a reference to a designated place, and

(c) section 201 of that Act applies to a ruling, order, direction or decision of the Local Court under those provisions as so applied.

(4) Without prejudice to the powers of the Court under this section, if it is alleged, or appears to the Court on its own view, that a person is guilty of contempt of the Court, whether committed in the face or hearing of the Court or not, the Court may refer the matter to the Supreme Court for determination.

(5) The Supreme Court is to dispose of any matter referred to it under this section in the manner it considers appropriate."

75. Thus it can be seen that inferior courts have the power to deal summarily with contempts in the face of the court and also to refer contempts to the Supreme Court.

76. Section 67(d) of the *Land and Environment Court Act* 1979 (NSW) confers on the Land and Environment Court the powers vested in the Supreme Court (Part 55 of the Supreme Court Rules) in respect of "the … punishment of persons guilty of contempt or of disobedience to any order made by the Court" in Class 5 proceedings (s 67(2)). Rule 6.3 of the *Land and Environment Court Rules* 1980 (NSW) indicate that Part 55 of the *Supreme Court Rules* also applies to Class 1, 2, 3,4 and 8 proceedings. See further *Hawkesbury City Council v Foste*r,[50] in which the Court of Appeal discussed the Court's jurisdiction to punish contempt in some depth.

[50] (1997) 97 LGERA 12.

Summary Disposal

(a) When should the summary power be used?

77. The first thing to appreciate about the summary power to punish for contempt in the face of the court is that the power should be used "sparingly" and only in serious cases: *Lewis v Ogden.*[51]

78. In *Keeley v Brooking*[52] a trial judge had summarily dealt with a witness who maintained that he could not remember questions asked of him in cross-examination. The trial judge was satisfied that the witness was lying about his poor memory. His Honour's finding was, "[m]y own assessment of Keeley is that he is a sly and thoroughly untruthful person, well capable of misleading members of the medical profession for his own purposes."[53]

79. The special leave question was whether the witness' false statement that he could not remember the answers to the questions asked of him was a "contempt" and what the relevant test for this form of contempt was. The High Court held that a judge does not need to be satisfied that answers are "plainly absurd or palpably false" before a finding of contempt can be made. A number of observations were made by the High Court as to how rare it is that a matter needs to be dealt with summarily. Justice Stephen observed (at 173-174):

> "His Honour was, of course, zealous in safeguarding such rights as the summary procedure afforded to the applicant. The applicant was represented by counsel, with whom his Honour carefully and in detail defined the conduct which was in question. Affidavit evidence on behalf of the applicant was received and much time was devoted to submissions urged on the applicant's behalf. His Honour delivered a reasoned judgment in which he carefully considered all relevant matters of fact and of law. Nevertheless the position of the applicant remained that of an accused facing a charge initiated by the adjudicator himself and his fate depended upon what his Honour described as 'the opportunity of seeking to persuade me that he has not been guilty of contempt'. The matter for decision was no simple question of fact, as whether or not he had done some observable physical act while in court, but turned upon an evaluation of the truthfulness of his evidence as to his state of recollection. There was an alternative course open, that of having the applicant face a charge of perjury, to be tried before judge and jury. There was no imperative need for instant punishment, as was shown by the six weeks or so which elapsed between the respondent being required to show cause and the show cause hearing
>
> It has been of just such considerations as these that the authorities to which I have referred have spoken in concluding that summary procedure for contempt not only should be employed most sparingly but should rarely be resorted to except in those exceptional cases where the conduct is such that 'it cannot wait to be punished'

[51] (1984) 153 CLR 682; [1984] HCA 26.
[52] (1979) 143 CLR 162; [1979] HCA 28.
[53] (1979) 143 CLR 162, 182 (Murphy J); [1979] HCA 28.

> because it is 'urgent and imperative to act immediately' to preserve the integrity of a trial in progress or about to start'."

80. President Kirby explained why summary disposal should be rarely exercised in this way in *European Asian Bank AG v Wentworth*:[54]

> "[W]hen a judge deals summarily with an alleged contempt he may at once be a victim of the contempt, a witness to it, the prosecutor who decides that action is required and the judge who determines matters in dispute and imposes punishment. The combination, in the judge, of four such inimical functions is not only unusual. It is so exceptional that, though it may sometimes be required to deal peremptorily with an emergency situation, those occasions will be rare indeed."

81. His Honour later observed (at 467 – 468):

> "The summary procedure is extraordinary and exceptional involving as it does a departure from normal curial procedures and in a case criminal in nature where the penalties are at large".

82. Similarly, in *Clampett v Attorney-General (Cth)*,[55] Black CJ (with whom Finkelstein and Greenwood JJ agreed) observed this at [38] and [39]:

> "…Contempt in the face of the court is a criminal offence yet when a person is charged with such an offence in circumstances such as those in this case, the onus of proof is in effect reversed. Instead of a case for the prosecution being presented by a prosecutor and tested by or on behalf of the person accused in proceedings presided over by an independent judge or magistrate, in a case such as the present the accused stands charged and is required to justify or otherwise defend his or her conduct."

83. The authorities make clear that the summary procedure is only to be used in extraordinary cases where there is a degree of urgency. It is not difficult to see why: a criminal proceeding where the judicial officer is the prosecutor, the victim, the witness and the judge, is a significant departure from the features of a criminal hearing.

84. So what would be an example of a case so urgent that the summary power ought to be exercised? One possible situation could be where a witness is refusing to answer questions. For example, the summary procedure was used in respect of a witness who was refusing to answer questions in *In the Matter of Steven Smith (No. 2)*. [56] That matter involved the sentencing of one of three co-offenders for murder. One of the co-accused (Mr Smith), who had already pleaded guilty to murder and been sentenced, was called by the Crown as a witness in relation to a factual dispute on the

[54] (1986) 5 NSWLR 445 ,452 (Kirby P).
[55] (2009) 260 ALR 462; [2009] FCAFC 151.
[56] [2015] NSWSC 1141.

sentence proceedings of a co-accused. It was anticipated that Mr Smith could give evidence concerning a conversation in which he had claimed that his two co-offenders alone were responsible for the murder. When called to give evidence, Mr Smith refused to answer questions and was hostile and aggressive towards Corrective Services officers. He also swore at the presiding judge. He was subsequently charged with two counts of contempt in the face of the court; he was not charged with insulting the judge as he apologised to her Honour before he was charged. Mr Smith committed the contempt on 13 March 2015 and was sentenced on 14 August 2015. He was sentenced to imprisonment for 3 years, to date from 7 August 2028 and expiring on 6 August 2031. He was already serving sentences for two counts of armed robbery and one of murder, with 7 August 2030 as his earliest release date. This decision illustrates some of the difficulties with the summary procedure. Although that matter was dealt with summarily rather than referred, it in fact took five months to finalise.

85. As there will inevitably be delay in dealing with a contempt to finalisation, where it is apparent to a judge or magistrate that the position of a witness will not change, then it will almost always be appropriate to refer the matter to the Supreme Court. The position may be different if the hearing is able to proceed with other evidence, and there is a possibility that the witness' position may change (particularly after having received legal advice).

86. Another occasion where summary disposal might be preferable is where reliance on the transcript would not fully convey the true nature of the contempt. The appellant in *Toner v A-G (NSW)*[57] was a barrister who had appeared in the District Court against the Government Insurance Office of New South Wales for damages for personal injuries arising out of a motor vehicle accident. After the presiding Judge had admonished Mr Toner about making statements that were not accurate, the following exchange occurred during the tendering of a medical report:

> "MR TONER: I did not - I said I object - I am arguing with your Honour for the simple reason I recall what I said and what I said is I object.
>
> HIS HONOUR: Those last remarks of counsel were shouted of the top of his voice at myself, as a judge of the District Court; shouted at the top of his voice and I will give you an opportunity to have yourself heard as to whether or not you should be treated as being in contempt of this court."

87. On the appeal, the Attorney General read two affidavits. One was sworn by the trial judge's associate. In this, she stated:

[57] Unreported, NSWCA, CA 40101 of 1991, 19 November 1991 (Kirby P, Clarke JA & Hope AJA).

> "I have never heard any other Counsel raise their voice to the same level as Mr Toner. At the time that Mr Toner shouted at his Honour I observed that Mr Toner's face was completely red. At no time . . . did I hear his Honour speak in other than his normal tone of voice."

88. Although this is an example where the tone had to be conveyed by way of affidavit in the higher court, where abusive conduct is directed at the judge, an allegation of apprehended bias may be made. Even in this instance, there may be good reasons to refer the matter to an independent judge to consider.

89. Another factor relevant to the decision whether to deal with a contempt summarily or refer it to the Supreme Court is the differing maximum penalties. For example, in New South Wales, the punishment for contempt dealt with summarily in the District or Local Court may not exceed imprisonment for exceeding 28 days or a fine of 20 penalty units: s. 199 of the *District Court Act* and s 24 of the *Local Court Act.* Similarly, in Victoria, the jurisdiction of the Magistrates Courts to deal with contempt is limited to dealing with contempts in the face of the court: *Magistrates' Court Act 1989* (Vic). A relevant consideration is thus whether the seriousness of the contempt can be reflected in a maximum penalty of 28 days imprisonment.

90. If a witness or accused is being abusive and will not listen or sit down, it may be necessary to deal with him or her summarily; it depends on whether the proceedings can be finished despite such behaviour. Often if such a person is warned of the risk that the conduct may constitute contempt and the person may be liable for imprisonment, the conduct might cease. There is also the possibility of purging a contempt (to which see below). The person can also be removed from the court until they have calmed down.

91. The summary procedure was approved in *Jenkins v Whittington*.[58] Trevor Jenkins, also known in Darwin as the "Rubbish Warrior", was charged with multiple offences relating to his conduct at Darwin Magistrate's Court in 2016. During the Local Court proceedings he had also engaged in behaviour that was described by a subsequent Court in these terms (at [4]):

> "This appeal hearing demonstrated the difficulties of doing justice in the case of a self-represented appellant who demands to be tolerated and understood, perhaps even indulged, as a homeless man without resources, but who has an extraordinary sense of entitlement, is obsessed with his perceived artistic and literary greatness, arrogant and unreasonable, extremely disrespectful to the Bench, untruthful in his statements from the Bar table, unreliable and selective in his submissions, and given to vituperative outbursts when questions were asked of him which exposed flaws in his arguments..

[58] [2017] NTSC 65.

> The appellant believes that he is a misunderstood genius: "I'm a genius, you know, and so people can't handle that." On another occasion: "I'm not a legend for nothing … I'm one of the greatest artists and greatest thinkers in this Territory. I am. If you don't like it, well, shove it up your arse. That's all I can fuckin' say."

92. In the Local Court, the judge had determined that the usual course for dealing with contempt in the face of the court was for the matter to be dealt with by the judge before whom the contempt was allegedly committed. The question for the Supreme Court was whether the summary power had been exercised correctly. When considering this question, the Court noted the High Court's caution that the procedure should be used only sparingly. However, the Court held that the procedure had been used correctly as it was so urgent and imperative to act immediately to preserve the integrity of the trial. In particular, Grant CJ found held at [53]:

> "It is apparent from a careful reading of the transcript of proceedings in this matter, however, that the very conditions of which the High Court spoke presented in this case. The appellant was making a mockery of the trial process. His conduct was such as to undermine the integrity of that process and effectively to prevent the determination of the criminal charges which he was then facing. The trial judge considered this was a deliberate and contumelious strategy on the part of the appellant. It was open to the trial judge to form that view. The matter had already been delayed on many occasions by reason of the particular challenges presented by the appellant, and it had been the subject of mention or preliminary hearing on some 18 prior occasions. This case was exceptional and it was urgent and imperative to act immediately to prevent the appellant from achieving his purpose of undermining the integrity of the trial process."

93. There will no doubt still be cases where the summary jurisdiction to punish for contempt in the face of the court is relevant but there are also good reasons to always refer the matter if in any doubt. The procedure is so unusual that the usual practice and procedure does not exist and, the fact that the judge performs all functions may leave them open to an allegation of bias. Of course, it is important to remember that even if the judge is the particular target of the contempt, whether physical or by words, the contempt power is not to be exercised to protect the judge: it is to be used to protect the dignity of the court: *Lewis v Ogden*.[59]

(b) The summary procedure

94. If a decision is made to deal with a contempt summarily the contemnor should be orally charged with contempt by the trial judge: *SCR*, Pt 55, r 3; *District Court Act*, s 199(3)(a). If the contemnor is not represented, he or she may need to obtain a lawyer and must be permitted an adjournment to make a defence to the charge: SCR Pt 55 r 3; *District Court Act* s 199(3)(b). Even if the contemnor has a lawyer, it may well be that the lawyer is not ready to deal with a charge of contempt immediately.

[59] (1984) 153 CLR 682, 693 (Mason, Murphy, Wilson, Brennan, Dawson JJ); [1984] HCA 26.

95. Although the judge or magistrate is the prosecutor in the summary procedure, the practice in NSW at least is that the court makes a request of the Attorney General to appoint someone to appear *amicus* to assist the court.

96. The judge or magistrate is a witness to the contempt and thus may have regard to his or her own observations. He or she is also permitted to rely on hearsay evidence: *Fraser v The Queen.*[60] If an *amicus* is appointed, as in *In the Matter of Steven Smith (No. 2)* [61] witnesses (besides the judge!) can be called and cross-examined.

97. A judicial officer cannot compel a contemnor to give evidence. In *Court of Appeal, Registrar of the v Maniam (No 1)*, [62] the Court of Appeal considered a referral from a medical practitioner who had not attended court in compliance with his subpoena to give evidence in a District Court trial (relating to drug charges). The doctor's explanation was that he had patients all morning and afternoon. As a result, the trial was delayed. The doctor was arrested, brought to the court and charged with contempt. In relation to the questioning of the defendant in the District Court before Sinclair DCJ, Kirby P observed (at 464):

> "The opponent is an educated and intelligent man. He is a medical practitioner. However, he had never previously been involved in giving evidence in a criminal trial. On the evidence (which seems perfectly understandable) quite different arrangements were regularly made for his attendance at civil compensation trials. Before Sinclair DCJ he was therefore in a vulnerable position. The procedures envisaged by the District Court Act were not followed. They contemplated nothing more than reference of the matter to this Court for its determination. Instead, an unauthorised and amalgamated procedure was pursued. Unadvised, the opponent gave oral testimony under oath. That testimony had virtually nothing to do with the exercise of the power under s 203 which was merely one of reference. The apparent contempt being otherwise so plain, on the evidence which Sinclair DCJ had earlier taken, it was highly prejudicial to the opponent's proper defence of his position, at least before he had been legally advised, to order him 'formally' to show cause as to why he should not be charged and to swear him to give evidence and answer judicial questions on the very matter which was to be transferred to the Supreme Court as s 203 envisaged."

98. As outlined above, in practical terms, once it is considered necessary for the summary charge to be adjourned so that an *amicus* can appear and/or the defence has time to prepare, a real question arises as to whether the circumstances are so urgent they need to be dealt with summarily. After the court determines whether the contempt is proved beyond reasonable doubt, the contemnor is either discharged or liable for punishment.

---

[60] [1984] 3 NSWLR 212, 227, 231 (Kirby P and McHugh JA).
[61] [2015] NSWSC 1141
[62] (1991) 25 NSWLR 459.

99. An example of how the summary power ought not to be used can be found in *Stradford & Stradford*.[63] In that matter, a Federal Circuit Court Judge was case managing a property dispute between an estranged husband and wife with young children. The husband had failed to provide specific documents. The matter was stood over to another date for mention and the judge marked on the papers that on the next occasion he would consider proceedings for contempt. Both the husband and wife were self-represented. When the husband did not produce all of the documents on the next occasion the judge imprisoned him for 12 months over the objection of the wife who insisted that she and her children would suffer as a result of it. The husband was able to be released from gaol a week later.

100. On appeal to the Full Court of the Family Court, the appeal was allowed and the court observed at [9]:

> "We are driven to conclude that the processes employed by the primary judge were so devoid of procedural fairness to the husband, and the reasons for judgment so lacking in engagement with the issues of fact and law to be applied, that to permit the declaration and order for imprisonment to stand would be an affront to justice."

101. Section 17 of the *Federal Circuit Court of Australia Act* 1999 (Cth) confers on that Court a power to punish contempts committed in the face or hearing of the Court. Part XIIIB of the *Family Law Act 1975* (Cth) provides for the contempt power whereas Part XIIIA of the *Family Law Act* provides for sanctions for failure to comply with orders. Section 112AP of the Family Law Act (in Part XIIIB) provides for a power to punish a person for contempt of court if it:

> "(a) does not constitute a contravention of an order under this Act; or
>
> (b) constitutes a contravention of an order under this Act and involves a flagrant challenge to the authority of the court."

102. The Federal Circuit Court and Family Court are also expressly provided under s 112AP(7) with the power to order the discharge of a person committed to prison for a term for contempt before the expiry of that term. Part XIIIA of the *Family Court Act* s 112AD provides for sanctions for not complying with orders with the rest of that Part setting our specific sentencing options including imprisonment. Rule 19.02 of the Federal Circuit Court Rules 2001 (Cth) provides for who may make an application for a person to be dealt with for contempt. There are mandatory procedural requirements including an affidavit in support. Other procedural rules outline the procedure for the hearing and ensure that the principles of procedural fairness are complied with.

[63] [2019] FamCAFC 25.

103. Returning to the decision in *Stradford & Stradford*,[64] it can be seen that the judge was not dealing with a contempt in the face of the Court; rather, his Honour was dealing with a potential breach of court orders. As the Court observed (at [19]):

> "It can thus be seen that the primary judge's process failed from the outset on a number of levels. In advance of any breach of orders the primary judge predetermined that any such breach, of whatsoever nature, would constitute "contempt" within the meaning of the Act. Moreover, the primary judge cast himself as prosecutor in any future proceeding for the offence of contempt. Both of these conclusions were reached by the primary judge without particularising any charge; establishing that the charges as particularised were prima facie established; and affording the husband any opportunity to be heard."

104. In *Jenkins v Whittington*[65] (referred to above), the Court made express reference to the requirement for natural justice to be afforded when the summary procedure is used but was satisfied that this had occurred in the Local Court proceedings. The defendant had been given notice of the charge and the opportunity to address the court as to penalty, which he had done. He had also had an opportunity to confer with his legal representative. In all the circumstances, the Court held that the appellant's conviction and sentence were not unreasonable or unjust.

105. It is important to be aware that the decision whether to deal with a matter summarily or refer it to the Supreme Court is one on which the alleged contemnor is entitled to be heard. This issue was considered by the NSW Court of Appeal in *Prothonotary of the Supreme Court of New South Wales v Dangerfield*.[66] The defendant had called the police to report a domestic violence incident by her brother. At her Local Court hearing she explained her injury in a different way to her original report to police which exculpated her brother. Ms Dangerfield was declared an unfavourable witness pursuant to s 38 of the *Evidence Act* and cross-examined by the police prosecutor. She answered further questions covering three pages of transcript and then refused to give any further evidence.

106. The Magistrate adjourned the proceedings for a short time to enable Ms Dangerfield to consult a duty solicitor. When the matter resumed, the Magistrate warned Ms Dangerfield that further refusal to answer questions would result in the matter being referred to the Prothonotary for contempt proceedings. Examination of Ms Dangerfield continued but she again refused to answer questions. The Magistrate then indicated that Ms Dangerfield was in contempt and referred the matter to the Supreme Court under s 24(4) of the *Local Court Act*. The Supreme Court judge dismissed the charge on the basis that the Magistrate had not given Ms Dangerfield

[64] [2019] FamCAFC 25.
[65] [2017] NTSC 65.
[66] [2016] NSWCA 277.

the opportunity to be heard on the question of referral. The Prothonotary then appealed to the Court of Appeal.

107. In *Dangerfield*, [67] the Court of Appeal held (at [52]) that exercising the power of referral for an alleged contempt requires determination of two separate issues: whether the court is of the opinion that the person is guilty of contempt of court, and, if so, whether the court should refer the matter to the Supreme Court to determine. This means that procedural fairness needs to be afforded at both stages, not just the initial question of whether an alleged contempt has occurred.

Referrals

108. Putting civil contempt to one side for the moment, in New South Wales there are broadly three different ways in which contempt proceedings can come to be heard in the Supreme Court.

109. First, a Magistrate, a District Court judge or a Supreme Court justice can *direct* the Prothonotary to commence proceedings in the common law division under SCR Part 55, Div 3, rule 11(1); (3). An order under SCR Pt 55 r 11(1) is executive and not judicial in character. Somewhat curiously whereas the *Local Court Act* provides that the Magistrate can reconsider the referral.[68] The *District Court Act* does not.[69]

110. Second, a Magistrate, a District Court judge or a Supreme Court justice can *refer* the matter to the Prothonotary to obtain advice from the Crown Solicitor's Office ("CSO") as to whether commence proceedings in the Common Law Division under Part 55, Div 3, r 11(6). This would be the course to adopt if the primary judicial officer wished to have legal advice before the Prothonotary commenced the proceedings. In this case, if the Prothonotary received advice from the CSO that the elements of criminal contempt could not be made out, the proceedings would not be commenced and the primary judge or magistrate could be advised accordingly.

111. Third, the Attorney General can commence proceedings for contempt in the Common Law Division. The Attorney General has standing to do so as the first law officer who clearly has an interest in protecting the administration of justice. In NSW, Clause 1 of Schedule 3 to the *Criminal Procedure Act 1986* (NSW) provides that:

> "Institution of contempt proceedings

[67] [2016] NSWCA 277.
[68] *Local Court Act 2007* (NSW) s 24(2).
[69] *District Court Act 1973* (NSW) s 203.

> (1) Proceedings for contempt of court may be instituted in the Supreme Court in the name of the "State of New South Wales" by—
>
> (a) the Attorney General, or
>
> (b) the Solicitor General or Crown Advocate acting under a delegation from the Attorney General.
>
> (2) Nothing in subclause (1) prevents contempt of court being dealt with in any other manner, and in particular nothing in that subclause prevents proceedings for contempt of court from being instituted in any other manner."

112. There are two interesting things to note about this clause. First, it is to be found in the *Criminal Procedure Act* rather than the *Civil Procedure Act* 2005 (NSW), even though contempt proceedings are heard in the civil jurisdiction. Secondly, since the enactment of this clause in 1998 there have been no contempt proceedings brought in NSW by any Attorney General.[70] However, the Attorney General has brought proceedings for the statutory offence of disruptive behaviour in court (see below at [114(ii)]) which was recently enacted in response to accused persons not standing for the judge in court.

113. Under SCR Pt 55 r 6, proceedings may be commenced in the Supreme Court either by notice of motion in civil proceedings already on foot (civil contempt) or by way of summons when independent proceedings are brought (by the Prothonotary or Attorney-General).

STATUTORY ALTERNATIVES

Criminal contempt

114. Before dealing with or referring a matter for punishment for contempt, there are relevant discretionary considerations. One of these is whether there are statutory offences which might better capture the relevant conduct. Conduct that otherwise might amount to contempt could be referred to police, the Director of Public Prosecutions or the Sheriff in the following circumstances:

    (i) Where the conduct consists of threatening of judicial officers, witnesses or jurors there are a number of public justice offences in Part 7 Div 3 of the *Crimes Act* 1900 (NSW).[71]

[70] *Courts Legislation Amendment Act 1998* (NSW), Sch 7.

[71] These include s 321 (corruption of witnesses and jurors), s 322 (threatening or intimidating judges, witnesses, jurors etc), s 323 (influencing witnesses and jurors), s 325 (preventing, obstructing or dissuading witness or

(ii) Where the conduct consists of disrespectful behaviour in court, the matter can be referred to the Attorney General for prosecution. There are multiple statutory offences dealing with disrespectful behaviour in court (see e.g. s 131 *Supreme Court Act*, s 67A of the *Land and Environment Court* Act, s 200A of the *District Court Act,* s 24A of the *Local Court Act* and s 103A of the *Coroners Act* 2009 (NSW). The common elements of such provisions are that:

a) All apply to parties or witnesses in proceedings that intentionally engage in behaviour which is disrespectful to the Court or presiding Judge;
b) The maximum penalty is 14 days imprisonment or 10 penalty units;
c) The proceedings are to be dealt with summarily and may be brought only by a person or a member of a class of persons authorised, in writing, by the Secretary of the Department of Justice for that purpose;
d) A Judge may refer any disrespectful behaviour in proceedings over which the Judge is presiding to the Attorney General;
e) Proceedings for an offence against this section may be commenced only with the authorisation of the Attorney General. Authorisation may be given by the Attorney General whether or not the disrespectful behaviour is referred to the Attorney General by a Judge under this section;
f) The Judge presiding over the proceedings in which the alleged disrespectful behaviour occurred cannot be required to give evidence in proceedings for the statutory offence;
g) All such provisions do not affect the power of the court to punish for contempt but have double jeopardy provisions in respect of similar behaviour.

(iii) Where the conduct consists of juror misconduct there are offences in Part 9 of the *Jury Act* 1977 (NSW) relating to juror misconduct, including a number of offences relating to the performance of a jury's functions. These include disclosure of information by jurors about their deliberations (s 68B) and inquiries by jurors to obtain information (s 68C). Section 68B of the *Jury Act* provides for a penalty of 20 penalty units for disclosure of information and 50 penalty units if it this disclosure was for a fee, gain or reward. Section 68C provides for a penalty of 50 penalty units or imprisonment for 2 years for jurors making enquiries outside of their functions as a juror. Section 71 provides that proceedings for these offences against this Act shall be disposed of in a summary manner before the Local Court.

(iv) Where the breach of an order relied upon is deliberate breach of a suppression order, proceedings could be brought under s 16 of *Court Suppression and Non-publication Orders Act* 2010 (NSW) which provides for a penalty of 1,000

juror from attending etc) and s 326 (reprisals against judges, witnesses, jurors etc). There is also the offence of perverting the course of justice in s 319.

penalty units or imprisonment for 12 months for breaching an order for an individual, or 5,000 penalty units for a body corporation.

(vi) Where the conduct consists of recording a witness or jury in court, the *Court Security Act* applies. No recording a witness or jury in court, no photos, videos or audio recordings can be taken within all court premises, as per section 9 of the *Court Security Act* 2005 (NSW). The maximum penalty that a court can hand down is a fine of 200 penalty units and/or imprisonment for up to 12 months.

Civil contempt

115. Just as there are statutory alternatives to bringing proceedings for criminal contempt, so too are there alternatives to bringing proceedings for civil contempt. Enforcement procedures are provided in Part 8 of the *Civil Procedure Act*. In Uniform Civil Procedure Rules ("UCPR"), Part 40, Div 1, additional enforcement procedures applicable to the Supreme Court only are provided. UCPR, r 40.6 provides:

> "(1) This rule applies in the following circumstances:
>
> (a) if:
>
> (i) a judgment requires a person to do an act within a time specified in the judgment, and
>
> (ii) the person fails to do the act within that time or, if that time is extended or abridged, within that time as extended or abridged,
>
> (b) if:
>
> (i) a judgment requires a person to do an act forthwith, or forthwith on a specified event, and
>
> (ii) the person fails to do the act as so required,
>
> (c) if:
>
> (i) a judgment requires a person to abstain from doing an act, and
>
> (ii) the person disobeys the judgment,
>
> but does not apply to a judgment for the payment of money (including a judgment for the payment of money into court).

> (2) In circumstances to which this rule applies, a judgment may be enforced by one or more of the following means:
>
> (a) committal of the person bound by the judgment,
>
> (b) sequestration of the property of the person bound by the judgment,
>
> (c) if the person bound by the judgment is a corporation:
>
> (i) committal of any officer of the corporation, and
>
> (ii) sequestration of the property of any officer of the corporation."

116. As Parker J observed in *Reliance Financial Services Pty Ltd v Allyma Express Holdings Pty Ltd (No 2)*:[72]

> "UCPR r 40.6 does not use the term 'contempt'. It may therefore be possible to pursue the remedies set out in r 40.6, namely committal or sequestration, for the purpose of the enforcement of an earlier order, without the proceedings attracting the requirements of SCR Pt 55, Div 2. But it is not necessary to decide in this case whether that is so."

117. His Honour was dealing in that matter with a failure to comply with an order of the NSW Supreme Court that certain vehicles be returned to specified persons. Those proceedings could have been brought under UCPR, r 40.6, but were not. Remedies of committal and sequestration are available under UCPR, r 40.6 but only when a judgment requires a person to do an act or abstain from doing an act. The relationship between this section and the contempt power is unclear. The commentary to *Ritchies Civil Procedure*, suggests that the rule forms part of the contempt power. That is not entirely apparent to us. It may be that it provides a procedural rule quite separate from the law of civil contempt where the *sole* purpose is to achieve enforcement. We do not propose to say anything more about this but it raises an interesting issue concerning the relationship between this Rule and civil contempt.

"SENTENCING" FOR CONTEMPT

Applicable provisions

118. The Rules of Court not only make provision for the procedure to be adopted for contempt, they provide for the types of punishment that may be imposed for an offence of contempt. Typically, provision is made for committal of the contemnor, fines, suspended sentences and good behaviour bonds. For example, Part 55(1) of the SCR provides:

[72] [2018] NSWSC 1776, [89] (Parker J).

> "(1) Where the contemnor is not a corporation, the Court may punish contempt by committal to a correctional centre or fine or both.
>
> (2) Where the contemnor is a corporation, the Court may punish contempt by sequestration or fine or both.
>
> (3) The Court may make an order for punishment on terms, including a suspension of punishment or a suspension of punishment in case the contemnor gives security in such manner and in such sum as the Court may approve for good behaviour and performs the terms of the security."

See similarly Rule 11.04.01 of the *High Court Rules* 2004 (Cth), s 112AP of the *Family Law Act*, Order 75 of the *Supreme Court (General Civil Procedure) Rules* 2015 (Vic), Order 75 of the *County Court Civil Procedure Rules* 2018 (Vic), Rule 306 of the SCR (SA), Rule 942(9) of the SCR *2000* (Tas), Order 55(7) of the *Rules of the Supreme Court 1971* (WA).

119. As outlined below, there is now no difference between the types of penalty that may be imposed for civil and criminal contempts. Both by statute and at common law, civil and criminal contempts may be dealt with by way of fine or imprisonment either of which may be suspended to achieve a bond-like order.

120. The language in both the rules and in common law cases as to the imposition of a "punishment" for contempt raises an issue as to whether State sentencing legislation should be applied when a court determines the appropriate penalty to be imposed for a contempt.

121. Over a number of years, many decisions of the New South Wales Supreme Court and Court of Appeal had held that the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("*Sentencing Procedure Act*") and its predecessor, the *Sentencing Act 1989* (NSW) applied to criminal (but not civil) contempts. [73]

122. As a result, the "sentencing options" for contempt included not only those forms of penalty contained in Part 55 of the SCR, but also included statutory alternatives to imprisonment set out in the *Sentencing Procedure Act*, such as intensive corrective orders and community correction orders. When ordering imprisonment, non-parole periods were often set pursuant to the *Sentencing Procedure Act*. In addition, the mandatory considerations provided by the *Sentencing Procedure Act* (such as those contained in s 21A) were also required to be taken into account when sentencing for contempt.

---

[73] *Attorney General (NSW) v Whiley* (1993) 32 NSWLR 262; *Principal Registrar of the Supreme Court of New South Wales v Jando* [2001] NSWSC 969; (2001)c\ 53 NSWLR 527; *Prothonotary of the Supreme Court v Fajloun* [2016] NSWSC 927 at [18] (Rothman J); *Kus v Ronowska* [2013] NSWCA 387.

123. However, in 2018, the New South Wales Court of Appeal held that the *Sentencing Procedure Act* did not apply to either civil or criminal contempt: *Dowling v Prothonotary of the Supreme Court*.[74] In particular, Basten JA, with whom Meagher JA agreed, held that the definition of the word "court" in the *Sentencing Procedure Act* was not apt to include a court exercising civil jurisdiction. As proceedings for contempt (including criminal contempt) are brought in the civil jurisdiction of the court, Basten JA held that the *Sentencing Procedure Act* could have no application to proceedings for contempt, whether the contempt was civil or criminal in nature.

124. In so holding, Basten JA referred to UK authority (*Morris v The Crown Office*) [75] which had held that the *Criminal Justice Act 1967* (UK) had no application to proceedings for contempt, whether civil or criminal: *Dowling* at [43]-[45]. His Honour acknowledged the existence of previous New South Wales authorities which had held that the *Sentencing Procedure Act*, and its predecessor, the *Sentencing Act 1989* (NSW) apply to sentencing for contempt, but noted that the earliest of these authorities drew a distinction between the application of sentencing legislation to civil and criminal contempts and that the distinction between civil and criminal contempts had been described in *Witham v Holloway* as (in significant respects) "illusory": *Dowling* at [47]-[48]. Accordingly, his Honour considered that it would be "anomalous" to have different statutory regimes apply to the imposition of punishment for different forms of contempt. His Honour considered that the "better view" was that the *Sentencing Procedure Act* did not apply to the imposition of punishment for contempt (at [40]).

125. Justice Basten concluded by identifying four "*problems*" with applying sentencing legislation to the imposition of punishment for contempt. First, his Honour held that the reasoning of the earliest New South Wales authorities was predicated on the assumption that the imposition of a punishment for contempt involved "sentencing". In fact, the common law, as reflected in the SCR, adopted quite different language in respect of the imposition of punishment for contempt (at [50]). Second, his Honour held that it was not appropriate to characterise all contempts as criminal in nature, and that not all contempts involve offences that can be dealt with summarily (at [51]). Third, his Honour held that previous authorities had erred in reasoning that there were "strong policy reasons" for applying sentencing legislation to contempts. The argument that there should be "consistency in sentencing" was circular, because it assumed that the task of imposing punishment for contempt involved an exercise in "sentencing" (at [53]). Finally, Basten JA held that earlier authority had erroneously distinguished English authority on the basis that sentencing legislation in New South Wales did not "fetter" the power to imprison, as the UK legislation had done. In

[74] (2018) 99 NSWLR 229;[2018] NSWCA 340.
[75] [1970] 2 QB 114.

particular, his Honour held that the power to order a contemnor's discharge was inconsistent with the entire scheme of sentencing legislation (at [54]).

126. Accordingly, Basten JA held that the primary judge had erred in "sentencing" the contemnor pursuant to the provisions of the *Sentencing Procedure Act*. In particular, the primary judge had erred by purporting to impose a non-parole period and a balance of term, as that structure was only available under the *Sentencing Procedure Act*, and assumed the existence of the power of the Parole Authority to release the contemnor on parole (at 57]).

127. The ramifications of the *Dowling* decision are still to be worked through. The most significant impacts of the *Dowling* decision relate to structure and content of the orders that can be made in respect of criminal contempts: in particular, non-parole orders can no longer be made, aggregate sentences can no longer be set; and alternatives to custodial imprisonment which require the involvement of executive authority, such as intensive community corrections orders, are no longer available in New South Wales to punish a criminal contempt.

128. New South Wales courts are now limited to those forms of punishment set out in SCR Part 55, namely imprisonment, fines, sequestration (in the case of a corporation) and suspended sentences, and alternatives to custody which may be fashioned by the Court in the exercise of its inherent jurisdiction. For example, in *Registrar of the Court of Appeal v Maniam (No 2)*,[76] the Court of Appeal (Kirby P, Mahoney JA and Hope AJA) acknowledged that the court had no statutory power to impose an obligation of community service on the contemnor, but held that the court had power to "in effect, impose an obligation of community service in the Liverpool Hospital, provided the hospital was prepared to accept [the contemnor] and as a condition for suspending the operation of a fine which would otherwise be imposed" (at 319C, per Kirby P; 320G per Mahoney JA and 321A, per Hope A-JA).

129. There are other potential difficulties, including that provisions in the *Sentencing Procedure Act* concerning the commencement of a sentence of imprisonment no longer apply to the imposition of a penalty for contempt; cf *Kus v Ronowska*.[77] At common law, the commencement of a sentence cannot generally be postponed: see Fox R and Freiberg A, *Sentencing: State and Federal Law in Victoria* (Oxford University Press: Melbourne 1999) 2nd edition, p 739, cited in *Ledson v Taylor (No 2)*.[78] Unless the inherent power of the Supreme Court is held to extend to the postponement of the commencement date of a punishment for contempt, significant difficulties will arise in the imposition of punishment for contemnors serving existing sentences (which is not infrequent in the case of contempts involving a refusal to

[76] (1992) 26 NSWLR 309.
[77] [2013] NSWCA 387.
[78] Unreported, ACTSC, 2 June 2010 (Nicholson J).

answer questions in a criminal trial, see eg *In the Matter of Steven Smith (No. 2)* [79] referred to above at [84]).

130. Further, it would seem to follow from the reasoning of the Court in *Dowling* that the *Crimes (Administration of Sentences) Act 1999* (NSW) does not apply to a contemnor who is imprisoned for contempt. This may have further consequences for the administration of prisoners who have been committed to correctional centres for a contempt of court.

131. Of somewhat less significance, the statutory considerations contained in provisions such as ss. 3A, 5(1) and s. 21A of the *Sentencing Procedure Act* no longer apply when a punishment is imposed for contempt. However, those factors generally reflect common law principles, which remain applicable. Examples of such common law principles include the principle that a contemnor should only be committed to prison as a last resort: *R v Way*. [80]

132. There is no uniformity in the position of other States and Territories with respect to the application of sentencing legislation to contempts:

133. In Queensland, sentencing legislation expressly applies to the imposition of a sentence for contempt: r 930 of the UCPR 1999 (Qld). However, it has been held that this reference to the *Penalties and Sentences Act 1992* (Qld) does not confine the orders that the Supreme Court can make in the exercise of its inherent jurisdiction: *Bundaberg Regional Council v Lammi*[81] and *Dubois v Rockhampton Regional Council*.[82]

134. In South Australia, it has been held that the provisions of the *Sentencing Act* 2017 (SA) do not apply to the imposition of a penalty for contempt.[83]

135. In Victoria, it would appear that there is a "conflict of authority" on whether the *Sentencing Act 1991* (Vic) directly applies in the punishment for contempt of court (see *DPP v Johnson & Yahoo!7*).[84] On the one hand, there is authority for the proposition that the *Sentencing Act* is "relevant" to penalties for contempt, although not directly applicable, as per *R v Herald & Weekly Times Pty Ltd,*[85] also *Grocon v Construction, Forestry, Mining and Energy Union (No 2).* [86] On the other hand, in

[79] [2015] NSWSC 1141.
[80] (2004) 60 NSWLR 168; [2004] NSWCCA 131at [11] (Spigelman CJ, Wood CJ at CL and Simpson J).
[81] [2014] QPEC 52; [2015] QPELR 111 at 114–5 (Horneman-Wren SC DCJ).
[82] [2014] QCA 21.
[83] *Maxilift Australia v Donnelly* [2020] SASC 8; *Nicholls v Director of Public Prosecutions* (1993) 61 SASR 31 and *Zappa v Registrar of the Supreme Court* [2004] SASC 375.
[84] [2017] VSC 45 at [9] (John Dixon J).
[85] [2008] VSC 251.
[86] (2014) 241 IR 288; [2014] VSC 134 [77]-[78] (Cavanough J).

Varnavides v Victorian Civil and Administrative Tribunal, [87] the Victorian Court of Appeal seemed to have adopted the view that no provisions of the *Sentencing Act* were directly applicable to contempt of any kind.

136. In Western Australia, s 3(3)(a) of the *Sentencing Act* 1995 (WA) provides that that Act does not apply to punishments for contempt. Despite this, the Western Australian Court of Appeal has held that the considerations contained in that Act should nonetheless be taken into account: *Kennedy v Lovell* [88] and *Porter v Steinberg (No 2)*. [89]

137. In the ACT, r 2506 of the Court Procedures Rules 2006 (ACT) empowers both the Supreme and Magistrates Courts to punish contempt under the *Crimes (Sentencing) Act 2005* (ACT).

138. In the Northern Territory, criminal sentencing legislation has been held to apply to the imposition of penalty for contempt: *Jenkins v Trigg.* [90]

The recommendations of the various Law Reform Bodies

139. In 2003, the Western Australian Law Reform Commission reviewed the current status of the *Sentencing Act 1995* (WA) and the *Sentence Administration Act 1995* (WA), noting that s 3(3) of the latter excluded its application to the law of contempt. Its report further noted that the effect of this was to exclude courts from using statute-based sentencing options when penalising contempt as well as preventing contemnors serving a prison sentence from being eligible for parole. The Commission recommended that:

> "There is no obvious reason for excluding the sentencing options available under the Sentencing Act 1995 (WA) from courts sentencing offenders for contempt offences and almost all submissions on this issue supported increasing the range of sentencing options available for contempt offences.
>
> It is therefore recommended that the Sentencing Act 1995 (WA) and Sentence Administration Act 1995 (WA) be amended so as to apply to contempt of court offences."

---

[87] [2005] VSCA 231.
[88] [2002] WASCA 226 at [11]-[14] (Malcolm CJ). Interestingly, in 2003, Western Australian Reform Commission recommended reform of s 3(3)(1), stating that "[t]here is no obvious reason for excluding the sentencing options available under the Sentencing Act 1995 (WA) from courts sentencing offenders for contempt offences and almost all submissions on this issue supported increasing the range of sentencing options available for contempt offences. It is therefore recommended that the Sentencing Act 1995 (WA) and Sentence Administration Act 1995 (WA) be amended so as to apply to contempt of court offences' (see Western Australian Law Reform Commission, Report on Review of the Law of Contempt (Report No 93, 2003) at 10.
[89] [2019] WASC 473.
[90] [2013] NTSC 4 at [29] (Blokland J).

140. In 2017, the Legal and Constitutional Affairs References Committee of the Commonwealth Senate conducted an inquiry into the law of contempt. In recommendation 30, the Committee stated that, in its view, legislation should expressly provide that sentencing courts can utilise the "various methods of and alternatives to serving custodial sentence", including "community service orders, good behaviour bonds, dismissal of charges and conditional discharge of the offender, deferral of sentencing, suspended sentences, periodic detention orders, home detention orders and parole".

141. In May 2019, the Victorian Law Reform Commission announced that it was reviewing the law relating to contempt of court, the possible reform of the *Judicial Proceedings Reports Act 1958* (Vic) and the legal framework for enforcement of prohibitions or restrictions on the publication of information.

142. In its Consultation Paper, the Commission provided a comprehensive overview of the interaction between the *Sentencing Act* 1991 (Vic) and contempt proceedings. The paper noted that the current position is that courts can have regard to sentencing legislation by way of analogy. The paper therefore called for submissions about whether the Act should apply to contempt proceedings. The Attorney-General's original reporting date of 31 December 2019 was extended and the Commission will now deliver its report on 28 February 2020. That report will not be publicly available until after it has been tabled in Parliament, which will happen up to 14 sitting days after 28 February.

DETERMINING THE APPROPRIATE PUNISHMENT FOR CONTEMPT

Maximum penalty

143. An offence of contempt is a common law offence. This means that the maximum penalty for contempt is at large, subject only to the restriction in the Bill of Rights 1688 (UK) restriction upon cruel punishments: *Wood v Galea*; [91] *Smith v The Queen.* [92]

144. However, there are jurisdictional limits. For example, the jurisdiction of the District and Local Courts in New South Wales to deal with contempt is limited to contempts in the "*face or hearing of the Court*". Similarly, in Victoria, the jurisdiction of the Magistrates Courts to deal with contempt is limited to dealing with contempts in the face of the court: *Magistrates' Court Act 1989* (Vic).

[91] (1997) 92 A Crim R 287 at 290 (Hunt CJ).
[92] (1991) 25 NSWLR 1 at 13–18.

General principles

145. In *Registrar of the Court of Appeal v Maniam (No 2)*,[93] Kirby P said (at 314):

> "A conviction of contempt of court is a conviction of an offence, criminal in nature. Punishment of the convicted contemnor must therefore take into account the considerations normally applicable to the punishment of crime and apt to uphold the purpose of this jurisdiction, viz, the undisturbed and orderly administration of justice in the courts according to law. Thus, in determining the punishment which is apt to the circumstances which have led to a conviction of contempt, it is appropriate to bear in mind the purposes of punishing the contemnor; deterring the contemnor and others in the future from committing like contempts; and denouncing the conduct concerned in an approximately emphatic way: see Director of Public Prosecutions v John Fairfax & Sons Ltd (1987) 8 NSWLR 732 at 741."

146. Further, his Honour elaborated (at 315):

> "The most serious class of contempt, from the point of view of sanction, is contumacious contempt. Not every intentional disobedience involves a conscious defiance of the authority of the Court which is the essence of this class of contempt: see Australian Consolidated Press Ltd v Morgan (1965) 112 CLR 483 at 500. This class of contempt is reserved to cases where the behaviour of the contemnor has been shown to be aimed at the integrity of the courts and designed to degrade the administration of justice, as distinguished from a simple interference with property rights manifested by a court order: cf Root v MacDonald 157 NE 684 (1927) at 688; 54 Am LR 1422 (1927) at 1429. In cases where such a measure of wilfulness is established, the court may proceed to punish the convicted contemnor by the imposition of a custodial sentence or a fine or both."

Relevant considerations in imposing punishment for contempt

147. There are a number of matters usually taken into account in considering the appropriate punishment for contempt. These considerations were first set out by Dunford J in *Wood v Staunton (No 5).*[94] They have been applied in numerous decisions of New South Wales and other Australian courts. *Wood v Staunton* concerned a refusal to give evidence, and the considerations are of particular relevance in that context. However, the considerations are relevant, and have been applied in other circumstances of contempt, including breaches of court orders.[95]

---

[93] (1992) 26 NSWLR 309.
[94] (1995) 86 A Crim R 183.
[95] *Commissioner for Fair Trading v Partridge* [2006] NSWSC 478, [22] (Bell J); *Registrar of the Court of Appeal v Maniam (No. 2)* (1992) 26 NSWLR 309 at316 – 317 (Kirby P); *Kennedy v Lovell* [2002] WASCA 226 at [14] (Malcolm CJ); *Perpetual Trustees Victoria Ltd v Allen* [2012] WASC 258 at [3] (Beech J); *Dental Board of Australia v Traianou* [2011] WASC 293 at [41] (Beech J); *Matthews v Australian Securities and Investments Commission* [2009] NSWCA 15 at [129] (Tobias JA).

Similar considerations are also applied by the Federal Court: *Kazal v Thunder Studios Inc (California)*: [96] These considerations are:

(a) the seriousness of the contempt proved;

(b) the contemnor's culpability;

(c) the reasons or motive for the contempt;

(d) whether the contemnor has received or tried to receive a benefit from the contempt;

(e) whether there has been any expression of genuine contrition by the contemnor;

(f) the character and antecedents of the contemnor;

(g) the contemnor's personal circumstances;

(h) personal and general deterrence; and

(i) the need for denunciation of contemptuous conduct.

148. As in sentencing generally, the need for personal (or specific) and general deterrence and the need for denunciation is well-established in contempt proceedings. As outlined above, a reduction of the moral culpability of the contemnor as a result of a contemnor's mental illness and/ or disadvantaged background may impact on the need for general deterrence and denunciation.[97] Evidence of rehabilitation may be relevant to the need for personal (or specific) deterrence.

149. It should also be remembered that because contempt proceedings are commenced in the civil jurisdiction of the Court, the usual rule that costs follow the event applies. In setting a penalty, the court may take into account the financial impact that will be visited upon the contemnor by the making of an adverse costs order.

DIFFERENT FORMS OF CONTEMPT

Refusal to answer questions

150. Contempt arising from a refusal to answer questions is one of the most common forms of criminal contempt. The seriousness of this form of contempt is well-recognised. In *Registrar of the Court of Appeal v Raad* [1992], [98] Kirby P said:

> "[t]he refusal to answer questions which are relevant and admissible strikes at the very way in which justice is done in the courts of this country. It undermines the rule

[96](2017) 256 FCR 90; [2017] FCAFC 111 at [101] (Besanko, Wigney and Bromwich JJ).
[97] See (2013) 249 CLR 571; [2013] HCA 37 and *Muldrock v R* (2011) 244 CLR 120; [2011] HCA 39.
[98] [1992] NSWCA 207.

> of law observed in our society. As this court said in Gilby, the refusal to be sworn, or once sworn to give evidence, is a failure to discharge the obligation which the person owes as a member of the community or because he or she is within in. It is a concomitant of a society ruled by law and not by brute force that a person competent to do so should, where required, be sworn or affirmed to give truthful evidence and that he or she should give evidence when called upon to do so in the courts in answer to questions lawfully addressed."

151. Similarly, in *Registrar of the Court of Appeal v Gilby*,[99] the Court (Mahoney, Priestley and Clarke JJA) observed:

> "…it may be accepted that, if witnesses will not give evidence, the process of law enforcement will be less effective and more people will suffer accordingly. There is a public interest in ensuring that, in this regard, disobedience of the law will be, and will be seen to be, punished."

152. In *C v Registrar, Court of Appeal* [100] the Court held (at 10):

> "There can be few more serious cases of contempt than a persistent repeated and obdurate refusal of a central witness in a criminal trial to answer questions when asked and directed by the Judge of trial."

Attacks upon Judges/ threats to judges/ insulting behaviour towards judges

153. It is important to be aware of the fine line between rudeness in court and contempt in the face of the court. This issue was considered by the High Court (Mason, Murphy, Wilson, Brennan and Dawson JJ) in *Lewis v Ogden.*[101] Their Honours were considering whether defence counsel had "gone too far" in his closing address. In that context, the High Court observed the following (at 689):

> "….mere discourtesy falls well short of insulting conduct, let alone wilfully insulting conduct which is the hallmark of contempt. The freedom and the responsibility which counsel has to present his client's case are so important to the administration of justice, that a court should be slow to hold that remarks made during the course of counsel's address to the jury amount to a wilful insult to the judge, when the remarks may be seen to be relevant to the case which counsel is presenting to the jury on behalf of his client.

154. The closing address of defence counsel in that matter included the following:

> "This trial has been or is going to be just slightly unusual from most trials. Most trials have the situation where there are three very clearly defined roles going on in front of you. There is the defence who are on this side who defend, there is the prosecutor on that side and he prosecutes and obviously this is the arena proper and you have got a

[99] [1991] NSWCA 235.
[100] Court of Appeal, 19 December 1995, unreported
[101] [1984] HCA 28; (1984) 153 CLR 682 at 689 (Mason, Murphy, Wilson, Brennan and Dawson JJ).

judge who judges. 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 coming out in a Collingwood jumper and started giving decisions one way. That would not be what we think a fair thing in an Australian sport. It may surprise you to find out that his Honour's role in this 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. His Honour will tell you that any comment that he makes does not bind you. That it stands or falls on its own merits but that instead you must consider those along with all of the other comments and accept or reject them as you see fit. That is different from his direction on the law. I speak of that, ladies and gentlemen, because as I say, his Honour has given some fairly definite views in this case. They have been pretty adverse to the accused Paul and certainly my presentation of the case on behalf of Paul." (at p690)

155. And later (at 691-692):

" . . . whether this is an example of a view that he has formed against me, or perhaps my client. We do not know. One method of seeing that is how he deals with the unsworn statement from the dock, ladies and gentlemen. The statement from the dock is a time honoured institution in our society."

..

"When his Honour comes to tell you about statements from the dock and deals with a statement, I want you to be very careful to analyse what his Honour says and to consider whether or not the points that he makes are legitimate. If you think they are legitimate, you use them. If he is right and I am wrong, it is your duty to say so, but do it fairly and squarely and openly and honestly and not as a result of being over-borne by what you think his views on the facts are."

156. The Court concluded (at 689):

"There is a fundamental distinction between discourtesy and wilfully insulting conduct. It is the latter which is the hallmark of contempt. The responsibility of counsel (or self-represented persons) to plead the case fearlessly and with vigour and determination does not amount to contempt. But such a responsibility is not inconsistent with courtesy."

157. *Prothonotary v Wilson*[102]concerned a contempt committed when a disappointed litigant threw bags of paint at a judge. In sentencing the contemnor, Wood CJ at CL said (at [21]):

"The gravamen of the offence lies not in protecting the personal dignity of the judge who may be the object of an assault or personal attack but of protecting the public from the mischief that will incur if the authority of the courts is undermined or impaired. The point is well made in the judgments of the Court of Appeal in Re

[102] [1999] NSWSC 1148.

> Johnson (1887) 20 QBD 68 where Bowen LJ said: 'What is the principle which we have here to apply? It seems to me to be this. The law has armed the High Court of Justice with the power and imposed on it the duty of preventing brevi manu and by summary proceedings any attempt to interfere with the administration of justice. It is on that ground, and not on any exaggerated notion of the dignity of individuals that insults to judges are not allowed. It is on the same ground that insults to witnesses or to jurymen are not allowed. The principle is that those who have duties to discharge in a court of justice are protected by the law, and shielded on their way to the discharge of such duties, while discharging them, and on their return therefrom, in order that such persons may safely have resort to courts of justice.'"

(On appeal, the Court of Appeal reduced the term of imprisonment to 3 months and 20 days, which Wilson had served: *Wilson v Prothonotary*.[103] This reduction in penalty reflected fresh evidence which was admitted on the appeal concerning Wilson's mental state at the time of the contempt.)

158. Similarly, in *Cook & Ors v Phillips & Ors,* [104] Kirby P said:

> "It is in the nature of matters that come before courts that there will often be strong passions raised. Unless this Court, by its orders in cases such as this controls such passions in the environment of the court room and the precincts of the Court, the achievement of a peaceful curial resolution of disputes will be frustrated and may, in a particular case, be prevented. This civilised feature of our society could then give way to verbal abuse, physical assault and even worse."

159. In *Prothonotary of the Supreme Court of New South Wales v Rakete*,[105] contempt proceedings were brought by the Prothonotary arising from an event which took place during a trial of several Nomads motorcycle gang members for malicious infliction of grievous bodily harm, malicious wounding, assault and related matters. The defendant took a seat in the public gallery which had a clear view of the principal Crown witness, who was giving evidence. He then used a digital camera to record the evidence until escorted from the courtroom by the Sherriff's officer.

160. Justice Harrison found the defendant guilty of contempt and held that the filming was an act that had a tendency to interfere with the administration of justice. He was subsequently sentenced to a 12-month good behaviour bond: *Prothonotary of the Supreme Court of New South Wales v Rakete*.[106]

[103] [2000] NSWCA 23.
[104] Unreported, Court of Appeal, 29 September 1995.
[105] [2010] NSWSC 665.
[106] [2010] NSWSC 665.

Breach of Court Orders

161. Although a breach of a court order or undertaking is considered to be a "civil contempt", it is dealt with as a "criminal contempt" if the judge is satisfied that the breach was contumacious.

162. The seriousness of breaches of court orders was discussed by Merkel J in *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*: [107]

> "The rule of law in a democratic society does not permit any member of that society, no matter how powerful, to pick and choose the laws or court orders that are to be observed and those that are not. Maintenance of the rule of law in our society does not only require that parties are able to resort to courts to determine their disputes (Patrick Stevedores Operation (No 2) Pty Ltd v Maritime Union of Australia (1998) 153 ALR 641 at [1] per Hayne J), it also requires that parties comply with the orders made by the courts in determining those disputes.
>
> If the individual respondents believed that the orders of Whitlam J were wrongly made, then it was open to them to appeal, or apply for leave to appeal, against those orders. Instead, they breached them. The fact that the breaches are by union leaders holding important offices in a federation of national trade unions makes them more, rather than less, serious: see Gallagher v Durack (1983) 152 CLR 238 at 244."

163. Where the contempt involves a non-compliance with court orders that is not contumacious, it will rarely be appropriate to impose a term of imprisonment as a disciplinary sanction: *Vaysan v Deckers Outdoor Corporation Inc*.[108]

164. The position will be different where the primary purpose of punishment is to ensure compliance with the court's orders. In such a case, it may be appropriate to impose a fine that accrues until the breach is remedied, or to order imprisonment until the contempt has been purged. Another alternative in such a case is for the court to order imprisonment or a fine that is suspended on condition that the contemnor comply with specified terms: *McNair Associates Pty Ltd v Hinch*.[109] As outlined above at [101], some jurisdictions including the Family Court, have legislative provisions to deal with breach of orders that fall short of being a contempt.

Contempt by publication

165. There are two forms of contempt by publication: *Sub judice* contempt and scandalising contempt.

---

[107] [2000] FCA 629 at [79]-[80] (Merkel J).
[108] (2011) 276 ALR 596, 640.
[109] [1985] VR 309

166. *Sub judice* contempt relates to the publication of material which has, as a matter of practical reality, a real and definite tendency to prejudice or embarrass legal proceedings pending in a court at the time of publication: *John Fairfax and Sons Pty Ltd v McRae*.[110] The purpose of *sub judice* contempt is to ensure a fair trial by ensuring that jurors are not exposed to prejudicial information: *DPP v Johnson & Yahoo 7*.[111]

167. Scandalising contempt relates to acts or publications which impair public confidence in the judiciary: *Gallagher v Durack*.[112] *Gallagher* concerned an allegation that the Federal Court was improperly influenced by unions. More recently, scandalising contempt arose in relation to comments made by three federal ministers about the approach of the Victorian Court of Appeal in considering the adequacy of a sentence imposed for terrorism charges. The ministers purged their contempt in a complete apology (see further below at [172].) Similarly, scandalising contempt arose in 2019 concerning the reporting of the criminal trial of George Pell by members of the media.

168. It has been held that the principal considerations when imposing a punishment for *sub judice* contempt are specific and general deterrence, and denunciation: *DPP v Johnson & Yahoo 7 (No 2)*;[113] *R v Derryn Hinch*.[114] Those considerations are also equally relevant to scandalising contempt.

PURGING CONTEMPT

169. Contempt in the form of breach of orders may be purged by apology, payment of compensation/reparation and payments of costs: *Australian Consolidated Press Ltd v Morgan*;[115] *Evans v Citibank Ltd*.[116] In some cases a contemnor may be given a further opportunity to comply with a court order or undertaking as to avoid a formal finding and penalty: for example, *Globaltel Australia Pty Ltd v MCI Worldcom Australia Pty Ltd*.[117] The same opportunity should generally be given to a contemnor who refuses to give evidence: *Smith v The Queen*.[118] If a court is satisfied that a contempt has been purged it may discharge the contemnor without making a formal charge of contempt: *Evans v Citibank.*[119]

[110] (1995) 93 CLR 351 at 372.
[111] [2016] VSC 699 .
[112] (1983) 152 CLR 238; [1983] HCA 2.
[113] [2017] VSC 45 at [6] (John Dixon J).
[114] [2013] VSC 554 at [12] (Kaye J).
[115] (1965) 112 CLR 483 at 489.
[116] [2000] NSWSC 1017.
[117] [2001] NSWSC 545.
[118] (1991) 25 NSWLR 1.
[119] [2000] NSWSC 1017.

170. Contempt by refusal to give evidence may be purged by later doing so. A contempt will still be made out, but purgation will be relevant to penalty: eg *Prothonotary of the Supreme Court of NSW v A*.[120]

171. The ability to purge a contempt, particularly by way of apology, is potentially relevant at each stage of the contempt hearing. In particular, an apology may avoid the need for contempt proceedings to be taken, or for a contempt finding to be made. Alternatively, as outlined above, an apology will be relevant to the determination of the punishment to be imposed. Finally, an apology may be relevant to a consideration of whether the court should exercise the discretion to discharge a contemnor prior to the expiry of any term of imprisonment: see SCR Pt 55 r 14.

172. The ability of an apology to avoid the need for a contempt prosecution, or a finding of contempt was illustrated in *DPP (Cth) v Besim; DPP (Cth) v MHK (No 2)*.[121] *Besim* concerned comments made by three federal ministers and later published in an article in The Australian newspaper about the approach of the Victorian Court of Appeal in considering the adequacy of a sentence imposed for terrorism charges.[122] Following the publications and statements, the Court wrote to the possible contemnors, giving them notice that the individuals were required to appear and make submissions as to why they should not be referred for a contempt prosecution. A directions hearing was convened for this purpose. At the directions hearing, counsel for the Australian newspaper informed the court that his clients apologised for the publication and retracted the publication "sincerely and fully". The Ministers initially expressed only regret falling short of an apology, but at a further directions hearing, the Solicitor General appeared on behalf of the Ministers and they made a full and unqualified apology. The Court issued a ruling in which it stated that, but for those apologies and retractions, the parties would have been referred to the Prothonotary of the Supreme Court of Victoria: *DPP (Cth) v Besim; DPP (Cth) v MHK (No 2)*.[123] In particular, the Court held that, prima facie, there was a serious breach of *sub judice*.

173. As outlined above, an apology may also be relevant to the Court's decision as to whether to order the early discharge of an offender who has been committed to a correctional centre as punishment for a contempt. The power to order such early discharge is contained in SCR, Pt 55, r 14, which provides that:

> "Where a contemnor is committed to a correctional centre for a term, the Court may order his discharge before the expiry of the term."

[120] [2017] NSWSC 495 at [48] (Bellew J).
[121] (2017) 52 VR 296.
[122] Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) [3.81]ff.
[123] (2017) 52 VR 296.

174. This power was considered by the Court of Appeal in *Young v Registrar, Court of Appeal [No 3]*[124] where Kirby P observed at 282:

> "The rule ... clearly contemplates discharge during the terms of imprisonment fixed by the Court which committed him to prison. It contemplates that the Court to which the discharge application is made will, in a sense re-visit and review the facts which have already been passed upon judicially by the Courts imposing the sentence of imprisonment. To that extent, it is not to the point to complain about the offence to principle of providing an effective 'appeal' or 'review' in a court of co-equal jurisdiction. Some form of 'review' is contemplated by the Court to which the discharge application is made as contemplated by the Supreme Court Rules 1970."

175. Later (at 282) his Honour noted that SCR, Part 55, r 14 is not concerned with alleged severity as that would be a matter for appeal noting:

> "… the procedure for discharge is not available to demonstrate that the original sentence was too severe when imposed. That is the business of an appeal, if such exists. Discharge is to permit the convicted contemnor to ask for clemency, demonstrate contrition, and establish that the punishment suffered already is enough to vindicate the authority of the court, and to punish the contemnor for the contempt found."

176. Justice Powell observed in relation to SCR, Part 55, r 14 that:

> "... there should be placed before [the Court] evidence as to some change in the relevant circumstances since the making of the order for committal which makes it inappropriate as, for example, because no good purpose will be served by detaining the contemnor further or, because the contemnor has purged his contempt that the contemnor be detained further."

177. The Court of Appeal declined to exercise the discharge power in *Young v Registrar*[125] as the apology was not considered to be genuine. Rather, Powell JA described it (at 292G) as "no more that an empty collection of words".

178. This power was more recently considered by Meagher JA in *Menzies v Paccar Financial Pty Ltd*[126] where his Honour was asked to consider whether two contemnors sentenced to a term of imprisonment for contempt by Rothman J ought to be released pursuant to the power in SCR, Part 55, r 14. The contempt proceedings had commenced *inter partes* in a civil dispute. The contemnors had purged their contempt by complying with the orders (to return certain vehicles) and were contrite. His Honour revoked both sentence warrants and ordered that both contemnors be released from the Correctional Centres at which they were residing. In doing so his Honour made some interesting observations.

---

[124] (1993) 32 NSWLR 262.
[125] (1993) 32 NSWLR 262.
[126] (2016) 93 NSWLR 88; [2016] NSWCA 280.

179. Justice Rothman had proceeded on the basis that the *Sentencing Procedure Act* applied. In a prelude to Meagher JA's later concurrence with Basten JA in *Dowling v Prothonotary*[127] that the sentencing legislation does *not* apply to the imposition of a punishment for contempt, his Honour observed (at [15]):

> "In determining what punishment to impose, the primary judge proceeded on the basis that Pt 3 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) applied. By s 4(3), Pt 3 applies "to the imposition of all penalties imposed by a court, whether under this Act or otherwise". In doing so his Honour did not expressly consider whether the contempts charged and dealt with were criminal contempts or whether in dealing with those charges the Court was exercising criminal jurisdiction: see the definition of "court" in s 3(1); and cases such as *Principal Registrar of the Supreme Court of NSW v Jando* [2001] NSWSC 969 at [38]-[45] (Studdert J) and *R v Dent* [2016] NSWSC 444 at [52]-[54] (RA Hulme J) in which Pt 3 was applied in sentencing proceedings in relation to charges which were clearly criminal contempts, and not brought in relation to the enforcement of orders of the Court."

180. Justice Meagher then noted the following (at [16]):

> "It was not submitted that the power under SCR Pt 55 r 14 is not available in circumstances where the contemnor has been committed to a correctional centre for a fixed term. As Kirby P observed in *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 at 282-283 the "reference in the rule to 'for a term' is clearly designed to permit discharge short of the service of a specified term". It confers that power in circumstances where the Court fixing punishment for a criminal contempt by a term of imprisonment might otherwise be functus officio: see *Attorney-General v James* [1962] 2 QB 637 at 641."

181. Rule 42.22 of the Federal Court Rules, which also permits release prior to the expiry of a fixed term of imprisonment, has been described as "not materially different" to SCR, Part 55 r 14. [128] Two Federal Court decisions concerning r 42.22 are *Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 7)*[129] and *Thunder Studios Inc (California) v Kazal (No 6)*.[130] In the latter case Rares J stated at [53]:

> "I am of the opinion that on an application under r 42.22 the contemnor must satisfy the Court that, first, there is a reason for discharging him or her early, and, secondly, that it is in the interests of justice to do so."

182. The recent case of *Armidale Local Aboriginal Lands Council v Moran (No 2)*[131] is another example of a contemnor being released before the end of her "sentence" under

---

[127] (2018) 99 NSWLR 229;[2018] NSWCA 340.
[128] *Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (No 7* (2015) 235 FCR 563; [2015] FCA 1103 at [11] (Logan J).
[129] (2015) 235 FCR 563; [2015] FCA 1103.
[130] (2017) 356 ALR 238; FCA 1573.
[131] [2019] NSWSC 1739.

SCR Part 55, r 14. In that matter, proceedings for "criminal contempt" were brought against a party to proceedings for failing to comply with an order to vacate premises in breach of orders imposed by Schmidt J.

183. The Armidale Local Aboriginal Lands Council ("the Council") owned a property on which a derelict two-storey building was located. It wished to demolish the premises and use the land to construct suitable accommodation for local members of the Indigenous community in need. Ms Moran was squatting on the premises and refused to leave. The Council brought proceedings to evict her and Schmidt J subsequently made orders, inter alia, that Ms Moran give vacant possession of the premises within 5 days: *Armidale Local Aboriginal Lands Council v Moran*.[132] Despite considerable efforts by the Council Ms Moran would not leave the premises. The Council bought proceedings for criminal contempt (contumacious breach of a court order). Ms Moran would still not leave the premises, including to attend court for the hearing of her contempt proceedings; she appeared by way of telephone.

184. Ms Moran's defence to the contempt charge was, in effect, that because she was Aboriginal the Council had an obligation to look after her and thus was required to renovate the premises rather than demolish them to build new premises. Her Honour was satisfied that Ms Moran's disobedience to the Court's orders was both "deliberate and persistent" and that she did not accept the authority of the Court. She had submitted that her "right" to occupy the premises overrode the Court's orders to the contrary. On that basis, her Honour was satisfied beyond reasonable doubt that she was guilty of criminal contempt as charged.

185. The Council submitted that the only appropriate punishment was imprisonment. It had scheduled demolition of the premises to commence on 12 December 2019. It was anticipated demolition would take 2-3 days. Demolition could not be commenced unless Ms Moran vacated the premises. It was submitted that a custodial sentence was appropriate not only to vindicate the court but also to ensure that Ms Moran was out of harm's way when the demolition works were undertaken.

186. In sentencing Ms Moran, her Honour was satisfied that a custodial sentence was appropriate: s 5(1) of the *Sentencing Procedure Act*; had regard to the purposes of sentencing in s 3A of the *Sentencing Procedure Act;* and recorded her reasons for not making an order allowing the offender to participate in an intervention program or other program for treatment or rehabilitation: s 5(2) of the *Sentencing Procedure Act*. Her Honour sentenced Ms Moran to a term of imprisonment of 14 days to commence on 5 December 2019 and expire on 18 December 2019 and noted that she would be entitled to be released on 18 December 2019.

[132] [2018] NSWSC 1133.

187. On 13 December 2019 Ms Moran came back before the Duty Judge, Lonergan J, seeking to "purge" her contempt. She was represented by the Aboriginal Legal Service and the Crown Advocate appeared as *amicus* to assist the Court. Affidavit evidence was placed before her Honour indicating contrition on the part of Ms Moran and there was evidence that the building had by then been demolished. Reliance was placed on SCR, Pt 55, r 14 and the decisions cited above. Her Honour ordered that Ms Moran be released immediately. Although the Notice of Motion sought an order that "the contempt be found to be purged", the Crown Advocate submitted, and Ms Moran accepted, that such an order was unnecessary. On one view the contempt was complete by the time that Adamson J made the declaration and imprisoned her on 5 December 2019. As Logan J observed in *Chaste*[133] at [38]:

> "…past conduct amounting to the contempts is a proved given which cannot be undone… that past involvement cannot be undone or purged."

188. The same orders were made as in *Menzies v Paccar*: that Ms Moran be discharged and released from the correctional centre at which was presently imprisoned and the sentence warrant be revoked.

189. It seems to us that there was some tension, prior to the decision in *Dowling,* between the provisions of the *Sentencing Procedure Act* and the *Crimes (Administration of Sentences) Act* on the one hand and SCR, Pt 55, r 14 on the other hand. Since 1989 in New South Wales the sentencing legislation does not allow for remissions and/or early release, save as for specified compassionate grounds. Rather, the release of prisoners is determined by the State Parole Authority. That statutory scheme sits rather uneasily with SCR Part 55, r 14 permitting the release of a contemnor prior to the expiry of a fixed term of imprisonment. As the law in New South Wales post *Dowling*[134] is that the *Sentencing Act* does *not* apply to the imposition of a custodial term as punishment for contempt, the tension between these provisions has now dissipated.

190. Of course, whether it is appropriate to release a contemnor prior to the expiry of a term of imprisonment will depend on matters such as the seriousness of the contempt, the nature and extent of any apology, and whether there is an ongoing need for specific and general deterrence and denunciation.

[133] (2015) 235 FCR 563; [2015] FCA 1103.
[134] (2018) 99 NSWLR 229; [2018] NSWCA 340.