FEDERAL COURT OF AUSTRALIA

Clampett v Attorney-General of the Commonwealth of Australia [2009] FCAFC 151

CONTEMPT OF COURT – contempt in the face of the Court – consideration of the principles governing the exercise of the power to punish for contempt in the face of the Court by the Court as constituted at the time of the contempt – consideration of s 17 of the *Federal Magistrates Act 1999* (Cth) and r 19.01 of the *Federal Magistrates Court Rules* – consideration of the factors informing the exercise of the discretion under s 17(3) of the *Federal Magistrates Act* – consideration of whether the exercise of the discretion miscarried – consideration of whether a substantial miscarriage of justice occurred

PRACTICE AND PROCEDURE – whether the Attorney-General or the Queen is the proper respondent in appeal of contempt in the face of the court

Federal Court of Australia Act 1976 (Cth) s 28(1)(f)
Federal Magistrates Act 1999 (Cth) s 17
Federal Magistrates Court Rules 2001 (Cth) r 19.01

Australian Industry Group v Automative, Food, Metals, Engineering, Printing and Kindred Industries Union of Australia and Others (2001) 188 ALR 653, cited
Conway v The Queen (2002) 209 CLR 203, cited
Fraser v The Queen; Meredith v The Queen [1984] 3 NSWLR 212, distinguished
John Fairfax & Sons Pty Ltd v McRae (1955) 93 CLR 351, discussed
Keeley v Mr Justice Brooking (1979) 143 CLR 162, discussed
Lewis v Judge Ogden (1984) 153 CLR 682, discussed
O'Brian v Northern Territory of Australia (2003) 12 NTLR 218, cited
Quartermaine v The Queen (1980) 143 CLR 595, cited
R v Ogawa [2009] QCA 307, discussed
Re Perkings; Mesto v Galpin 4 VR 505, distinguished
Weiss v The Queen (2005) 224 CLR 300, cited
Wilde v The Queen (1988) 164 CLR 365, cited

LEONARD WILLIAM CLAMPETT v ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA
QUD 203 of 2008

LESLEY ALEXANDRA NOAH v ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA
QUD 323 of 2008

BLACK CJ, FINKELSTEIN, GREENWOOD JJ
28 OCTOBER 2009
BRISBANE

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION **QUD 203 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**LEONARD WILLIAM CLAMPETT** **Appellant**
AND:	**ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA** **Respondent**

JUDGES:	**BLACK CJ, FINKELSTEIN, GREENWOOD JJ**
DATE OF ORDER:	**28 OCTOBER 2009**
WHERE MADE:	**BRISBANE**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The conviction and sentence be set aside.

3. The matter be remitted to the Federal Magistrates Court for rehearing before another Federal Magistrate.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION **QUD 323 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**LESLEY ALEXANDRA NOAH** **Appellant**
AND:	**ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA** **Respondent**

JUDGES:	**BLACK CJ, FINKELSTEIN, GREENWOOD JJ**
DATE OF ORDER:	**28 OCTOBER 2009**
WHERE MADE:	**BRISBANE**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The conviction and sentence be set aside.

3. The matter be remitted to the Federal Magistrates Court for rehearing before another Federal Magistrate.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION **QUD 203 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**LEONARD WILLIAM CLAMPETT** **Appellant**
AND:	**ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA** **Respondent**
JUDGES:	**BLACK CJ, FINKELSTEIN, GREENWOOD JJ**
DATE:	**28 OCTOBER 2009**
PLACE:	**BRISBANE**

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION **QUD 323 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**LESLEY ALEXANDRA NOAH** **Appellant**
AND:	**ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA** **Respondent**
JUDGES:	**BLACK CJ, FINKELSTEIN, GREENWOOD JJ**
DATE:	**28 OCTOBER 2009**
PLACE:	**BRISBANE**

BLACK CJ

INTRODUCTION

1 These are appeals against conviction and sentence for contempt in the face of the Federal Magistrates Court. The appellant Mr Clampett was found guilty on two counts of contempt and was sentenced to imprisonment with hard labour for 28 days on each count, to

be served concurrently. Ms Noah was found guilty on one count of contempt and sentenced to time already served, which amounted to nearly two days. The appeals, which were heard together, arise out of related circumstances.

2 On the appeals against conviction the central issue is whether the Federal Magistrate exercised his discretion properly, or at all, in deciding to deal with the matters himself rather than referring them for hearing before another federal magistrate.

3 There is a preliminary point about whether the Attorney-General of the Commonwealth was correctly named as the respondent or whether the respondent should be the Queen. The point does not affect the outcome and I consider it at the conclusion of these reasons.

BACKGROUND

4 On 2 July 2008 Ms Noah appeared on her own behalf as a respondent to enforcement proceedings brought in the Federal Magistrates Court by the Australian Government Solicitor (AGS), represented by Mr Henry.

5 The enforcement proceedings followed an unsuccessful application for judicial review by Ms Noah in which she was ordered to pay the successful respondent's costs in the sum of $3,505. When Ms Noah failed to pay the costs ordered against her the AGS, representing the respondent in the judicial review proceedings, applied for an order for the issue of enforcement summons requiring her to attend the Federal Magistrates Court to be orally examined.

6 Ms Noah applied to have the summons struck out. In the hearing of the strike-out application she made extensive submissions about what she contended was a lack of jurisdiction. The Federal Magistrate found that her submission had no foundation in law and did not call upon Mr Henry.

The case against Mr Clampett

7 Whilst delivering ex tempore reasons for judgment dismissing the strike-out application, the Federal Magistrate was interrupted first by Ms Noah and then by

Mr Clampett, a supporter of Ms Noah, who was seated in the public gallery. The transcript records the following exchanges:

> FEDERAL MAGISTRATE: Now, gentlemen, if you don't be quiet, I'll deal with you. Is that what you'd like? One further utterance from you, madam, and I will deal with you as well.
> MS NOAH: In which way?
> FEDERAL MAGISTRATE: Yes. Just watch your tongue or I will deal with you as well.
> MS NOAH: You already are dealing with me, sir, in not a very fair and equitable way.
> FEDERAL MAGISTRATE: Ms Noah, I'll give you one further warning.
> MR CLAMPETT: Will that be civil contempt or criminal contempt?
> MS NOAH: Yes, that's what I'd like to know. Would that be civil or criminal?
> FEDERAL MAGISTRATE: Okay, that's it. What's your name sir?
> MR CLAMPETT: It has got nothing to do with you, your Honour.
> FEDERAL MAGISTRATE: What is your name?
> MR CLAMPETT: I'm [in] the public gallery.
> FEDERAL MAGISTRATE: Would you get the – just get the Federal Police along here, thank you, Mr Bailiff.
> MR CLAMPETT: They know who I am.
> FEDERAL MAGISTRATE: I'm not interest[ed] in – I want to know your name, please.
> MR CLAMPETT: Leonard William Clampett. You know very well who I am.
> FEDERAL MAGISTRATE: I have no idea.
> MR CLAMPETT: That's the reason why you've got a kangaroo on the wall behind you. It's called the Kangaroo Court.
> MS NOAH: Yes.
> MR CLAMPETT: Both you and Mr Henry are paid by the Commonwealth Government.
> MS NOAH: To represent the people, not protect your public [sector] colleagues, conspire with them, to pervert the course of justice.
> FEDERAL MAGISTRATE: Anything further you want to add?
> MS NOAH: Quite a lot actually, I'd like to appeal this and I don't recognise (indistinct) ---
> FEDERAL MAGISTRATE: Well, you'll get your chance to appeal but after I've dealt with you for contempt.
> MS NOAH: I don't like ---
> FEDERAL MAGISTRATE: Just adjourn the Court for the time being, thanks.
> MS NOAH: I want to challenge the jurisdiction of this whole Court actually.

8 The Federal Magistrate then adjourned the proceedings. When they were resumed five minutes later neither Mr Clampett nor Ms Noah was present but Mr Henry was. The Federal Magistrate told Mr Henry that he intended to re-mention the matter after he had reviewed the transcript of events and that he intended to "deal with" Mr Clampett and Ms Noah the following week. He asked Mr Henry to swear an affidavit recounting the events that had just transpired and Mr Henry agreed. The matter (ie the application for oral examination) was then adjourned until 10 am on Wednesday 9 July 2008.

9 On 4 July 2008 Mr Henry swore an affidavit recounting the events of 2 July 2008. On the same date a warrant issued for the arrest of Mr Clampett.

10 When the proceedings resumed shortly before 10 am on Wednesday 9 July 2008, the Federal Magistrate commenced by charging Mr Clampett with two counts of contempt. The charges, as set out in the Warrant for Committal signed by the Federal Magistrate on 9 July 2008, were:

> (1) On or about 3.27 pm on Wednesday 2 July 2008 at the Federal Magistrates Court of Australia constituted by Federal Magistrate Burnett at Court 5, Level 1 Commonwealth Law Courts Brisbane **Leonard William Clampett** did interrupt proceedings during the course of delivery of an ex tempore judgement of the Court from the public gallery in particular calling out to the Court by tone and words intended to be insulting the words, "That's the reason why you've got a kangaroo on the wall behind you. It's called a kangaroo court."
>
> AND
>
> (2) On or about 3.27 pm on Wednesday 2 July 2008 at the Federal Magistrates Court of Australia constituted by Federal Magistrate Burnett at Court 5, Level 1 Commonwealth Law Courts Brisbane **Leonard William Clampett** did interrupt proceedings during the course of delivery of an ex tempore judgement of the Court from the public gallery in particular calling out to the Court by tone and words intended to scandalise the Court by calling out the words "Both you and Mr Henry are paid by the Commonwealth" meaning the Court and Mr Henry were acting in collusion to deny the applicant her right to an impartial hearing according to law and that the Court was proceeding corruptly, not independently and acting in collusion with the other party to the proceeding.

11 Mr Clampett pleaded not guilty to both counts.

12 It appears that under the authority of the warrant for his arrest Mr Clampett had been arrested at his home that morning, handcuffed, and brought into court – still in handcuffs – escorted by two police officers. There is nothing in the material to suggest that Mr Clampett was violent or that he otherwise presented any physical risk, or that he had any history of escaping from custody or that there was otherwise any risk of his doing so on that occasion.

13 Nevertheless, the handcuffs remained in place for the duration of the contempt proceedings despite Mr Clampett having requested that they be removed. The transcript records the following exchange:

> FEDERAL MAGISTRATE: All right. So you plead not guilty to the second charge?
> MR CLAMPETT: Absolutely, not guilty and you know it. It would make things

> easier for yourself if you didn't tell lies too. And would you mind removing these handcuffs.
> FEDERAL MAGISTRATE: Mr Clampett.
> MR CLAMPETT: Excuse me?
> FEDERAL MAGISTRATE: No, they will remain in place.
> MR CLAMPETT: Oh, so the intimidation goes on, does it?

(The possible basis for a mistaken perception by Mr Clampett about what was being alleged against him and about the accuracy of the transcript is mentioned later in these reasons.)

14 During the hearing that followed Mr Clampett raised the following objections:

- the presence of Mr Henry, Solicitor for the Australia Government Solicitor, in the courtroom during the contempt hearing (on the grounds that he wanted to call Mr Henry and the Federal Magistrate as witnesses);
- the accuracy of the transcript recording the second charge of contempt; and
- the Federal Magistrate's jurisdiction to hear the matter.

Mr Clampett did not make any submissions about sentence.

15 The Federal Magistrate then delivered oral ex tempore reasons for judgment finding Mr Clampett guilty on both counts and ordering that he be imprisoned with hard labour to 28 days on each count, each sentence to be served concurrently. The Federal Magistrate adjourned the Court at 10:13 am on 9 July 2008. Mr Clampett remained in custody until 17 July, at which time he was released on bail.

Ms Noah's alleged contempt and contempt hearing

16 At 10:44 am on the same day, 9 July 2008, the Federal Magistrate resumed delivering his ex tempore reasons for judgment in the strike-out application in which he had been interrupted on 2 July 2008. Having delivered his reasons, the Federal Magistrate then turned to consider the matter of costs. Having done so he continued the hearing of the enforcement summons. Mr Henry, on behalf of the AGS, examined Ms Noah about her financial situation and assets. At the conclusion of Mr Henry's examination Ms Noah asked to cross-examine Mr Henry. The Federal Magistrate refused this request, presumably on the basis that Mr Henry's evidence would not have been relevant at that stage of an enforcement proceeding where the issue in question was Ms Noah's ability to satisfy a debt. During the

hearing Ms Noah made several comments which elicited warnings from the Federal Magistrate.

17 The Federal Magistrate then informed the parties that the enforcement proceeding would be adjourned until 2.30 pm that day, when he would hear both parties' submissions about costs. The following exchange ensued:

> MS NOAH: Whose arguments will you hear, just his or mine as well?
> FEDERAL MAGISTRATE: I'll hear your arguments as well.
> MS NOAH: Ooh, woo.
> FEDERAL MAGISTRATE: Now Ms Noah. If you don't take this process seriously I promise you ---
> MS NOAH: Well, I'm trying to.
> FEDERAL MAGISTRATE: No, you're not. You're not. Now, I've been very indulgent, very indulgent with you. Last week and this week. You have tested my patience very sorely. Very ---
> MS NOAH: Yes, it's been mutual, your Honour.
> FEDERAL MAGISTRATE: No, well that's it. That's the end of it, thank you. I'll adjourn the proceedings. I'll take a recording of the last five minutes, please, and I'll deal with you at 2.30. In the meantime, the bailiff can take Ms Noah downstairs and hold her.
> MS NOAH: Oh, that's ridiculous.
> MR HENRY: Thank you, your Honour.
> MS NOAH: I don't recognise the jurisdiction of this Court and I will not stand in honour of that man. He's a disgrace.

18 When the Court resumed, at 2.32 pm (Ms Noah having been held in custody in the meantime), the Federal Magistrate charged her with contempt of Court. The Warrant for Committal signed by the Federal Magistrate on 9 July 2008 sets out the charge as follows:

> …**Lesley Alexandra Noah** at about 11.57 am on Wednesday 9 July 2008 at the Federal Magistrates Court of Australia constituted by Federal Magistrate Burnett at Court 5, Level 1 Commonwealth Law Courts Brisbane **Lesley Alexandra Noah** did act in contempt of proceedings before the Court by stating in tone and words intended to be insulting and contemptuous of the Court the words, "Yes, it's been mutual, your Honour" when admonished by the Court is respect of her attitude, behaviour and lack of co-operation in respect of enforcement proceedings then before the Court.

19 Ms Noah pleaded not guilty. She spent some 20 minutes presenting submissions in her defence. Among other submissions, mainly relating to the enforcement proceedings, Ms Noah asserted that the words "Yes, it's been mutual, your Honour" did not constitute contempt, and that the Federal Magistrate had not provided Ms Noah with "any evidence or grounds or oaths".

20 Shortly before the contempt hearing concluded, the Federal Magistrate asked Ms Noah if she had anything else to say. She replied, "I'd like to apologise if I've offended anyone else in this Court".

21 The Federal Magistrate then offered Ms Noah time "to reflect upon the charge". She replied "Okay, yes, could I have a couple of days, please?" The Federal Magistrate said "Yes" and Ms Noah said that she would like to seek legal advice. The following exchange then occurred:

> Federal Magistrate: Yes, certainly. We'll remand the matter. The respondent can be remanded in custody until Friday at 9.30 am. Adjourn the Court, please?
>
> Ms Noah: Excuse me, in custody. Why is that?

22 The Federal Magistrate adjourned the Court at 2.52 pm.

23 When proceedings resumed at 9.30 am on Friday 11 July 2008 Ms Noah had obtained legal representation. Her solicitor sought, and was granted, an adjournment. The matter was adjourned for mention on 3 September 2008 and Ms Noah was released on the undertaking that she would attend the Court on that date, be of good behaviour in regard to the conduct of the proceedings and not make contact with Mr Bailey.

24 Ms Noah did not have legal representation when the matter was again before the Court on 3 September 2008 and the Federal Magistrate offered her a further adjournment. She said that she would like to avail herself of that opportunity so that she could seek legal advice. Ms Noah maintained that the apology referred to at [20] above was directed at the Court.

25 Proceedings resumed on 24 September 2008. Ms Noah was represented by counsel. The Federal Magistrate convicted Ms Noah on the contempt charge and sentenced her to time already served. At that time she had spent nearly two days in custody.

GROUNDS OF APPEAL

26 The ground common to both appeals is that the Federal Magistrate erred in not disqualifying himself 'in the circumstances where there was a dispute as to the facts constituting [the counts]'.

27 In Mr Clampett's case this dispute was originally characterised as one about the words alleged in Count Two but, in written submissions, his counsel argued the first ground on the basis that the Federal Magistrate should have disqualified himself in circumstances where the matter was not urgent and where procedural fairness required a differently constituted bench. Counsel for Mr Clampett did not deny that his client's words were capable of constituting a contempt, but submitted that Mr Clampett "should not have been found guilty of contempt of Court *in the manner in which he was found guilty*" (emphasis added).

28 In Ms Noah's case the dispute was said to be whether the words "Yes, it's been mutual your Honour" in fact constituted a contempt in the face of the Court. Counsel for Ms Noah also argued, as a separate ground of appeal, that the Federal Magistrate erred in concluding that the words constituted a contempt.

29 Counsel also argued that the Federal Magistrate did not properly take into account his clients' defences. In Mr Clampett's case his 'defence' was that he had not spoken all the words alleged in Count Two. In written submissions counsel for Mr Clampett characterised this failure as a denial of natural justice. In Ms Noah's case her 'defence' was that she had not intended to be insulting and contemptuous of the Court.

30 Mr Clampett also appealed on two other grounds relating to natural justice. Essentially these were that the Federal Magistrate should have allowed Mr Clampett to call Mr Henry as a witness and that the Federal Magistrate should have allowed Mr Clampett an opportunity to listen to the audio tape of the alleged contempt so as to enable him to make submissions about its content.

31 Mr Clampett also appealed against sentence on the ground that his sentence was manifestly excessive and that the Federal Magistrate did not properly consider all of the sentencing options.

32 Underlying all the specific grounds is the broader question whether the Federal Magistrate properly exercised his discretion to hear the charges himself instead of referring them to another federal magistrate for hearing and determination. This is the principal issue to which I now turn.

CONSIDERATION

33 Section 17 of the *Federal Magistrates Act 1999* (Cth) (Act) confers upon the Federal Magistrates Court the same power to punish contempts as that possessed by the High Court of Australia in respect of contempts of that Court. The section also specifically provides that the jurisdiction of the Federal Magistrates Court to punish a contempt committed in the face or hearing of the Court may be exercised by the Court as constituted at the time of the contempt: see s 17(3).

34 But whilst the power of the Federal Magistrate to exercise the jurisdiction is undoubted, it is essential to bear in mind that the power is discretionary. This becomes plain when the nature of the power and judicial decisions about its exercise are considered, and it is confirmed by the language of s 17(3) itself which provides that the jurisdiction "may" be exercised by the Court as constituted at the time of the contempt.

35 Cases of the highest authority warn that the summary power of punishing for contempt, in circumstances where the judge before whom the alleged contempt occurred then goes on to hear the matter, should be used sparingly and only in serious cases: see *Lewis v Judge Ogden* (1984) 153 CLR 682 at 693 per Mason, Murphy, Wilson, Brennan and Dawson JJ.

36 Likewise in *Keeley v Mr Justice Brooking* (1979) 143 CLR 162 at 173-174, Stephen J, having reviewed the authorities, including *Balogh v St. Albans Crown Court* [1975] QB 73 observed that the conclusion to be drawn from them (a conclusion with which he evidently agreed) was 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' because it is 'urgent and imperative to act immediately' to preserve the integrity of 'a trial in progress or about to start'.

37 It is obvious and well recognised that the essential problem with a summary hearing before the judicial officer before whom the contempt was allegedly committed is the conflict with fundamental principles of justice that occurs when, in effect, the roles of prosecutor, witness and judge are performed by one and same person: see *Keeley* 143 CLR 162 at 173 per Stephen J. Specific aspects of the problem emerge when interruptions said to amount to a contempt of court take the form of insults that may be seen to reflect upon, or be aimed at, the

judicial officer who will decide the case and who must then exercise the wide discretionary power to impose a penalty; and even the more so when the penalty may be (as here) a term of imprisonment.

38 There is yet a further problem. 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.

39 Whilst these considerations do not preclude a summary hearing by the judge or magistrate before whom a contempt is said to have occurred, they are at the heart of the concerns expressed about such a procedure in the cases and in academic writings, and they underscore the need for caution. They also point to the matters that must be considered and given appropriate weight in the exercise of the discretion conferred by provisions such as s 17(3) of the Act. If fundamental principles of justice are to be departed from it must surely be for the reason that, quite exceptionally, the broader interests of justice so require. Indeed, this consideration is so strong that if the same person were to act as prosecutor, witness and judge when the broader interests of justice did not manifestly so require, proceedings intended to uphold the authority of the court would be seen to diminish that authority so that the process would, at best, be self-defeating.

40 The question in the present cases then is whether the Federal Magistrate's discretion to hear the charges for contempt himself miscarried.

Did the Federal Magistrate properly exercise his discretion in the matter of Mr Clampett?

41 The proceedings against Mr Clampett unfolded very quickly, as appears from the summary of the facts, especially at [7] and [8] of these reasons. The decision to "deal" with Mr Clampett for contempt was evidently made then and there. No reasons were given then or later for the Federal Magistrate's decision to hear the matter himself. The exercise of the discretion to proceed in this way was not discussed in the reasons for decision delivered by

the Federal Magistrate when he found Mr Clampett guilty of contempt and sentenced him to imprisonment for 28 days.

42 When an important question requires the careful balancing of powerful competing considerations affecting the administration of justice in its application both with regard to the integrity of the system of justice generally and to the rights of an individual accused of a criminal offence, one may expect to see at least some indication – other than the result itself – that such a process has been undertaken.

43 There may of course be circumstances that really allow for no other conclusion than that the contempt has to be dealt with then and there. Violent and unequivocal behaviour that interrupts a jury trial at a critical moment can be imagined as such a case, and an instance in which the power to have the offending person removed from the court is not of itself sufficient to secure the interest of justice.

44 In the present case, however, there were, as well as the competing considerations to which I have referred, particular matters that pointed in favour of referral to another federal magistrate. The conduct was not such that it, incontestably, "could not wait to be punished" nor was it "urgent and imperative to act immediately" to preserve the integrity of a proceeding in progress. Moreover, even if the matter were to be viewed as especially serious and requiring not only prompt attention but also severe punishment if the authority of the court were to be maintained, it was by no means essential that the contempt had to be dealt with by the same magistrate. There was, of course, no jury waiting and no witness being interrupted or delayed in the course of giving evidence, to take but two examples. In considerable contrast, the Federal Magistrate was delivering reasons for judgment in a strike-out application in proceedings for the oral examination of a judgment debtor. Those proceedings were not of themselves especially urgent and, in any event, it was evidently thought appropriate to delay the hearing of the charges for some days; and this was not for the purpose of allowing Mr Clampett to obtain legal advice and representation, for that matter was not mentioned until the day fixed for the hearing of the charges.

45 In this context, it may be noted that counsel for Mr Clampett, whilst not denying that the actions of his client were capable of constituting contempt of court, relied strongly upon the absence of any urgent need for the Federal Magistrate to hear the proceedings himself and

argued that he should have disqualified himself, a submission which he contended derived support from the statement of Lord Denning that "[i]t is a jurisdiction which undoubtedly belongs to us but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter" (see *Regina v Commissioner of Police of the Metropolis, ex parte Blackburn (No. 2)* [1968] 2 WLR 1204 at 1206).

46 It is trite law that an appellate court will not upset the exercise of a judicial discretion merely because it would have taken a different course. It must appear that some error has been made in the exercise of the discretion, such as a failure to take into account some material consideration: see *House v The King* (1936) 55 CLR 499 at 504-505. A failure to appreciate that a power requires the exercise of a discretion will of course itself be such an error.

47 In the matter of Mr Clampett, I am satisfied that the Federal Magistrate's discretion miscarried. It is by no means apparent that he turned his mind at all to the discretion he was required to exercise but I would conclude that even if he did do so he did not give any or adequate weight to important considerations, central to the due administration of justice in such a case, that the nature of the power required him to take into account in the circumstances. Those considerations were the need to exercise sparingly the power to hear the charges himself and to do so only in exceptional cases in which the overall requirements of the administration of justice required (or at least justified) such a course. The authorities and the considerations to which I have referred in these reasons about the exceptional nature of the power and the potential conflict with fundamental principles of justice compel the conclusion that these were matters that are required to be taken into account and to be given appropriate weight in the proper exercise of the discretion conferred by s 17(3) of the Act.

48 I have reached this conclusion having taken into account the speed with which the decision to "deal with" Mr Clampett was made, the nature of the proceedings and the stage they had reached and, in the circumstances, the absence of any statement of the Federal Magistrate's reasons for taking the course he did. The absence of any reasons is a strong indicator of error where the proper exercise of a discretion requires the careful balancing of powerful competing considerations going to the administration of justice, and particularly so in a case such as this where the balance of those considerations pointed in favour of a hearing

before another judicial officer or where (as is also the present case) a severe penalty may have been in contemplation.

Nevertheless, no substantial miscarriage of justice?

49 It does not, however, follow that the appeal must necessarily be allowed. Counsel for the respondent submitted, in substance, that whatever criticisms might be made about the proceedings, Mr Clampett was plainly guilty of contempt of court. It is therefore necessary to consider whether, despite the Federal Magistrate's failure to exercise his discretion properly, the appeal should be dismissed because there was, in any event, no substantial miscarriage of justice.

50 There is no equivalent in the *Federal Court of Australia Act 1976* (Cth) to the common statutory proviso that allows the Supreme Courts to dismiss a criminal appeal if no substantial miscarriage of justice has occurred. Both the High Court and this Court have, however, interpreted s 28(1)(f) of the *Federal Court of Australia Act* – which gives the Federal Court power on appeal to grant a new trial on any appropriate ground – as authorising the Court to dismiss an appeal on the basis that no substantial miscarriage of justice has actually occurred. In *Conway v The Queen* (2002) 209 CLR 203 at 208 Gaudron A-CJ, McHugh, Hayne and Callinan JJ held that:

> To construe s 28(1)(f) as authorising the dismissal of appeal on the basis that no substantial miscarriage of justice has actually occurred gives effect to the long established rule of the common law that a new trial is not ordered where an error of law, fact, misdirection or other wrong has not resulted in any miscarriage of justice.

51 It is well established that some errors are so fundamental that they cannot come within the proviso even if an appellate court is of the opinion that without the error the appellant would inevitably have been convicted: *Wilde v The Queen* (1988) 164 CLR 365 at 372-373 per Brennan, Dawson and Toohey JJ; *Quartermaine v The Queen* (1980) 143 CLR 595 at 600-601 per Gibbs J. In *Wilde* 164 CLR per Brennan, Dawson and Toohey JJ at 372 – 3:

> This view is undoubtedly correct, for the proviso was not intended to provide, in effect, a retrial before the Court of Criminal Appeal when the proceedings before the primary court have so far miscarried as hardly to be a trial at all. It is one thing to apply the proviso to prevent the administration of the criminal law from being "plunged into outworn technicality" (the phrase of Barwick C.J. in *Driscoll v. The Queen*); it is another to uphold a conviction after a proceeding which is fundamentally flawed, merely because the appeal court is of the opinion that on a proper trial the appellant would inevitably have been convicted. The proviso has no application where an irregularity has occurred which is such a departure from the

> essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. Errors of that kind may be so radical or fundamental that by their very nature they exclude the application of the proviso… [Footnotes omitted]

52 In *Weiss v The Queen* (2005) 224 CLR 300 the High Court noted (at 317) that:

> … no single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal, even though persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt. What can be said, however, is that there may be cases where it would be proper to allow the appeal and order a new trial, even though the appellate court was persuaded to a requisite degree of the appellant's guilt. Cases where there has been a significant denial of procedural fairness at trial may provide examples of cases of that kind.

53 Although counsel for Mr Clampett was realistic and correct in not denying that the actions of his client were capable of constituting a contempt of court, this not a case in which, despite the error made by the Federal Magistrate, the appeal should be dismissed and the conviction upheld.

54 The Federal Magistrate's failure to exercise the discretion resulted in several unsatisfactory features of Mr Clampett's case such that it cannot be said that there was no substantial miscarriage of justice. These aspects of the case suggest that, had the discretion been exercised correctly and had the charges been heard by a court differently constituted, Mr Clampett's case might have borne a different complexion.

55 First, there was the refusal of the Federal Magistrate to accede to Mr Clampett's request that the handcuffs be removed. As there had been no apparent need from the viewpoint of security for Mr Clampett to be in handcuffs in the first place, it is hard to see what basis there was for him being kept in handcuffs whilst he was expected to present his defence. The imposition of handcuffs on a person in court – particularly a person conducting his own defence – risks compromising procedural fairness by restricting the person's ability to communicate freely and thereby to present his case. Handcuffs prevent the use of hands and arms to aid self-expression and they also restrict, and most likely remove, the ability to take notes and to refer to papers. This would be particularly disabling for a person who is representing himself. More broadly, to require an accused person to present his defence whilst in handcuffs, is to require him to present his defence not from the position of a free man who stands accused of a charge which has to be proved against him, but of a person who

needs to be restrained or, there being no need for him to be restrained, is in effect being punished.

56 Secondly, there were Mr Clampett's complaints that the Federal Magistrate did not afford him the opportunity to call Mr Henry as a witness and to listen to the audio tape of the alleged contempt. At first sight these might seem to have been provocative applications. However, counsel for Mr Clampett explained the situation and argued that his client wanted to call Mr Henry as a witness and to listen to the audio tape with a view to obtaining evidence that would "correct" the record about the words he used and that had become the subject of Count Two. It was argued that Mr Clampett perceived a need to do this as a consequence of his misunderstanding of the Federal Magistrate's articulation of Count Two and his subsequent conclusion that the transcript was inaccurate. Accepting this argument for present purposes, it may well be that had Mr Clampett been allowed to question Mr Henry and to listen to the audio tape, he would have succeeded in clarifying the precise nature of the charge laid against him.

57 There may therefore be more to this than first appears. On a careful reading of the transcript, aided by reference to the audio recording to which we were invited to listen, there is a case to be made that Mr Clampett really did think that the transcript was inaccurate in critical respects. For his part, the Federal Magistrate evidently could not see what Mr Clampett saw as a serious problem. The charge against Mr Clampett recited what he had said and then asserted the legal effect of those words. It may well be that Mr Clampett failed to draw a distinction between the two and may indeed have understood that it was being alleged that all the words of the charge had actually been spoken by him – which of course was not the case. The possibility of a misunderstanding seems clear enough now but it does not appear to have been clear at the time and the Federal Magistrate may well have proceeded upon the footing that Mr Clampett's view of the matter was but another instance of his contemptuous behaviour.

58 The Federal Magistrate did give Mr Clampett a copy of the transcript, but since it did not contain the words that Mr Clampett thought had been attributed to him, his concerns may well have been heightened. Thus, the step taken by the Federal Magistrate to resolve the confusion may have only made matters worse.

59 It is reasonable to infer that had the matter come before a different federal magistrate, the chances of a misunderstanding occurring, and continuing, would have been greatly reduced. Had the case been heard by another federal magistrate and had Mr Clampett claimed that he had not used the words attributed to him in the charge, the federal magistrate would have been able to point out that the additional words were not in fact attributed to him but were an allegation as to the effect of the words that he did use.

60 Thirdly, although in the view I take of this matter the issue does not arise directly, I consider that it was also unsatisfactory for the Federal Magistrate to have proceeded upon the basis that Mr Clampett would not have paid any fine and that he should therefore have been sentenced to imprisonment without any option to pay.

Should there be a rehearing before another Federal Magistrate?

61 It follows from what I have said that the appeal should be allowed and the conviction and sentence set aside. The matter should be remitted to the Federal Magistrates Court for rehearing before another federal magistrate. It will of course be a matter for the Attorney-General to determine in the circumstances, including time served in prison, whether the public interest is served in having a retrial.

Did the Federal Magistrate properly exercise his discretion in the matter of Ms Noah?

62 The principles that I have discussed when considering the failure of the Federal Magistrate to effectively exercise the discretion in the case of Mr Clampett apply equally in the case of Ms Noah.

63 Here too, the Federal Magistrate decided, then and there, to "deal with" her. Here too, he gave no reasons for exercising his discretion to hear the charge of contempt himself rather than to refer it to another federal magistrate. Here too, there were no compelling reasons of urgency or otherwise that pointed to a need, in the broader interests of the administration of justice, for the Federal Magistrate to hear the charge himself notwithstanding the compromise that that would involve with the fundamental principles of justice (see at [34] – [39]). The lack of any urgency is underlined by the circumstance that, although charged on 9 July, Ms Noah was not convicted of contempt until late September 2008, and only then did the enforcement proceedings resume.

64 For the same reasons as in the case of Mr Clampett, and again, particularly because no reasons were given in circumstances where the exercise of the discretion required a careful balancing of powerful considerations, I conclude that the Federal Magistrate was in error in the exercise of his discretion under s 17(3) of the Act.

Nevertheless, no substantial miscarriage of justice in Ms Noah's case?

65 In this case also it is now necessary to consider whether, notwithstanding the Federal Magistrate's failure to exercise his discretion properly, Ms Noah's appeal should be dismissed because there was, in any event, no substantial miscarriage of justice.

66 As with Mr Clampett, there were unsatisfactory aspects of Ms Noah's case such that it cannot be said that there was no substantial miscarriage of justice.

67 First, there was the way in which the Federal Magistrate decided to "deal with" Ms Noah after the luncheon adjournment and in the meantime hold her in custody. There was no suggestion that she presented any risk or that she might abscond. She was simply placed in custody without being given any opportunity to ask why or to submit otherwise. As the transcript shows, it all happened very quickly. She was to be held in custody for two or three hours before being brought back into the Court to be "dealt with".

68 The unsatisfactory conduct of this proceeding continued after the luncheon adjournment in the circumstances outlined at paras [19] to [21] of these reasons. Upon being offered by the Federal Magistrate time "to reflect upon the charge" Ms Noah asked for "a couple of days" and said she would like to seek legal advice. Instead she was remanded in custody until 9.30 am on the following Friday, it then being Wednesday. Unsurprisingly, Ms Noah asked why it was that she was to be remanded in custody; she received no answer. At that time she had not been found guilty of any offence.

69 As well as these aspects of the conduct of the proceedings, there is also the possibility here – as was the case with Mr Clampett – that had the due exercise of the Federal Magistrate's discretion led to the charge having been heard by a court differently constituted, the matter might have unfolded more favourably – perhaps even entirely favourably – to Ms Noah. Her defence was that she did not intend to be insulting or contemptuous of the Court and before a different magistrate that defence might – it can be put no higher than that – have

had a better prospect of success. Also, her apology might – again it can be put no higher than that – have had some prospect of being accepted and understood in the way she asserted that it should be. Her chances might have been improved too, had a different federal magistrate been reminded by counsel that the proceedings were criminal in nature, with the criminal onus and standard of proof.

70 In these circumstances, the Federal Magistrate's discretion having miscarried, there is no occasion nevertheless to uphold the conviction and sentence. The appeal should be allowed and the conviction and sentence set aside. The matter should be remitted to the Federal Magistrates Court for rehearing before another federal magistrate.

IS THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA THE PROPER RESPONDENT?

71 In both appeals, the Attorney-General of the Commonwealth of Australia has been named as the respondent and counsel for the appellants raised in its written submissions the question whether the Attorney-General is the appropriate respondent in an appeal against a conviction of contempt in the face of the Federal Magistrates Court. Counsel for the appellants referred the Court to cases in which the Attorney-General was held to be the proper respondent (*Attorney-General v Times Newspapers* [1974] AC 273 at 311 per Diplock LJ; *MacGroarty v Clauson* (1989) 167 CLR 251), and others in which the Queen was held to be the appropriate respondent (*Fraser v The Queen* [1984] 3 NSWLR 212 at 218-219 per Kirby P and McHugh JA; *Re Perkins; Mesto v Galpin* [1998] 4 VR 505 at 510 per Brooking JA, with whom the other members of the Court of Appeal agreed). Counsel for the appellants adopted the approach that if the Court accepted the submission of counsel for the respondent that the Queen was the correct respondent, it was not a matter of consequence to the appellants and that the name of the respondent should be amended accordingly. Neither counsel submitted that the Federal Magistrate was the proper respondent: see *Re Perkings* 4 VR 505 at 510: cf *Keeley* 143 CLR 162; *Lewis* 153 CLR 682.

72 The position taken by counsel for the respondent was that whilst the Attorney-General was entitled to bring proceedings for contempt in the face of the Court and was entitled to be a party to contempt proceedings, the Attorney-General was not a necessary respondent and could not be made a respondent against his or her will. The appropriate respondent in a case

such as the present, counsel submitted, was the Queen and he relied upon the observations of Brooking JA in *Re Perkings* 4 VR 505 at 510 in support of that proposition.

73 Counsel also relied upon observations made by Martin CJ in *O'Brian v Northern Territory of Australia* (2003) 12 NTLR 218 at [43] in support of his submission that the Queen was the proper respondent. In that case, however, Martin CJ went on to observe at [46]:

> There being no objection, I am not disposed to say anything more about the agreement that the Northern Territory of Australia should be joined. But, it seems to me that the proper contradictor in a case involving an allegation of want of jurisdiction in a judicial officer is the Attorney-General, since, traditionally, the Attorney-General has the ultimate responsibility for the protection of the courts of the Territory.

74 The observation of Martin CJ that the Attorney-General was the proper contradictor for the reason that the Attorney-General had the ultimate responsibility for the protection of the courts (in that case of the Northern Territory) seems to me to go to the heart of the matter. Indeed, the same concept informs the observation of Brooking JA in *Re Perkings* 4 VR 505 that the Queen had the ultimate responsibility of the protection of the courts, the due administration of justice and the enforcement of the criminal law.

75 The reference to the Queen is not of course a reference to Her Majesty personally but a reference to the Queen who acts through and upon the advice of her ministers. At least in the case of the Commonwealth it would seem more readily understood and more closely reflecting the constitutional reality to say, as Martin CJ said with respect to the Northern Territory, that the Attorney-General has the ultimate responsibility for the protection of the courts of the Commonwealth.

76 It cannot be doubted that there is such a responsibility with respect to the High Court of Australia as the Federal Supreme Court mandated by the Constitution and a pivotal element in its workings. As well, whilst the other federal courts created by the Parliament under Ch III of the Constitution continue to possess a jurisdiction conferred upon them by the Parliament, they too must necessarily attract an obligation to be protected to enable them to perform their constitutionally mandated functions. (The same may be said about the necessary obligation to provide the courts with the resources they need to perform their

functions: see King, "The Attorney-General, Politics and the Judiciary" (2000) 29 *Western Australian Law Review* 155 at 170.)

77 The responsibility to protect the courts may be seen as a general responsibility of the other branches of government and as a particular responsibility of the Attorney-General as a minister of State. The Administrative Arrangements Order under which the Governor-General, acting with the advice of the Federal Executive Council, orders that particular matters be dealt with by various Departments of State provides that the Attorney-General's Department is to deal with matters of law and justice, including courts and tribunals. The Administrative Arrangements Order also specifies the legislation to be administered by each Minister of State administering a department. In the case of the Attorney-General's Department the legislation to be administered by the Attorney-General includes the *Federal Court of Australia Act 1976*, the *Federal Magistrates Act 1999*, the *High Court of Australia Act 1979* and the *Judiciary Act 1903*. Other acts to be administered by the Attorney-General include legislation relating to the judiciary, to the criminal law of the Commonwealth, and to its enforcement in the courts.

78 In the allocation in this way of responsibility to the Attorney-General there is a reflection of some of the traditional functions of the Attorney-General in England and Wales, although there are also substantial differences: see Selway BM, "The Different Role of an Australian Attorney-General" (2002) 13 PLR 263; King LJ, "The Attorney-General, Politics and the Judiciary" (2000) 29 *Western Australian Law Review* 155; Bennett D, "The roles and functions of the Attorney-General of the Commonwealth" (2002) 23 ABR 61.

79 The merging of functions seems to have been assumed upon the establishment of the Commonwealth on 1 January 1901, when the Attorney-General's department was created and the Honourable Alfred Deakin, a member of the Federal Executive Council, summoned and sworn in that day, was appointed to administer it. It was plain then that the office of Attorney-General of the Commonwealth of Australia would have different functions to its counterpart in England and Wales, and yet the adoption of the same title suggests that some of the functions of the English office came with the new Commonwealth office.

80 The essential point here is that the undoubted responsibility to protect the courts of the Commonwealth – whatever its extent and whatever its content might be in any particular

instance – rests with the Attorney-General of the Commonwealth as Her Majesty's responsible minister of State: see ss 64 and 61 of the Constitution. See also *Australian Industry Group v Automative, Food, Metals, Engineering, Printing and Kindred Industries Union of Australia and Others* (2001) 188 ALR 653, in which Merkel J held (at 655) that the "Attorney-General is the appropriate officer of the state to represent and safeguard the public interest in vindicating the authority of its courts". In my view, the course taken by the appellants in this case of naming the Attorney-General of the Commonwealth as the respondent was correct in the context of federal proceedings, because it most closely reflects practical and constitutional reality. Whether one speaks of the Queen as protecting the courts or the Attorney-General, the fact is that the relevant function is the constitutional responsibility of one of the ministers of State appointed by the Queen's representative, namely the Attorney-General. Where the protection of the courts is a matter in issue, it is surely better that there be no mistake as to who is the actual person with the ultimate responsibility.

81 Finally, it would be an odd result if the Attorney-General might bring proceedings for contempt of court, in the fulfilment of his role to protect the courts, but could reject the role of respondent if he chose to do so. If the functions of the office extend, as is uncontroversial, to protecting the courts by bringing proceedings, I find it impossible to see how, as a matter of logic, the same role could be denied when undertaken in the capacity of a respondent. For it is the same role, looked at from one viewpoint rather than from the other.

82 There is therefore, in my opinion, no occasion to grant leave to amend the title of the respondent.

I certify that the preceding eighty two (82) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Black.

Associate:

Dated: 28 October 2009

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION **QUD 203 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**LEONARD WILLIAM CLAMPETT** **Appellant**
AND:	**ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA** **Respondent**
JUDGES:	**BLACK CJ, FINKELSTEIN, GREENWOOD JJ**
DATE:	**28 OCTOBER 2009**
PLACE:	**BRISBANE**

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION **QUD 323 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**LESLEY ALEXANDRA NOAH** **Appellant**
AND:	**ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA** **Respondent**
JUDGES:	**BLACK CJ, FINKELSTEIN, GREENWOOD JJ**
DATE:	**28 OCTOBER 2009**
PLACE:	**BRISBANE**

REASONS FOR JUDGMENT

FINKELSTEIN J

83 I agree in the reasons of the Chief Justice and in the orders his Honour proposes.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Finkelstein.

Associate:

Dated: 28 October 2009

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION **QUD 203 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**LEONARD WILLIAM CLAMPETT** **Appellant**
AND:	**ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA** **Respondent**
JUDGES:	**BLACK CJ, FINKELSTEIN, GREENWOOD JJ**
DATE:	**28 OCTOBER 2009**
PLACE:	**BRISBANE**

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION **QUD 323 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**LESLEY ALEXANDRA NOAH** **Appellant**
AND:	**ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA** **Respondent**
JUDGES:	**BLACK CJ, FINKELSTEIN, GREENWOOD JJ**
DATE:	**28 OCTOBER 2009**
PLACE:	**BRISBANE**

REASONS FOR JUDGMENT

GREENWOOD J

84 These are two appeals heard together against sentence and conviction for contempt in the face of the Federal Magistrates Court of Australia. In the case of Mr Clampett (QUD 203 of 2008), the conviction arose out of events that occurred before the Court on 2 July 2008 in

the course of Federal Magistrate Burnett delivering ex tempore reasons for the dismissal of an application by Ms Noah to strike out, as beyond jurisdiction, a proceeding for her oral examination pursuant to an order for an enforcement summons consequent upon Ms Noah's failure to pay costs of $3,505.00 the subject of an order in an earlier proceeding. In the case of Ms Noah (QUD 323 of 2008), her conviction and sentence arose out of events in the course of the oral examination.

85 Before turning to the grounds of appeal, the contextual background needs to be explained as it informs the subsequent events and, like all human events, context matters.

86 In 2007 Ms Noah sought to stand as a candidate for the House of Representatives seat of Rankin in the Federal election to be held on 24 November 2007. In order to do so, Ms Noah was required to nominate for the seat in the manner required by the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act") which required her, among other things, to lodge a nomination form with the Office of the Electoral Commissioner (the "Australian Electoral Commission") signed by not fewer than 50 persons entitled to vote at the election, as she was intending to stand as an independent candidate rather than a candidate endorsed by a political party (s 166(1)(b) of the Electoral Act). She was also required to comply with s 170 of the Electoral Act which provided for the payment, relevantly here, of a nomination fee or deposit of $500.00 "in legal tender or in a cheque drawn by a bank or other financial institution on itself" (s 170(3)(b)).

87 As things transpired, the Divisional Returning Officer for the seat of Rankin, an employee of the Australian Electoral Commission, Mr Scott Bailey, rejected Ms Noah's nomination under s 172 of the Electoral Act on the ground that she had failed to comply with s 166 of the Electoral Act. A Divisional Returning Officer is the Australian Electoral Commission's Officer responsible for conducting the election for the House of Representatives in each division.

88 Ms Noah sought judicial review of the rejection decision and commenced proceedings before the Federal Magistrates Court (BRG 933 of 2007) for particular relief. In that application, Ms Noah nominated Mr Ian Campbell as the respondent. Mr Campbell was the Australian Electoral Commissioner from 2 July 2005 to 19 September 2008.

89 For all the obvious reasons, the application was heard urgently. It was heard before his Honour, Federal Magistrate Burnett. The Australian Government Solicitor (the "AGS") entered an appearance for Mr Campbell and instructed Mr Gotterson QC to appear on the hearing of the application and resist the orders sought by Ms Noah. Ms Noah was self-represented. On the hearing of the application, a preliminary matter arose. Since the decision-maker was Mr Bailey, the Divisional Returning Officer for the seat of Rankin, rather than Mr Campbell, FM Burnett suggested that the application should be properly constituted by making an order for the removal of Mr Campbell as respondent and substituting Mr Bailey as the officer responsible under the Electoral Act. Ms Noah sought, with the support and acceptance of the AGS, that order. It was made. The application for substantive relief was then immediately heard. The AGS proceeded to represent Mr Bailey in Ms Noah's challenge to Mr Bailey's rejection decision and Mr Gotterson QC continued to appear to resist the application on instructions from the AGS. The application was thus heard and determined.

90 This sequence of events became important as the question of the standing of the AGS to represent Mr Bailey became a major matter of enduring concern to Ms Noah. She formed the view and pressed it strongly in subsequent proceedings before FM Burnett that Mr Bailey had not instructed the AGS to act in the matter or at all; the AGS had not, after the substitution order, filed a fresh notice of appearance on behalf of Mr Bailey; the AGS could not under its charter represent a private citizen; and, the conduct of AGS officers of purporting to act without the instructions of Mr Bailey necessarily involved a breach of ethical standards on the part of those officers and a contravention of legislation governing the conduct of the profession.

91 Ms Noah was unsuccessful in her application for review of the rejection decision. The application was dismissed on 21 November 2007 (*Noah v Campbell* [2007] FMCA 2128). After a consideration of public interest issues going to the exercise of the discretion on costs, Ms Noah was ordered to pay the costs of the application fixed on the basis of a scale of allowable fees "for preparation" of the matter to what is described as "Stage 1" at $2,005.00. Recoverable counsel's fees were allowed at $1,500.00 constituting recoverable costs of the proceeding of $3,505.00 in all. Federal Magistrate Burnett did not allow the full amount of senior counsel's fees as a recoverable cost item.

92 Ms Noah failed to pay those costs.

93 However, several attempts were made by Ms Noah to pay the amount of the costs by delivering or posting to Mr Bailey personally at his private residence, a cheque in that sum drawn by Ms Noah's husband on his company's account. Two things influenced Ms Noah to deal with the costs in this way. First, Ms Noah simply refused to deal with the AGS or recognise or accept that the AGS had any standing to represent Mr Bailey, for all the reasons mentioned earlier notwithstanding that Mr Bailey was for all purposes relevant to the proceedings, a representative decision-maker of the Australian Electoral Commission. Secondly, Ms Noah took the position that she could not pay the costs other than by way of legal tender which, in her view, necessarily involved payment in gold or silver. Ms Noah took the position and sought to articulate it before FM Burnett that payment in any way other than by gold or silver would not be constitutionally competent or possible as the printing, issue and circulation of paper money or coins pursuant to the *Currency Act* 1965 (Cth) (the "Currency Act") is unlawful as the Currency Act is not a valid law of the Commonwealth by reason of s 115 of the Commonwealth Constitution and related provisions of the Constitution. That argument also involved questions going to the validity of ss 15 and 22 of the Currency Act.

94 Unfortunately, these two notions fundamentally affected the subsequent course of events. Ms Noah was present in Court and participated in the substitution order introducing Mr Scott Bailey as the relevant respondent to the review proceeding she had commenced. The AGS was not acting for Mr Bailey in any private capacity as a citizen of Australia to either assert a right on his behalf or resist a contended private wrong, as Ms Noah believed. The AGS represented Mr Bailey in his representative capacity as the Divisional Returning Officer of the Australian Electoral Commission and decision-maker at the relevant date for the seat of Rankin. There was no need for Ms Noah to be seeking out and contacting Mr Bailey about any of these matters including the payment of costs by means of her husband's company's cheque, which Mr Bailey, on the evidence, resented. Plainly enough, much wasted time, cost and emotional energy could have been avoided had Ms Noah simply made arrangements with the AGS for the payment of the costs debt by way of a bank cheque. Such a step would have been entirely orthodox. The entire matter would then have simply evaporated.

95 The second notion concerning the unconstitutionality of the Currency Act is also misconceived. As to the rejection of this notion, see: *Re Skyring's Application (No. 2)* (1985) 58 ALR 629 at 633 per Deane J where his Honour said this:

> I have come to a clear conclusion that there is no substance in the argument that there is a constitutional bar against the issue by the Commonwealth of paper money as legal tender. Nor, in my view, would there be any substance in an argument that the provisions of s 36(1) of the Reserve Bank Act 1959 are invalidated or overruled by the provisions of the Currency Act 1965.

96 An appeal from the orders of Deane J was dismissed by their Honours Mason, Wilson, Brennan and Dawson JJ on 9 July 1985. See also *Skyring v FCT* (1992) 23 ATR 84; *Ramsey v Skyring* (1999) 164 ALR 378 per Sackville J at [2], and [13] to [50]; *Jones v Skyring* (1992) 109 ALR 303 per Toohey J; *Skyring v Ramsey* [2000] FCA 774 per Ryan, O'Connor and Weinberg JJ; *Re Skyring* (1994) 68 ALJR 618 per Dawson J at pp 618-619; *In the Matter of Skyring* [2004] FCA 827 per Dowsett J at [2] and *Skyring v Commissioner of Taxation* (2008) 244 ALR 505 at [6] to [26] in which the authorities are gathered together.

97 Again, substantial public resources are apt to be entirely wasted by ventilating this notion of unconstitutionality as a contended answer to an obligation to pay a lawful debt, in the light of the above authorities, unless there is an entirely new ground of unconstitutionality to be advanced.

98 Ms Noah did not appeal from the order dismissing her application for judicial review or the order as to costs. Since the debt had not been paid, the AGS applied *ex parte* on behalf of the enforcement creditor (in the name of Mr Bailey as the judgment creditor in his representative capacity notwithstanding Mr Bailey had ceased to be an employee of the Australian Electoral Commission in December 2007) for an order for the issue of an enforcement summons. That order was made. Rule 1.05(2) of the *Federal Magistrates Court Rules* provides that if in a particular case the rules are insufficient, the court may apply the *Federal Court Rules* in whole or in part. The Deputy District Registrar applied the *Federal Court Rules* in making that order. The oral examination of Ms Noah came on for hearing before FM Burnett on 2 July 2008.

99 Before the oral examination began, FM Burnett heard an application made by Ms Noah to strike out the enforcement summons and, in effect, set aside the enforcement

order as beyond jurisdiction. Sixteen grounds were relied upon by Ms Noah to support that contention based on affidavit and other material she identified and recited into the record. The particular contentions are identified by her at pp 15 and 16 of the transcript of proceedings before FM Burnett. The grounds are then expanded upon throughout the transcript by Ms Noah. It is not necessary to repeat each of the contentions here. However, it is fair to say that the submissions are dominated (although there are other grounds as well) by the notion that the AGS was not a "party" to the proceeding; the AGS had no standing to seek orders or take any step in the name of Mr Bailey; the AGS could not represent Mr Bailey; the AGS had no instructions from Mr Bailey personally; and, because the AGS had no relevant standing, Ms Noah therefore had taken steps to arrange for payment to Mr Bailey directly of the amount of the costs. Ms Noah also contended that she ought to have been served with and heard on the creditor's application for an enforcement order.

100 A preliminary matter was raised by Ms Noah concerning the constitutionality of the initial order for payment of costs and the implications of that argument for the enforcement proceeding more generally. Ms Noah had given a notice to the Attorneys-General of the States and the Commonwealth of the constitutional questions she sought to raise. FM Burnett heard Ms Noah on each of the 16 arguments she advanced, but for the contention in relation to the constitutionality of the Currency Act which relied upon the argument based upon s 115 of the Constitution and related provisions addressed in the above authorities at [95] and [96]. FM Burnett considered that there was simply no merit in entertaining submissions on that question.

101 At the conclusion of Ms Noah's submissions, FM Burnett said that he did not need to hear submissions from Mr Henry of the AGS who appeared on behalf of the enforcement creditor, in response to any of Ms Noah's submissions. The election by the Federal Magistrate to commence delivering *ex tempore* reasons for his proposed order to dismiss the strike-out application, addressing each of Ms Noah's submissions, without calling upon Mr Henry to respond on any matter, may have created in the mind of Ms Noah the impression that the Federal Magistrate either had pre-determined the matter or had not given sufficient consideration to her contentions. This impression may have had particular resonance in Ms Noah's mind having regard to the strength of her conviction that the AGS had no standing to act for Mr Bailey and that she was confronted with a contended impossibility of payment of the costs order because of the unconstitutionality of the Currency Act. Notwithstanding

that both these conceptions were entirely unmeritorious and neither would have required FM Burnett to call upon Mr Henry to respond to them, it may explain, in part, the response of the lay litigant to subsequent events.

102 Nevertheless, it must be remembered that the Federal Magistrates Court is a court in which a large volume of matters across a wide jurisdiction are dealt with every day. It is essential that judicial officers in that court deal with matters at the conclusion of the hearing and that reasons be delivered *ex tempore* rather than reserved for later publication, if at all possible. In acting dispositively of the controversy before the court it may very well be the case that a judicial officer does not need to hear submissions from one side of the controversy if the judicial officer is satisfied that a particular submission is entirely unmeritorious.

103 In any event, during the course of FM Burnett delivering *ex tempore* reasons for the proposed dismissal of Ms Noah's strike-out application, the following exchange occurred as reflected in the transcript of proceedings at pp 57, 58 and 59:

> ***JUDGMENT DELIVERED*** [the pronouncement of *ex tempore* reasons]
>
> FEDERAL MAGISTATE: There's no need to make notes, Ms Noah, you'll get a transcript of these proceedings at the end of the day.
>
> MS NOAH: I'm not making notes.
>
> UNIDENTIFIED SPEAKER: Ripping the Constitution up.
>
> MS NOAH: No, I'm not, I'm ripping up the rules that apply.
>
> FEDERAL MAGISTRATE: Yes, good.
>
> [Continuation of *ex tempore* reasons]
>
> FEDERAL MAGISTRATE: Now, gentlemen, if you don't be quiet, I'll deal with you. Is that what you'd like? One further utterance from you, madam, and I will deal with you as well.
>
> MS NOAH: In which way?
>
> FEDERAL MAGISTRATE: Yes. Just watch your tongue or I will deal with you as well.
>
> MS NOAH: You already are dealing with me, sir, in not a very fair and equitable way.
>
> FEDERAL MAGISTRATE: Ms Noah, I'll give you one further warning.
>
> MR CLAMPETT: Will that be civil contempt or criminal contempt?

MS NOAH: Yes, that's what I'd like to know. Would that be civil or criminal?

FEDERAL MAGISTRATE: Okay, that's it. What's your name, sir?

MR CLAMPETT: It has got nothing to do with you, your Honour.

FEDERAL MAGISTRATE: What is your name?

MR CLAMPETT: I'm the public gallery.

FEDERAL MAGISTRATE: Would you get the – just get the Federal Police along here, thank you, Mr Bailiff.

MR CLAMPETT: They know who I am.

FEDERAL MAGISTRATE: I'm not interest (sic) in – I want to know your name, please.

MR CLAMPETT: Leonard William Clampett. You know very well who I am.

FEDERAL MAGISTRATE: I have no idea.

MR CLAMPETT: That's the reason why you've got a kangaroo on the wall behind you. It's called the Kangaroo Court.

MS NOAH: Yes.

MR CLAMPETT: Both you and Mr Henry are paid by the Commonwealth Government.

MS NOAH: To represent the people, not protect your public spectrum colleagues, conspire with them, to pervert the course of justice.

FEDERAL MAGISTRATE: Anything further you want to add?

MS NOAH: Quite a lot, actually, I'd like to appeal this and I don't recognise (indistinct) … ---

FEDERAL MAGISTRATE: Well, you'll get your chance to appeal but after I've dealt with you for contempt.

MS NOAH: I don't like ---

FEDERAL MAGISTRATE: Just adjourn the Court for the time being, thanks.

MS NOAH: I want to challenge the jurisdiction of this whole Court actually.

ADJOURNED

104 I have listened to the entirety of the audio digital recording for the proceedings of 2 July 2008. At line 46 at p 57, Ms Noah's statement "No, I'm not, I'm ripping up the rules

that apply" should read, "No, I'm not, I'm ripping up the rules that *don't* apply". Ms Noah was not charged with contempt in the face of the court on the footing that she immediately embraced Mr Clampett's statement that a kangaroo appears on the wall behind the Federal Magistrate (as part of the Coat of Arms) because the court was conducting itself as a "kangaroo court". Nor was Ms Noah charged with contempt in the face of the court on the footing that she embraced Mr Clampett's observation that Mr Henry and the presiding Federal Magistrate are both "paid by the Commonwealth Government" adding her own comment "to represent the people, not protect your public spectrum colleagues, conspire with them, to pervert the course of justice".

105 The audio digital recording and the transcript reveal that Federal Magistrate Burnett took this course. The court reconvened after the adjournment later that afternoon at approximately 3.33pm according to the transcript. Ms Noah says that Mr Henry had left the court by then. However, the audio recording demonstrates that Mr Henry was present in court. Perhaps there is a slight inaccuracy in the time nominated in the transcript. FM Burnett adjourned the enforcement summons and the completion of *ex tempore* reasons for proposed orders dismissing the strike-out application. FM Burnett said that he had sought a copy of the transcript and that he would deal with Mr Clampett in the following week. FM Burnett requested Mr Henry to file an affidavit deposing to his recollection of the concluding period of the hearing.

106 The application was adjourned to 9 July 2008.

107 On 4 July 2008, Mr Henry swore an affidavit in relation to the concluding events of 2 July 2008. On 4 July 2008, FM Burnett issued a warrant for the arrest of Mr Clampett so as to bring him before the court to answer charges in relation to two counts of contempt in the face of the court. Count 1 is recited in these terms:

> **Leonard William Clampett** is charged with contempt in the face of the Court in that [on] or about 3.27pm on Wednesday 2 July 2008 at the Federal Magistrates Court of Australia constituted by Federal Magistrate Burnett at Court 5, Level 1 Commonwealth Law Courts Brisbane **Leonard William Clampett** did interrupt proceedings during the course of delivery of an ex tempore judgment of the Court from the public gallery in particular calling out to the Court by tone and words intended to be insulting the words, "That's the reason why you've got a kangaroo on the wall behind you. It's called a kangaroo court".

108 Count 2 is recited in these terms:

> **Leonard William Clampett** is charged with contempt in the face of the Court in that on or about 3.27pm on Wednesday 2 July 2008 at the Federal Magistrates Court of Australia constituted by Federal Magistrate Burnett at Court 5, Level 1 Commonwealth Law Courts Brisbane **Leonard William Clampett** did interrupt proceedings during the course of delivery of an ex tempore judgment of the Court from the public gallery in particular calling out to the Court by tone and words intended to scandalise the Court by calling out the words "Both you and Mr Henry are paid by the Commonwealth" meaning the Court and Mr Henry were acting in collusion to deny the applicant her right to an impartial hearing according to law and that the Court was proceeding corruptly, not independently and acting in collusion with the other party to the proceeding.

109 At approximately 10.00am on 9 July 2008, Mr Clampett appeared before the Federal Magistrates Court and was charged by FM Burnett with both counts of contempt in the face of the court. Mr Clampett was self-represented. At p 5, ll 26 to 33 of the transcript of proceedings, Mr Clampett said this to FM Burnett:

> MR CLAMPETT: I'd like you to explain to me, firstly, how you believe I could have possibly paid $2000.00 this morning not to be brought here after you sent two police cars, a deputy sheriff and three armed federal police officers to my home. Did you think there was going to be a siege or something, did you? I was coming here this morning at 9.30 anyway to continue listening to the lies that you're telling.

110 At p 3, ll 10 to 12 of the transcript, Mr Clampett responded to Count 2 asserting that he was "absolutely, not guilty and you know it". Mr Clampett said to FM Burnett, "It would make things easier for yourself if you didn't tell lies too". Mr Clampett then asked, "… and would you mind removing these handcuffs". This exchange occurred:

> FEDERAL MAGISTRATE: No, they will remain in place.
>
> MR CLAMPETT: Oh, so the intimidation goes on, does it?

111 Mr Clampett ultimately entered a plea of not guilty to Count 1.

112 In the course of the hearing of the contempt charges, Mr Clampett repeatedly challenged the jurisdiction of FM Burnett to hear the charges laid against him. Mr Clampett requested a number of times that Mr Henry be removed from the court as he was to be a witness in the prosecution of the charges. FM Burnett said that he controlled the proceedings not Mr Clampett. Mr Clampett described the conduct of FM Burnett as intimidation and said, "You're a toe cutter". Upon being read the second count, Mr Clampett protested, before

pleading to Count 2, that he did not say the words recited in the Count 2 following the quoted words, "Both you and Mr Henry are paid by the Commonwealth". Those additional words explanatory of the quoted words were:

> … meaning the Court and Mr Henry were acting in collusion to deny the applicant her right to an impartial hearing according to law and that the Court was proceeding corruptly, not independently and acting in collusion with the other party to the proceeding.

113 Exchanges took place between FM Burnett and Mr Clampett as to whether the transcript reflected the additional words. In response to FM Burnett's question as to whether Mr Clampett wished to raise any other matters in his defence, this exchange occurred:

> MR CLAMPETT: Yes, I want you and Maurice James Henry as witnesses because you're both liars.
>
> FEDERAL MAGISTRATE: Yes, okay.
>
> MR CLAMPETT: I want you in the witness box.
>
> FEDERAL MAGISTRATE: Anything further you want to say beyond that?
>
> MR CLAMPETT: There's nothing else to say unless you tell the truth.

114 Additionally, Mr Clampett asserted that FM Burnett could not hear the charges because, "No man can judge in his own court. You can't accuse me then find me guilty". Mr Clampett added, "You think anyone but you would be able to charge me, bring me to the Court and people would think you would find me not guilty? You're a fool". Mr Clampett continued to challenge the authority and jurisdiction of FM Burnett to hear and determine each count. FM Burnett found Mr Clampett guilty of both counts and asked him a series of questions addressing factors relevant to sentence such as the age, health, mental state and service background of Mr Clampett. Mr Clampett contended that these questions were irrelevant and challenged the jurisdiction of FM Burnett to conduct the proceeding.

115 As to the question of an apology this exchange occurred:

> FEDERAL MAGISTRATE: Clearly, you don't intend to apologise for your disruption in the proceedings last Wednesday.
>
> MR CLAMPETT: Apologise for what?
>
> FEDERAL MAGISTRATE: Yes, okay, thank you.

116 FM Burnett delivered *ex tempore* reasons for the sentence he imposed upon Mr Clampett. FM Burnett referred to an affidavit of Mr Clampett marked Exhibit 2 in which references are made to the Federal Magistrates Court of Australia described as the "Fe'ral Magistrates Court". In that affidavit references are made to the "Fe'ral Treasurer" and the "Fe'ral Commissioner of Taxation". FM Burnett referred to warnings he had issued during the course of the proceeding. FM Burnett concluded that Mr Clampett had exhibited a "generally unhealthy attitude to the Court revealed not only by his conduct but by his affidavit and further by his refusal to apologise". FM Burnett ordered:

> (1) That Mr Clampett be imprisoned with hard labour to 28 days on each count, each sentence to be served concurrently.

117 Ms Noah was in court when these events occurred.

118 Mr Clampett remained in custody until 17 July 2008 at which time he was released on bail. At the conclusion of the sentencing remarks, the court was adjourned. At 10.49am the court resumed and FM Burnett commenced further extemporising the reasons for the dismissal of the strike-out application. Upon the pronouncement of those reasons, discussion took place about the costs of the strike-out application. Ms Noah pressed her contention that the AGS had no right of appearance. Ms Noah asserted a right to respond to the *ex tempore* reasons for judgment which was denied. Ms Noah was directed to enter the witness stand and respond to questions from Mr Henry in the execution of the enforcement summons. This exchange occurred:

> FEDERAL MAGISTRATE: Now you stand in the witness box and you answer Mr Henry's questions.
>
> MS NOAH: Oh, okay, really and I don't get the opportunity to call witnesses myself and have the same – it's like a one-sided hearing, is it?
>
> FEDERAL MAGISTRATE: This is an enforcement summons. This is like an oral examination.
>
> MS NOAH: Oh, okay.
>
> FEDERAL MAGISTRATE: You haven't paid the money that was ordered to be paid so Mr Henry is entitled to ask you questions to find out what you're worth so that he can go out and arrange for the bailiff to sell your house or sell your car or whatever it might be to pay the outstanding sum of money.
>
> MS NOAH: Well, I'll answer questions to him if he will answer my questions to[o] …

FEDERAL MAGISTRATE: No, no, no. Ms Noah, Ms Noah, let's just get the ground rules fairly straight and clear immediately. I don't want to have to deal with you in a very unpleasant way.

MS NOAH: No, I've seen how that happens.

FEDERAL MAGISTRATE: Yes, but I will if you force my hand, I will. Okay. So don't be insolent, please. Just be cooperative. You have remedies. You can take anything I do that you're unhappy with, you can take on appeal … but, for the time being, you simply have to accept what I say and do as I ask. If you don't, I'll deal with you for contempt. Okay, now, I've warned you twice now. I've warned you on the last occasion. I'm warning you again today. Please don't force my hand. If you do, you know what will happen.

MS NOAH: But I don't think that you're operating within the Rules, your Honour, surely I have a right to ---

…

FEDERAL MAGISTRATE: Ms Noah, I'm not going to negotiate with you. Would you mind standing in the witness box, please?

MS NOAH: No, I'll stand in the witness box, why not? Let's go along with your charade.

FEDERAL MAGISTRATE: Ms Noah, hold your tongue.

119 Mr Henry then asked Ms Noah a series of questions about the various documents described in the summons none of which Ms Noah had brought to court with her.

120 I have listened to the audio tape of the oral examination and read the transcript. It is fair to say that Ms Noah was uncooperative and obfuscating in her responses to almost all of the questions put to her. When asked about gross weekly earnings derived from various employers, responses in these terms emerged:

MR HENRY: All right. What was your pay there? [being a reference to employment of Ms Noah by Mr Gary Dean]

MS NOAH: I don't know. It was difficult to say really, because there's nothing in the Currency Act that allows me to measure it.

MR HENRY: Did he pay you in coins or did he pay you in cheque or did he pay you … ?

MS NOAH: No, he didn't pay me in gold and silver coins.

…

MR HENRY: How much is outstanding on each of those mortgages?

MS NOAH: I don't know, I'm unable to measure that because it doesn't specify in the Currency Act. I've got no means of assessing my financial …

MR HENRY: Okay how much were the loans, how much for the loans in 2000 and 2003 [from the Bank of Queensland]?

MS NOAH: I don't know, I can't measure that because it doesn't specify in the Currency Act. ... What I want to say is I can't measure my financial means because there's nothing in the Currency Act that specifies how one can do that, I've got nothing to measure it against.

121 At pp 91 and 92 of the transcript and as reflected in the audio digital recording, Ms Noah returned to the following theme:

MR HENRY: You are here to be examined as [to] your ability capacity to pay the costs of the failed application last year to the Court as well as the costs of the enforcement.

WITNESS: Okay, so it's just we listen to what you have to say and no one else. I don't have any say in any of this. Is that how it works?

MR HENRY: No.

FEDERAL MAGISTRATE: Ms Noah, I've already – listen I've already explained to you. There's a judgment against you. $3500.00. You haven't paid it.

WITNESS: I have.

FEDERAL MAGISTRATE: You haven't paid it. Mr Henry's client.

WITNESS: Who's that, sorry?

FEDERAL MAGISTRATE: In this case, Mr Bailey … brings an application for the recovery of his costs.

WITNESS: Where is he? Where's he written that down?

FEDERAL MAGISTRATE: No, no, Ms Noah, please don't debate things with me, I'm just telling you what the state of the law is. You don't have to like it but it's just the fact.

WITNESS: No, but I'd like to see Mr Henry's and Mr Bailey's instructions.

FEDERAL MAGISTRATE: Well, no Ms Noah.

…

WITNESS: So how do we know that he wants me to pay his costs. I've not seen them.

…

> FEDERAL MAGISTRATE: This process is all about Mr Henry inquiring, on behalf of the Australian Government Solicitor, who is a solicitor for Mr Bailey, what assets you have so if they need to enforce their order by compelling the bailiff to go and sell your property, they can.
>
> …
>
> MR HENRY: Certainly. In the circumstances, your Honour, I see no point in asking any further questions.

122 At 11.57am, Ms Noah left the witness box, which concluded the oral examination. The following exchange then occurred which gave rise to the contempt charge laid against Ms Noah.

> FEDERAL MAGISTRATE: I'll adjourn the proceedings generally, thank you. Sorry, before we go, Mr Henry, I will adjourn the application till 2.30 to deal with the matter of costs. You will have an opportunity between now and 2.30 Ms Noah to look at the submissions that Mr Henry has prepared. I'll hear the arguments at 2.30 and I'll make orders ---
>
> MS NOAH: Whose arguments will you hear, just his or mine as well?
>
> FEDERAL MAGISTRATE: I'll hear your arguments as well.
>
> MS NOAH: Ooh, woo.
>
> FEDERAL MAGISTRATE: Now Ms Noah. If you don't take this process seriously I promise you ---
>
> MS NOAH: Well, I'm trying to.
>
> FEDERAL MAGISTRATE: No, you're not. You're not. Now, I've been very indulgent, very indulgent with you. Last week and this week. You have tested my patience very sorely. Very …
>
> MS NOAH: Yes, it's been mutual, your Honour.
>
> FEDERAL MAGISTRATE: No, well that's it. That's end of it, thank you. I'll adjourn the proceedings. I'll take a recording of the last five minutes, please, and I'll deal with you at 2.30. In the meantime, the bailiff can take Ms Noah downstairs and hold her.
>
> MS NOAH: Oh, that's ridiculous.
>
> MR HENRY: Thank you, your Honour.
>
> MS NOAH: I don't recognise the jurisdiction of this Court and I will not stand in honour of that man. He's a disgrace.

123 The proceeding was adjourned until 2.30pm. At 2.32pm, FM Burnett advised Ms Noah of the charge in these terms:

> You, in the face of the Court, about 11.57 am today, Wednesday, 9 July 2008, the Court being constituted by myself, Court 5, Level 1, Commonwealth Law Courts, did act in contempt of proceedings before the Court by stating in tone and words intending to be insulting and contemptuous of the Court the words "Yes, it's been mutual, your Honour" when admonished by the Court in respect of your attitude, behaviour and lack of cooperation in respect of enforcement proceedings then before the Court.

124 Ms Noah entered a plea of "not guilty".

125 At pp 97 to 101 of the transcript of proceedings on 9 July 2008, Ms Noah then made a series of submissions by way of defence to the charge. Those submissions relied upon events that had taken place in the course of the enforcement proceeding and events which occurred on 2 July 2008. These matters were thought by Ms Noah to be important relevant matters in answer to the suggestion that her statement constituted contempt in the face of the court. The matters of importance were these. First, FM Burnett had provided Mr Henry on 2 July 2008 with an opportunity at the outset of the hearing on 2 July 2008 to obtain a copy of legislation relating to the circumstances concerning the representation of Mr Bailey by the AGS. Ms Noah contended that the AGS ought not to have been provided with that opportunity.

126 Secondly, when Ms Noah sought to make submissions on 2 July 2008 FM Burnett made "constant attempts to intimidate me by making derogatory and racist comments throughout and badgering me". Ms Noah says she remained calm throughout this conduct. Thirdly, Ms Noah says that, "whenever I attempted to raise the constitutional matters pertinent to my case and the Commonwealth, Mr Burnett intercepted me and made many gobsmacking remarks which, in my view, slandered the fundamental laws of this country such as the Currency Act as a load of garbage".

127 Fourthly, Ms Noah says that FM Burnett refused Ms Noah's requests to call witnesses in relation to the currency matters and other matters.

128 Fifthly, Ms Noah says FM Burnett did not call upon Mr Henry to respond to Ms Noah's submissions and proceeded to deliver reasons for judgment "which were more bizarre by the minute, in my view". Ms Noah says that by this time many present in court were "running out of patience and respect". Sixthly, after the adjournment consequent upon the events concerning Mr Clampett, Ms Noah confronted Mr Henry concerning a claim of perjury on Mr Henry's part. Ms Noah says that she and others from the public gallery

attended a coffee shop and saw Mr Henry walking away from the court. She contends that there must have been irregularities in the transcript or a tampering of the transcript. Seventhly, the AGS had no standing to represent Mr Bailey. Eighthly, the Deputy Registrar of the court has "obligingly waived the rules" by making an ex parte enforcement order for the issue of an enforcement summons. Ninthly, Ms Noah contended that:

> As for Burnett FM, he has demonstrated his prejudice of this case, flouted the law and has discriminated against me since these proceedings commenced. How can any judge possibly consider ruling in favour of a party who has not put forward any verbal submissions or arguments at the hearings. After I had finished my submissions, Mr Burnett did not give the Australian Government Solicitor a chance to respond to my allegations or state his client's own case. No doubt, that had already been done behind closed doors beforehand.

129 FM Burnett responded, "Do be careful, please, Ms Noah". Ms Noah said, "Instead, Mr Burnett – this is my understanding of what occurred". FM Burnett responded to the suggestion that something had taken place behind closed doors by saying this:

> FEDERAL MAGISTRATE: Don't go making suggestions that will make matters worse for you. I will deal with you for contempt if you make any suggestion along those lines at all. There's absolutely no suggestion. There's no basis for any suggestion that there's been any coercion between myself and any member of either party to these proceedings.

130 Tenthly, Ms Noah contended that particular individuals had conspired to pervert the course of justice. She said:

> Furthermore, myself and other citizens with integrity will be obliged to lodge many formal complaints at the highest level against those individuals who have conspired to pervert the course of justice. I wish to go on record as stating that my rights for justice have been breached on many occasions and that I strongly object to the lawfulness of this whole proceeding and all the orders and charges that Mr Burnett has made against me and my supporters in relation to this case.

131 Ms Noah concluded those observations in this way:

> I must now, formally, move that Mr Burnett either dismisses the Australian Government Solicitor's application and stands down immediately on the basis of prejudice from this case or face civilian charges against him for contempt of Court. What say you to my motion, Mr Burnett.

132 These matters seem to have been put forward on 9 July 2008 by Ms Noah as justification for the statement that her patience had also been very sorely tested. No

explanation was given for Ms Noah making these accusations and no factual foundation was ever advanced to give content to the claims.

133 Ms Noah contended that no evidence had been presented against her. FM Burnett provided Ms Noah with a copy of a warrant for arrest which outlined the charge of contempt in the terms recited at [123]. Ms Noah asked FM Burnett to explain how saying "Yes, it's been mutual, your Honour" could constitute contempt in the face of the court. FM Burnett said that the words needed to be looked at in their context and the contention was that the words were stated in a tone and by words that were intended to be insulting and contemptuous. Ms Noah disagreed with that construction and observed that she had not been provided with "any evidence or grounds or oaths ... in relation to this …". Ms Noah then added:

> I'd like to apologise if I've offended anyone else in this Court.

134 Ms Noah was remanded in custody from 9 July 2008 until Friday, 11 July 2008 and the matter was adjourned to that date to enable Ms Noah to obtain legal advice. At 9.30am on 11 July 2008 a solicitor appeared for Ms Noah. The matter was adjourned to 3 September 2008 upon Ms Noah's undertaking to attend on the next return date and until the matter was concluded and on condition that Ms Noah "have no contact direct or indirect with Mr Bailey". The matter was further adjourned to 24 September 2008. Mr D O'Gorman SC appeared for Ms Noah on that day. Ms Noah gave evidence in support of her defence of the charge. Firstly, Ms Noah contended that she did not say the words, "Yes, it's been mutual, your Honour". She contended that she said the words, "the feeling has been mutual, your Honour". Secondly, in uttering those words, Ms Noah contended that she was not intending to be insulting of the court nor contemptuous of the court. Thirdly, Ms Noah contended that she did not say the words, "I'd like to apologise if I've offended anyone *else* in this Court?" but rather she said the words, "I apologise if I've offended anyone in this Court". She gave evidence that she said those words as an intended apology to the court. Ms Noah contended that the transcript was incorrect. The audio digital recording of the proceedings on 9 July 2008 was played to the court. I have also listened to the recording. Mr O'Gorman SC accepted on behalf of Ms Noah in the proceeding before FM Burnett that the audio recording confirmed the accuracy of the transcript and that Ms Noah made the two statements in the terms reflected in the transcript.

135 Mr O'Gorman SC contended that the words "Yes, it's been mutual, your Honour" are not capable of constituting contempt in the context where the words appear. Ms Noah was simply saying that her patience had also been tested sorely and that many litigants in court have their patience tested sorely. Mr O'Gorman SC contended that all that Ms Noah was saying was that, along with FM Burnett, her patience had been tested. More particularly, Mr O'Gorman SC contended that Ms Noah:

> … doesn't say that her patience had been tested as a result of things done by your Honour that shouldn't have been done or anything like that but all she has said is that her patience had also been tested.

136 Mr O'Gorman SC contended that immediately when the allegation was put to her that she was being insulting and contemptuous of the court she immediately indicated that that was not her intention. Mr O'Gorman SC said that in summary, the words used were not capable of being contemptuous and, if they were capable of being contemptuous, there was no intention on the part of Ms Noah to be contemptuous or insulting of the court.

137 FM Burnett gave *ex tempore* reasons for judgment on 24 September 2008 at the conclusion of submissions: *Noah v Bailey* [2008] FMCA 1426. At [1] to [4] of the reasons, brief background details of the earlier applications are set out. FM Burnett recognised that Ms Noah had been present in court when Mr Clampett had been convicted and sentenced on the morning of 9 July 2008 and that it was "fair to say that Ms Noah was somewhat emotionally charged". FM Burnett noted the submission that Ms Noah as a self-represented litigant may not have appreciated what she was doing [6]. At [7], FM Burnett identified the two contentions put by Mr O'Gorman SC that the words spoken did not constitute contempt and nor was there any intention on Ms Noah's part for those words "to be understood as constituting insulting or contemptuous words". FM Burnett did not accept either of those submissions.

138 At [8], FM Burnett noted that the court proceedings had a lengthy history and that many exchanges had taken place between Ms Noah and FM Burnett resulting in a number of warnings concerning the manner in which Ms Noah addressed the court. FM Burnett noted that Ms Noah was not happy with the court [8] and she was unhappy with the outcome of her applications [9]. FM Burnett observed that Ms Noah, "vented her emotion to the Court in such a way from her intonation and her expression, to clearly and intentionally be

contemptuous and insulting to the Court". [9] FM Burnett noted that immediately after the adjournment of the proceeding to 2.30pm with Ms Noah remanded in custody, statements may have been made by her that she did not intend to be insulting or contemptuous [10]. FM Burnett noted that those statements were not made to the court [10]. FM Burnett did not accept that the apology actually made to the court was genuine. FM Burnett noted that on the adjournment of the court Ms Noah said, "I don't recognise the jurisdiction of this Court and I will not stand in honour of that man, he's a disgrace". [11] FM Burnett concluded that those remarks were "clearly a reflection of her views of the institution, which is the Court, and it is for that reason I am not satisfied that any remarks that she later made were not necessarily spoken with genuine intention". [12] FM Burnett was satisfied that "it was the intention of Ms Noah in that exchange to be intentionally insulting and contemptuous to the Court". [13] FM Burnett found Ms Noah guilty of contempt and sentenced her to the time already served in custody.

139 Ms Noah relies upon three grounds of appeal to this court. They are these:

1. The learned Magistrate erred in concluding that the words "Yes, it's been mutual your Honour" constituted contempt in the face of the court.

2. The learned Magistrate erred in not disqualifying himself in the circumstances where there was a dispute as to the facts constituting the count.

3. The learned Magistrate did not take into account, or did not properly take into account, the appellant's defence that she had not intended to be insulting and contemptuous of the Court.

140 As to the first ground, the words used and tone of voice apparent from the audio recording needs to be judged in the context of the proceeding and the sequence of exchanges that had taken place in the course of the oral examination. For Ms Noah's part, she contended in her observations on 9 July 2008 that the events of 2 July 2008 were significant and informed her defence to the contempt charge. In context, FM Burnett put to Ms Noah on 9 July 2008 that her ridiculing response of "Ooh woo" to his answer to her question of "Whose arguments [on costs] will you hear, just his or mine as well?", of "I'll hear your arguments as well", was not taking the court process seriously. That resulted in FM Burnett warning Ms Noah to take the proceeding seriously. Ms Noah asserted that she was trying to do so. FM Burnett then put to Ms Noah that she was not doing so. FM Burnett then put to Ms Noah that he had been "very indulgent" with her having regard to the proceedings "last week and this week". In that context, FM Burnett put to Ms Noah that "You have tested my

patience very sorely". Ms Noah responded with the words, "Yes, it's been mutual, your Honour". That statement is capable of bearing the meaning that in the context of the proceedings "last week and this week" FM Burnett had very sorely tested the patience of Ms Noah in the things that he had done in the conduct of the proceedings.

141 On 9 July 2008, Ms Noah identified those things in considerable detail (see [124] to [130] of these reasons and in particular the observations made by Ms Noah and noted at [125], [127], [129] and [130] of these reasons). Another factor that seemed to bear on Ms Noah's view that her patience had been sorely tested by the conduct of FM Burnett was the opinion she held and expressed that, "I don't recognise the jurisdiction of this court and I will not stand in honour of that man. He's a disgrace" and that FM Burnett had conspired with others to pervert the course of justice: see [129] of these reasons. That was the view that Ms Noah articulated on 2 January 2008 when she said to FM Burnett consequent upon the statement of Mr Clampett that, "Both you and Mr Henry are paid by the Commonwealth Government", the words, "To represent the people, not protect your public spectrum colleagues, conspire with them, to pervert the course of justice". That view was consistent with the strident expression of opinion by Ms Noah immediately upon the adjournment of the matter after the above remark. The audio recording reveals this sequence:

> FEDERAL MAGISTRATE: Just adjourn the Court for the time being, thanks.
>
> MS NOAH: I want to challenge the jurisdiction of this whole Court actually.
>
> BAILIFF: Silence, all stand please. The Magistrates Court is now adjourned.
>
> MS NOAH: Notice who is standing, just one arsehole. What a lot of bullshit. Let's get out of this cesspit. These are all the rules that don't apply, that I don't understand. The Court doesn't f-g understand either (loud tearing of pages).
>
> MR HENRY: I haven't said a word.
>
> MS NOAH: No, you didn't say a word. You didn't have to, 'cause you f-g sorted this out beforehand didn't you? You fixed it didn't you? Your little buddies, you had a chat. You came in here, had a chat to Tracey, had a chat to him, had a chat with the Deputy Registrar. You didn't need to say a f-g word. It had all been decided beforehand (some additional indistinct words spoken by Ms Noah). This is a kangaroo court and you are a public servant (some additional indistinct words by Ms Noah). Let's get out of this shithole.

142 Statements were then made by the man who had earlier identified himself to FM Burnett as Leonard William Clampett, addressed to Mr Henry by name. The audio recording reveals agitation by Mr Clampett and shouting by Ms Noah in these words:

> MR CLAMPETT (to Mr Henry): You're just a liar.
>
> MS NOAH: You are.
>
> MR CLAMPETT: You're just another government liar.
>
> MS NOAH (shouting): You're just a puppet. You're paid to lie. You don't have any balls. You don't have any balls and you do not have any integrity and I am taking you to the … (some additional indistinct words). No, no (shouting loudly). I am giving you notice that I'm reporting you to the Legal Services Commission and don't think that I don't know how to do it (some additional indistinct words).

143 The audio tape reveals the sounds of the voices of Mr Clampett and Ms Noah fading as presumably they left the precincts of the courtroom and the immediate presence of the microphones.

144 Accordingly, examined in the context of the events of 2 July and 9 July 2008 (as Ms Noah explained them on 9 July 2008), which occurred in the presence of FM Burnett (and thus leaving aside the statements made by Ms Noah at [141] and [142]), the Federal Magistrate did not err by concluding that the words the subject of the contempt charge constituted contempt. That follows because the words taken in context suggest that Ms Noah's patience had been sorely tested by the court's behind-closed-doors dealing with the AGS; the court's conspiring with Mr Henry to pervert the course of justice; the refusal of the court to properly apply the rules of court and decide the applications on the merits; and the discriminatory and prejudicial conduct of FM Burnett in the conduct of the proceedings before the court.

145 Thus the words, the subject of the charge, interfere with the authority of the court and reflect a despising of the authority and dignity of the court. The words import scorn and reproach and invite the diminution of the standing of the court and its processes. The words import a wholesale rejection of an independent determination of the applications without fear or favour on the merits having regard to the applicable law. The statements excite misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office and involve a baseless attack on the integrity and impartiality of the presiding Magistrate. (*Ex*

parte Bellanto; Re Prior [1963] SR (NSW) 190 at 199; *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434 at 442 and 443 per Rich J; *Gallagher v Durack* (1983) 152 CLR 238; *Parashuram Detaram Shamdasani v King-Emperor* [1945] AC 264 at 269).

146 As to the question of whether Ms Noah *intended* the words to be insulting or contemptuous of the court, FM Burnett addressed that contended ground both in the course of submissions with counsel and expressly in the course of the reasons for judgment. The proposition had been put by Mr O'Gorman SC that Ms Noah did not contend that her patience had been tested as a result of things done or not done by FM Burnett in the course of the proceedings (see [135] of these reasons). However, there was clear evidence before FM Burnett that Ms Noah intended the remark the subject of the charge to be contemptuous and insulting. Ms Noah had said to FM Burnett on 9 July 2008 that during the course of the proceedings on 2 July 2008 FM Burnett had made attempts to intimidate her by making derogatory and racist comments throughout the proceedings and badgering her. She contended that FM Burnett had demonstrated prejudice in the conduct of the case, flouted the law and discriminated against her since the proceedings began. She contended that FM Burnett and others had no doubt already dealt with the matter behind closed doors prior to the hearing which was the explanation for FM Burnett not calling upon Mr Henry to make submissions in response to Ms Noah's submissions on 2 July 2008. On the basis of FM Burnett's contended prejudice, Ms Noah called for FM Burnett to stand down or face civilian charges against him for contempt of court. Ms Noah concluded by calling upon Mr Burnett in these terms, "What say you to my motion, Mr Burnett". Moreover, Ms Noah was of the view that she did not recognise the jurisdiction of the court and that FM Burnett was a disgrace, in the conduct of the various proceedings. The apology Ms Noah gave to the court was expressly conditioned by the word "else". Ms Noah accepted that what she said by way of an apology was, "I'd like to apologise if I've offended anyone *else* in this court". That statement of apology is consistent with a statement that Ms Noah was willing to apologise to anyone in the court who might have been offended by her remarks other than FM Burnett and thus the court. That view was entirely consistent with the view Ms Noah held and had expressed about and to FM Burnett.

147 Plainly, it was open to FM Burnett to conclude that the words the subject of the contempt charge were said with an intention of being contemptuous or insulting of the court.

148 On the question of intention, Ms Noah on 9 July 2008, made reference to her criticism addressed to Mr Henry, immediately upon the adjournment of the proceeding on 2 July 2008, concerning contended perjury on his part. The content of those statements made by Ms Noah is set out at [141] and [142]. Ms Noah regarded those remarks as relevant in answering or defending the contempt charge. Plainly, Ms Noah held strong views that FM Burnett had conspired with Mr Henry to pervert the course of justice. Those views were expressed directly to FM Burnett in the course of the proceedings on 2 July 2008, in any event.

149 As to ground 2 of the grounds of appeal, Ms Noah contends that FM Burnett ought to have disqualified himself in circumstances where there was a dispute as to the facts constituting the count. The dispute relating to the words actually said by Ms Noah evaporated once the digital recording was played. The scope of the remaining dispute was whether the words said by Ms Noah the subject of the charge were capable of constituting contempt and whether Ms Noah expressed those words with the intention of being contemptuous or insulting of the court. The contempt occurred in the presence of FM Burnett. The proceedings on 2 July 2008 and 9 July 2008 are the subject of a transcript and a digital audio recording. The words said and the intonation of voice are audible and plain.

150 The contempt proceeding was conducted in this way. The statement by Ms Noah was made at approximately 11.57pm on 9 July 2008. FM Burnett adjourned the proceedings then before him. The oral examination of Ms Noah had concluded and the outstanding question to be dealt with was the disposition of the costs in relation to Ms Noah's unsuccessful strike-out application. FM Burnett said that he would adjourn the oral examination to 2.30pm to deal with the matter of costs. It was at that moment that the exchange occurred between FM Burnett and Ms Noah which led to Ms Noah's uttering the words the subject of the contempt proceeding (see [122]). FM Burnett then said that he would examine a recording of the last five minutes of the proceeding and directed the bailiff to "take Ms Noah downstairs and hold her".

151 The court resumed at 2.32pm. FM Burnett recited the contempt charge to Ms Noah and she entered a plea of "not guilty". Further exchanges occurred and Ms Noah requested an opportunity to state her defence to the charge. Ms Noah at pp 97 to 101 of the transcript identified those matters that she perceived answered the charge which have been discussed in

these reasons (see [125] to [132]). On 9 July 2008, FM Burnett caused a warrant for committal to issue reciting the charge. A copy of the warrant was provided to Ms Noah. An exchange took place between Ms Noah and FM Burnett concerning the nature and content of the contempt charge. FM Burnett said that he would provide Ms Noah with time to reflect upon the charge if she would like to exercise that opportunity. She said that she would need a couple of days to do so. FM Burnett adjourned the matter to Friday, 11 July 2008 and remanded Ms Noah in custody. At 9.30am on 11 July 2008, Mr T.P. O'Gorman, Solicitor and member of the firm Robertson O'Gorman appeared for Ms Noah. Mr O'Gorman requested an adjournment of approximately one month to prepare the relevant proceedings. FM Burnett agreed to provide Mr O'Gorman with that time for preparation. In addition, FM Burnett provided an explanation of the relevant facts going to the contempt charge, introduced in this way:

> FEDERAL MAGISTRATE: Mr O'Gorman, what I might do just for your benefit, is just recite very broadly the facts ---
>
> MR O'GORMAN: I've read the transcript, your Honour.
>
> FEDERAL MAGISTRATE: --- as they stand. Oh, perhaps, but the transcript doesn't, of course, colour – or the words aren't coloured by the intonation.
>
> MR O'GORMAN: I see.
>
> FEDERAL MAGISTRATE: Which, of course, is important in the context of this particular application.
>
> MR O'GORMAN: Yes.

152 At pp 104 to 108 of the transcript, FM Burnett set out the relevant facts, in effect, particularising the context and events giving rise to the contempt charge. Mr O'Gorman requested that the matter be adjourned to a mention date on 3 September 2008 at 9.30am. The terms of that adjournment were then discussed. FM Burnett adjourned the hearing to enable Mr O'Gorman to take further instructions from Ms Noah and the court reconvened at 10.16am. A brief discussion took place concerning aspects of the events. Mr O'Gorman advised the court that Ms Noah would give certain undertakings previously mentioned in these reasons (see [134]). At 10.24am, the matter was adjourned to 9.30am on 3 September 2008. The matter came on for a substantive hearing on 24 September 2008. At that hearing, Ms Noah was represented by Mr D.P. O'Gorman SC instructed by Fisher Dore, Solicitors.

Ms Noah gave evidence and Mr O'Gorman made submissions on her behalf. The content of those matters has already been discussed (see [134] to [136]).

153 No submission was made to FM Burnett either by Mr T.P. O'Gorman of Robertson O'Gorman on behalf of Ms Noah or by Mr D.P. O'Gorman SC on behalf of Ms Noah that FM Burnett ought to disqualify himself from the conduct of the proceedings.

154 The proceedings were initiated by FM Burnett pursuant to s 17 of the *Federal Magistrates Act* 1999 (Cth) which is in these terms:

> **SECTION 17 CONTEMPT OF COURT**
>
> **17(1)** The Federal Magistrates Court has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court.
>
> **17(2)** Subsection (1) has effect subject to any other Act.
>
> **17(3)** The jurisdiction of the Federal Magistrates Court to punish a contempt of the Federal Magistrates Court committed in the face or hearing of the Federal Magistrates Court may be exercised by the Federal Magistrates Court as constituted at the time of the contempt.

155 Part 19 of the *Federal Magistrates Court Rules* addresses conduct in contempt of the court and rule 19.01 addresses contempt in the face of the court or in the course of a hearing before the court. Rule 19.01 is in these terms:

> **RULE 19.01 CONTEMPT IN THE FACE OR HEARING OF COURT**
>
> 19.01(1) If it appears to the Court that a person is guilty of contempt in the face of or in the hearing of the Court, the Court may:
>
> (a) direct that the person attend before the Court; or
>
> (b) issue a warrant for the person's arrest.
>
> 19.01(2) When the person attends before the Court, the Court must:
>
> (a) tell the person of the contempt with which the person is charged; and
>
> (b) allow the person to state his or her defence to the charge; and
>
> (c) after hearing the defence, determine the charge; and
>
> (d) make an order for the punishment or discharge of the person.
>
> 19.01(3) The Court may direct that the person be kept in custody or released until

the charge is determined.

19.01(4) The Court may direct that the person give security for the person's attendance before the Court to answer the charge.

156 As FM Burnett said in his reasons for judgment, the contempt power is exercised to vindicate the integrity of the court and its proceedings, not the personal dignity of the individual judicial officer. The contempt however occurred in the face of the court constituted by a particular judicial officer who saw and experienced firsthand all the relevant events reflected in the transcript and digital audio recording and, in particular, all those events the subject of FM Burnett's explanatory summary given to Mr T.O'Gorman to enable preparation of a defence to the charge on behalf of Ms Noah to occur.

157 FM Burnett elected to exercise the power to punish Ms Noah's contempt in the face of the court, conferred by s 17(1) of the *Federal Magistrates Act*, by the court as constituted at the time of the contempt. The controversy of fact did not ultimately embrace any issue of what was said by Ms Noah but rather, as a question of fact, whether Ms Noah said the words with a particular state of mind, that is, an intention to be insulting or contemptuous of the court. That question was determined by FM Burnett based on his knowledge of the events and the words said and his experience of the demeanour of Ms Noah reflected in her tone of voice. Those events, words and tone are reflected in the transcript together with the digital audio recording.

158 The election to exercise the power to punish contempt in the face of the court in this way, although of early origin in the common law and expressly conferred by the *Federal Magistrates Act* and addressed by the *Federal Magistrates Court Rules*, is apt to place the judicial officer in a difficult position of framer and prosecutor of the charge; repository of the knowledge of the relevant events as the personification, in one sense, of the court in whose face the contempt has occurred; and the person required to determine whether the charge is made out beyond reasonable doubt. Thus, the power ought to be exercised sparingly and with great caution so as to engage the class of case in which the integrity of the court or its proceedings must necessarily be protected by invoking the exercise of the power by the court as constituted at the time of the contempt. In *Lewis v His Honour Judge Ogden* (1984) 153 CLR 682 at 693, Mason, Murphy, Wilson, Brennan and Dawson JJ described that class as "only in serious cases". In *Keeley v Mr Justice Brooking* (1979) 143 CLR 162 at 186,

Murphy J described summary trial for contempt conducted by the judge who presided over the proceeding at which the contempt is alleged to have been committed as "dangerous to the administration of justice". A qualification was put, in these terms, by his Honour at 187: "Summary trial for contempt by the same judge should not be initiated *unless* the contempt appears clear and no collateral inquiry is contemplated (as where a witness shouts abuse, gives nonsensical answers or in terms refuses to answer a question which he has been directed to answer)".

159 In *Keeley*, Barwick CJ at 170 and 171 observed that orders for contempt in the face of the court are "extremely rare" and the jurisdiction to make such an order is to be exercised with "great caution". In *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, Dixon CJ, Fullagar, Kitto and Taylor JJ also described the power to punish summarily for contempt as one to be exercised with great caution because of its "exceptional nature". However, whilst recognising that judges must exercise such caution, their Honours observed at 370 that because the power:

> … is founded on the elementary necessities of justice, there must be no hesitation to exercise it, even to the point of great severity, whenever any act is done which is really calculated to embarrass the normal administration of justice.

160 The requirement for great caution was particularly so as no appeal lay from a summary conviction for contempt in the face of the court. Summary conviction meant conviction without trial by jury on indictment. Under the current structural arrangements, appeals lie to the Federal Court of Australia from the exercise of the power conferred on the Federal Magistrates Court by s 17 of the Federal Magistrates Act. There may however be some confusion in the use of the term "summary proceeding" when applied to the exercise of power conferred by s 17. It is a statutory jurisdiction. The Federal Magistrates Act expressly provides for the exercise of the power by the court as constituted at the time of the contempt. That jurisdiction may be exercised under s 17(3) as a matter of discretion and although the discretion may be at large, it would normally be exercised according to settled principle. The term "summary proceeding" as a description of the exercise of the statutory power conferred by s 17(1) and the jurisdiction invoked by s 17(3) does not imply any dispensation with the hearing rule, due process, proper representation of the party or proper analysis and evaluation of the facts relevant to the charge by the judicial officer, or the exercise of the jurisdiction in a way other than entirely consistently with the oath sworn by the judicial officer.

161 The conflation of roles mentioned earlier strongly suggests however that great caution must be exercised in isolating the *class of case* that warrants the exercise of the power, as Stephen J has observed in *Keeley* at p 173. In *Fraser v The Queen; Meredith v The Queen* [1984] 3 NSWLR 212 at 224-225, McHugh JA said of summary proceedings:

> In the case of summary proceedings for contempt in the face or hearing of the court, there are special reasons for the extension of facilities and privileges to the alleged contemnor. By any standard the procedure is extraordinary. The judge may be, at once, the witness, possibly even the victim, of the contempt. He may be the initiator of the former curial proceedings to bring the contemnor before the court, as was the case here. It is he who has to decide the issues of fact, to determine the charge, and then to make the order for punishment or discharge the contemnor. This unusual concatenation of roles imposes upon the judge *peculiar responsibilities* and *equivalent duties* to ensure that *justice* is done and seen to be done, if he decides to deal with a matter summarily … It is trite to say that a person faced with a serious charge, and the risk of punishment, including imprisonment, should be given an *ample opportunity to be heard* … The rule as to *hearing parties* is fundamental to *due process of law*. But it is specially important in the extraordinary summary procedure for contempt for the reasons already suggested. The requirement of the appearance of justice imposes on the judge a *special obligation* to ensure that he has *not made up his mind until everything that can reasonably be placed on the scale is allowed to be put there*.
>
> [emphasis added]

162 In this case, Ms Noah said to FM Burnett, taken in context, that her patience had been sorely tested by FM Burnett's conduct of the proceedings on 2 July 2008 and 9 July 2008. In explaining that statement in her defence, Ms Noah made a series of baseless allegations unsupported by any evidence that the presiding Magistrate had conspired with the Australian Government Solicitor to pervert the course of justice in relation to the applications concerning Ms Noah by resolving those matters behind closed doors with her opponent. She described FM Burnett as "a disgrace". The content of Ms Noah's broad allegations against FM Burnett as the source of her patience having been sorely tested on those days lay in Ms Noah's perception of FM Burnett's conduct. The content of Ms Noah's broad allegations is set out in these reasons and I will not repeat them here (see [144], [146] and [125] to [131]).

163 There was no basis for those allegations. They were not explained by her or otherwise justified. They were, in effect, abandoned by her lawyers. No apology was proffered quickly other than a conditional one that, in terms, excluded FM Burnett and thus the court. Ms Noah was given extensive time to prepare, in conjunction with her lawyers, for the hearing and determination of the contempt charge. She was represented initially by

Mr T. O'Gorman of Robertson & O'Gorman Solicitors and then by Fisher Dore Solicitors who instructed Mr D.P. O'Gorman SC to appear on her behalf. No submission was made by Mr T. O'Gorman or by Mr D.P. O'Gorman SC that FM Burnett ought to disqualify himself from determining the matter. Ms Noah was a self-represented litigant at the moment when she made the remark the subject of the contempt charge. She was also self-represented in the conduct of the proceedings and in the formulation of the various arguments she put to the court. It seems clear that the views Ms Noah formed concerning the contended conduct of FM Burnett largely arose out of an inference she drew from FM Burnett's election not to call upon Mr Henry to respond to her submissions made in support of a strike-out application. That step seemed, in part, to cause Ms Noah to react the way she did.

164 Nevertheless, a lay litigant is not entitled to make baseless allegations of a very serious kind in the face of the court simply because the contemnor is unrepresented, inflamed and misconceived as to a number of central matters informing her conduct.

165 Having regard to the conduct of the contempt proceeding and the steps FM Burnett took to ensure that the events central to the charge were summarised and the matter adjourned in a way which enabled Ms Noah to be represented initially by Mr T. O'Gorman and ultimately by Mr D. O'Gorman SC without any objection being taken to FM Burnett's presiding in the determination of the matter, it seems to me that Ms Noah was afforded a proper hearing, proper representation and an opportunity to adduce whatever evidence she regarded as relevant (recognising that she gave oral evidence). She was afforded an opportunity by counsel to make submissions. The submissions made were addressed in the reasons for judgment.

166 The allegations made by Ms Noah as the source of her sorely tested patience were serious matters. The Federal Magistrates Court is invested with a statutory power to deal with contempt in the face of the court, by the court as constituted at the time of the contempt. The court engages extensively with many self-represented litigants. The statutory power so conferred and the consequent exercise of the jurisdiction ought not to be unduly constrained in the relevant class of case. The exercise of the power, of course, is subject to appellate review and thus superior court supervisory review. A contempt that occurs in the face of the court of a serious kind, especially those that engage serious allegations of an attempt to pervert the course of justice and which occur in the course of a proceeding, must be able to be

addressed in the exercise of the jurisdiction conferred under s 17(3) of the Federal Magistrates Act, by Federal Magistrates throughout Australia confronting such a class of case. That must be especially so where the contemnor is represented by solicitors and senior counsel and no objection is taken to the conduct of the charge by the presiding Magistrate.

167 If the power to punish contempt in the face of the court is constrained, in the relevant class of case, by approaching the exercise of the power on the footing that once the charge of contempt is laid, the disposition of the charge must be adjourned to the list or adjourned to the docket arrangements of another Federal Magistrate, as a matter of applied general principle, with the result that a contempt must be heard and determined by the court other than as constituted at the time of the contempt, the function of the court might seriously be impaired and the court might be deprived of the statutory power expressly conferred upon it by the Parliament, notwithstanding that the statutory provision recognises that the jurisdiction is to be exercised according to discretionary factors. That is not to say that the statutory power enlivens the jurisdiction to be exercised other than in a manner entirely consistent with the public interest in the proper administration of justice *in each case*.

168 The question to be determined is whether the *class of case* is one which ought properly be determined by the court as constituted at the time of the contempt. Cases, perhaps many cases, having regard to the great caution to be exercised, will arise where the court as constituted at the time of the contempt ought not to hear and determine the charge. Each case must be assessed having regard to its own circumstances and seriousness. Many factors will influence that conclusion.

169 In the case of Ms Noah, for all the reasons already mentioned, I am not satisfied that Federal Magistrate Burnett erred by failing to disqualify himself from hearing and determining the charge of contempt in the face of the court brought against Ms Noah. Therefore, I am not satisfied that ground 2 of the grounds of appeal, are made out.

170 Accordingly, the appeal by Ms Noah ought to be dismissed.

***R v Ogawa* [2009] QCA 307, a decision of an intermediate Court of Appeal per Keane JA and Chesterman JA and Jones J agreeing, 13 October 2009**

171 Recently, an intermediate Court of Appeal has had to consider an appeal from a summary conviction for contempt in the face of the District Court held at Brisbane. The appellant, Ms Ogawa, was charged with two counts of using a carriage service to harass and two counts of using a carriage service to make a threat in contravention of ss 474.17 and 474.15(1) respectively of the *Criminal Code* (Cth).

172 The trial began before Judge Durward SC on 9 March 2009. It was adjourned to the following day. On 10 March 2009 the matter was then adjourned to 11 March 2009 so that questions relating to legal aid support could be dealt with. On 11 March 2009, the Legal Aid Commission was excused from further involvement in the matter. The trial was set down to commence on 12 March 2009 and the trial judge emphasised, having regard to earlier events, that the matter would proceed in Ms Ogawa's absence if she was disruptive.

173 At the commencement of proceedings on 12 March 2009, the court was informed that Ms Ogawa was refusing to clothe herself in attire appropriate for court. She was brought into court and informed by the trial judge that the jury was to be empanelled and that she was entitled to participate in that process. Keane JA notes that the transcript shows that Ms Ogawa screamed at the trial judge until she was taken out of the court-room. The jury panel was assembled and Ms Ogawa was again brought into court. She made repeated statements to the following effect: "Help. Help. Help. White Australians killing me." The trial judge directed that she be removed and that the jury be empanelled in her absence. Once this was done, Ms Ogawa was returned to the court-room and placed in the charge of the jury. She was then immediately removed from the court. The trial judge delivered reasons for ruling.

174 During the course of the trial, the trial judge had Ms Ogawa brought into court at the conclusion of the examination-in-chief of each witness on order to afford her an opportunity to defend the charges. She was also provided with transcripts and documentation as the trial progressed. Ms Ogawa did not, however, involve herself in proceedings.

175 On 18 March 2009, a solicitor sought and obtained permission for Dr Clive Turner, a legal academic who had previously intervened on Ms Ogawa's behalf, to attend upon her in

custody and attempt to persuade her to take part in the proceedings. After the meeting with Dr Turner, Ms Ogawa was returned to the court-room. However, his Honour noted that her behaviour was "as abominable as it [had] been throughout the trial".

176 At the close of the prosecution case, Ms Ogawa did not seek to adduce any evidence in her defence.

177 Ms Ogawa was convicted by the jury on 19 March 2009 of all four counts. After the delivery of the verdicts, she was returned to the court-room so she could be called upon with respect to sentence. The sentencing was adjourned to a later date.

178 The trial judge then, on **19 March 2009**, charged Ms Ogawa with contempt in the face of the court under s 129 of the *District Court of Queensland Act* 1967. The charge was that on dates between 9 March 2009 and 18 March 2009 she "wilfully interrupted the proceedings of the Court in the course of [her] trial by physically struggling with the correctional officers and screaming constantly and continually while in Court".

179 The contempt hearing took place before Durward SC DCJ on **27 March 2009**. His Honour explained his reasons for delaying the consideration of the contempt charges until after the trial, in these terms:

> "A charge of contempt could have been found before the verdicts were delivered. Indeed, I made at least one and possibly more statements about a charge of contempt being open for consideration in the course of the trial. However, I never gave up on the hope that your behaviour would improve and that you would participate in the trial. In those circumstances, the making of the charge of contempt in the course of the trial would have been contrary to that hope and it may have rendered what was a futile expectation on my part, nugatory."

180 Ms Ogawa was represented by counsel who tendered an apology on her behalf. The apology was considered but rejected by the trial judge. His Honour found the charge proved. Ms Ogawa was convicted and sentenced to four months' imprisonment, with a parole release date of 26 May 2009.

181 Ms Ogawa applied to the Court of Appeal for leave to appeal from her conviction for contempt and the sentence imposed arising out of the conviction. The Court of Appeal refused leave on the basis that there was no substantial injustice to be corrected as Ms Ogawa

had already served her sentence for contempt; and, there was no reasonable argument that the sentence was the result of an error by his Honour. Ms Ogawa's appeal against conviction was put on grounds that the trial judge failed to adequately inform her of the particulars of the charge; failed to consider that the frequency with which he called her into court led to the actions constituting the charge; failed to properly examine the psychiatric evidence in determining whether the charge had been made out; and the trial judge should have referred to Ms Ogawa's mental condition before calling upon her to show cause.

182 Keane JA considered and rejected each of these grounds.

183 Ms Ogawa did not submit that the trial judge should not have dealt with the contempt proceeding and that issue was not expressly alive before the Court of Appeal. However, Keane JA set out the passage from *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 recited at [159] of these reasons in which Dixon CJ, Fullagar, Kitto and Taylor JJ describe the summary jurisdiction to punish for contempt as founded on the elementary necessities of justice and importing an obligation not to hesitate in the exercise of the summary jurisdiction whenever any act is done which is really calculated to embarrass the normal administration of justice.

184 In the case of Ms Ogawa, the trial concluded on 19 March 2009. The trial judge adjourned the summary determination of the contempt charge to 27 March 2009. There was no prospect of the trial of the offences against the *Criminal Code* (Cth) being imperilled. The Court of Appeal did not consider the procedure of adjourning the determination of the contempt proceeding to a later date objectionable or one which imperilled the proper administration of justice. Nor did the Court of Appeal consider the determination of the proceeding by the judicial officer before whom the contempt occurred, objectionable. Keane JA with whom Chesterman JA and Jones J agreed, by referring to the observations just mentioned of their Honours in *John Fairfax & Sons Pty Ltd v McRae* seemed to accept that there was no error on the part of the trial judge in dealing with the contempt charge in the manner described.

185 The grounds for Ms Ogawa's appeal against sentence were that the trial judge should not have rejected her apology, and that the sentence was manifestly excessive.

186 With regard to the first ground, it was held that a court is not bound to give a contemnor the benefit of the doubt in every case. Keane JA referred to the decision of the New South Wales Court of Appeal in *Director of Public Prosecutions v Wran* (1987) 7 NSWLR 616, in which the contemnor sought during his evidence to justify his contempt by asserting his belief that he was entitled to act as he did. The Court held that the apology expressed by Mr Wran in his submissions on penalty did not entitle him to the credit an earlier expression of regret might have earned. In this case not only had Ms Ogawa failed to apologise up to the point of sentencing submissions, but she continued to scream during the sentencing process, displaying the very kind of conduct for which she was being held in contempt. It was open to the trial judge to find that her apology was not genuine.

187 The Court also rejected Ms Ogawa's submissions that the sentence was manifestly excessive.

Mr Clampett

188 At one level, the circumstances concerning the contempt on the part of Mr Clampett reflect precisely the class of case where the jurisdiction conferred by s 17(3) of the Federal Magistrates Act ought properly be exercised. Mr Clampett does not contest that he said the words the subject of each count. Mr Clampett interrupted the evaluation of each of Ms Noah's 16 grounds in support of the strike-out application by FM Burnett as the court was pronouncing an *ex tempore* judgment in the application. The delivery of the *ex tempore* judgment had to be adjourned. Mr Clampett called out his remarks from the gallery. They were outrageous. He accused FM Burnett of conducting a kangaroo court which is plainly insulting and contemptuous. He immediately followed that remark by observing that FM Burnett and Mr Henry on behalf of the AGS are both paid by the Commonwealth which had the effect of suggesting that FM Burnett and Mr Henry were acting in collusion to deny Ms Noah a right to an impartial hearing. The second remark has resonance with the first remark.

189 As the chronology described earlier reveals, FM Burnett issued a warrant for the arrest of Mr Clampett on 4 July 2008 and Mr Clampett was brought before the court at 10.00am on 9 July 2008. The contempt charge was heard and determined by FM Burnett that morning. Mr Clampett raises a number of grounds of appeal from his conviction. He

contends that he was denied an opportunity to cross-examine Mr Henry and denied an opportunity to examine FM Burnett, as a witness. Since the words said are not in contest, it is difficult to see where the cross-examination of Mr Henry would lead and what propositions Mr Clampett would propose to put to FM Burnett if the opportunity is available to do so. An issue also arises as to whether FM Burnett is a compellable witness on the hearing of the contempt charge having regard to s 16(2) of the *Evidence Act* 1995 (Cth).

190 However, there are two matters of concern arising out of the conviction of Mr Clampett. The first is that the transcript and digital audio recording make it clear that Mr Clampett was inflamed because of the circumstances of his arrest and did not properly understand the scope of count 2 of the contempt charge. Plainly enough, he was convinced that he was being charged with having said words which included the words explanatory of the meaning of the words he actually said. Thus, he was not in a position to come to grips with count 2. In addition, Mr Clampett might well have been aided by adjourning the matter to enable legal advice to be obtained. Secondly, the circumstances of Mr Clampett's arrest and his presence before the court in handcuffs may well have made it difficult for Mr Clampett to answer each charge in a balanced dispassionate way. Having misunderstood count 2 and being confronted with the circumstances of his arrest, Mr Clampett did not understand nor deal properly with matters affecting his interests on the question of sentencing.

191 For these reasons, I am satisfied that Mr Clampett's appeal ought to be upheld. The conviction and sentence must be set aside. The proceeding should be remitted to the Federal Magistrates Court for re-hearing. Having regard to the history of the matter, the matter should be re-heard by a Federal Magistrate other than FM Burnett.

192 I agree with the observations of the Chief Justice that the Attorney-General of the Commonwealth of Australia is the proper respondent.

I certify that the preceding one hundred and nine (109) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Greenwood.

Associate:

Dated: 28 October 2009

Counsel for the Appellant:	Mr D O'Gorman SC with Mr R Reed
Solicitor for the Appellant:	Fisher Dore Lawyers
Counsel for the Respondent:	Mr R Derrington SC
Solicitor for the Respondent:	The Australian Government Solicitor
Date of Hearing:	20 November 2008
Date of Judgment:	28 October 2009