Foreword

Sir Leo Cussen perceptively stated more than a century ago that the "essence" of contempt of court "is action or inaction amounting to an interference with, or obstruction to, or having a tendency to interfere with or obstruct the due administration of justice, using that term in a broad sense". He carefully prefaced that statement with the observation that "the 'manifold aspects' of contempt cannot be strapped up in definitions".[1]

The statement captures the central concern of the common law of contempt of court with the vindication and protection of the exercise of the adjudicatory function by a court. The prefatory observation points at the uncertainty and imprecision that has characterised the development of contempt of court at common law. Having to date escaped wholesale legislative revision despite repeated calls for change from law reform bodies, contempt of court continues in Australia in its common law complexity.

Perhaps because its central concern is with the vindication and protection of the exercise of the adjudicatory function, the common law of contempt of court occupies a peculiar position within our system of justice. Judicial administration of the law of contempt notably invokes, yet in critical respects defies, traditional distinctions between public and private interests, between inquisitorial and adversarial processes, between civil and criminal prohibitions, between civil and criminal procedures, and between protective measures and punitive sanctions.

No doubt because the sources of potential interference with, and obstruction of, the exercise of the adjudicatory function are many and diverse, the substantive content of the law of

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1 *Re Dunn* [1906] VLR 493 at 497.

contempt covers an extensive range of circumstances. In so doing, it necessarily balances a variety of interests.

In some of the circumstances in which the common law of contempt of court continues to apply, concern for the vindication and protection of the administration of justice by a court is in tension with other concerns of a fundamental and systemic nature. Notable amongst them is concern for freedom of communication, which arises most acutely where the action that might be thought to interfere with or obstruct the due administration of justice is an act of publication. The concern extends beyond freedom of communication on matters that might be in issue before a court to communication that might be thought to be involved in holding the administration of justice by a court up to the glare of public scrutiny.

The balance struck has, by and large, been one by which judges have self-consciously sought to constrain freedom of communication no more than those judges have believed to be truly necessary to prevent real harm to the administration of justice. The exemplar in that respect has long been the self-confident self-denying approach adopted by the High Court early in its existence when it refused to find contempt in the publication of a newspaper article which stated of one of its own members that he "is, we believe, what is called a political Judge, that is, he was appointed because he had well served a political party" and "moreover, seems to know his position, and does not mean to allow any reflections on those to whom he may be said to be indebted for his judgeship".[2] The High Court as an institution survived; indeed it grew in stature. The Judge whose integrity was impugned, Higgins J, is remembered as one of its most distinguished members.

Whether the appropriate balance has been maintained by all courts in all subsequent cases is doubtful. The essential problem is always that a court which has to decide whether a disparaging

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2 *The King v Nicholls* (1911) 12 CLR 280.

publication constitutes a contempt cannot be wholly disinterested. As Sir Owen Dixon once put it, the jurisdiction of the court "cannot but be attended with some difficulty" given the "embarrassment" that the court must have when "considering what it should do in relation to an attack upon itself".[3] Adjudication of a claim that a disparaging publication constitutes a contempt of court in that respect encounters the same innate difficulty as adjudication of a claim of apprehended bias: the court is involved in a process of assessing an adverse perception of the court itself. The difficulty is compounded in circumstances where the claim of contempt is initiated by the court itself.

Like any other doctrine of the common law, the contemporary content of the law of contempt of court falls to be expounded through the principled application of precedents cognisant of the policies imbued in those precedents and of the compatibility of those policies with a contemporary understanding of justice. More than most other doctrines of the common law, however, the precedents which bear on the content of the law of contempt tend to be obscure, the contemporary resonance of some of the underlying policies tend to be debatable, and the inherited rules of substance and procedure tend to be blurred.

Those difficulties in the subject-matter make the appearance of this first Australian text dedicated to the law of contempt of court long overdue and extremely welcome. Professor Rolph is to be congratulated for having the courage to forge a path through a legal thicket where many others would fear to tread. The coverage of the text is comprehensive. Within it, the description of the law is admirably rigorous and analytical. The complexities are exposed, and the ambiguities and uncertainties are acknowledged. Yet a meaningful taxonomy is imposed, and a tolerably concise and workable set of principles is laid out. The result is a rich repository of legal knowledge, which will be readily digestible by lawyers and judges whose quotidian role is to apply the current

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3 *The King v Dunbabin; Ex parte Williams* (1935) 53 CLR 434 at 447.

law of contempt, and which will be usefully studied by scholars and potential reformers of the law who might strive for a deeper understanding of its origins and possible trajectory.