'No, No! Sentence First – Verdict Afterwards':† Freedom of the Press and Contempt by Publication in *Attorney-General for the State of New South Wales v X*

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> The twelve jurors were all writing very busily on slates. "What are they doing?" Alice whispered to the Gryphon. "They can't have anything to put down yet, before the trial's begun." "They're putting down their names," the Gryphon whispered in reply, "for fear they should forget them before the end of the trial."
>
> Lewis Carroll[1]

1. Introduction

The exchange between Alice and the Gryphon is revealing of a conundrum in the law of sub judice contempt – the rule protects jurors from prejudicial pre-trial publicity, despite the possibility that news coverage is ephemeral in the minds of jurors.[2] The actual impact of media publicity on jurors provokes the question; is the sub judice rule 'so integral to the proper administration of justice as to justify the resulting curtailment of freedom of speech?'[3] In cases where the public interest in the administration of justice conflicts with the public interest in freedom of speech, Australian courts have traditionally favoured the former. The decision in *Attorney-General for the State of New South Wales v X*[4] [hereinafter *Attorney-General (NSW) v X]* marks a shift in the way in which Australian courts balance the competing public interests in free speech and the right to a fair trial. The Court of Appeal did not charge the *Sydney Morning Herald* with contempt for publishing a leading story that suggested Duong Van Ia was guilty of a pending charge of supplying heroin.[5] The prejudice to the trial of the accused was held to be outweighed by the public interest in discussing new drug leaders in the drug trade.

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† Lewis Carroll *Alice's Adventures in Wonderland* (Wordsworth Editions Limited: 1992) at 101.

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1 Lewis Carroll, above at 90–92.

2 The Australian Law Reform Commission noted 'there is no real conflict between freedom of publication and a fair trial, because no person involved in a trial ... is ever actually influenced by publications relating to the trial.' See Australian Law Reform Commission, *Contempt* Report No 35 (1987) at para 246. Very little empirical research has been carried out on this issue in Australia. For results of American research see New South Wales Law Reform Commission, *Contempt by Publication* Report No 43 (2000) at para 2.55–2.68.

3 *Contempt by Publication*, above n2 at para 2.2.

4 *Attorney-General for the State of New South Wales v X* (2000) 49 NSWLR 653 (Spigelman CJ, Mason P and Priestley JA).

5 Greg Bearup and Kate McClymont 'Unmasked: Our New Drug Bosses' *The Sydney Morning Herald* (27 October 1997) at 1 (continued at 6); Greg Bearup and Kate McClymont 'Uncle Six: From Refugee to High Roller' *The Sydney Morning Herald* (27 October 1997) at 7; Greg Bearup and Kate McClymont 'How a Big Fish Escaped the Net' *The Sydney Morning Herald* (27 October 1997) at 6.

This case note provides a comprehensive analysis of *Attorney-General (NSW) v X*[6] and its impact on the law of sub judice contempt. The first part of the note outlines sub judice contempt and the public interest defence, canvassing the approach by Australian courts to date. Part two provides a summary of *Attorney-General (NSW) v X*[7], outlining the facts of the case, the reasoning of Barr J at first instance, and the judgments by the Court of Appeal. The next part of the article evaluates the majority and minority reasoning, concluding that the majority view is the better one because the media should not be 'chilled' by a narrow public interest defence, certainly in light of the principles of open justice and the implied freedom of political communication, as well as the possibility that media publicity has only a limited impact on jurors. The final part of the paper predicts the impact of the decision on contempt by publication.

2. *Contempt of Court*

A. The Sub Judice Rule

The right to a fair trial in Australia is not only embedded in the common law, but is also considered a fundamental human right.[8] The law of contempt of court aims to protect the public interest in the proper administration of justice.[9] Sub judice contempt prohibits the publication of prejudicial information about a case which is currently being heard or is pending hearing in a court.[10] To be considered 'prejudicial' the publication must have a 'real and definite tendency', as a 'matter of practical reality' to 'preclude or prejudice the fair and effective administration of justice in the relevant trial.'[11]

The sub judice rule assumes that 'if jurors and witnesses are exposed to media material about a trial that is not part of the evidence presented, tested and argued in court, they may be hindered from reaching an impartial and proper verdict.'[12] This assumption stems from the premise that the media has a very powerful

6 Above n4.

7 Ibid.

8 The right to a fair trial was deemed to be embedded within the common law in *R v Macfarlane; Ex parte O'Flanagan & O'Kelly* (1923) 32 CLR 518 at 541–542 (Isaacs J). The High Court recently discerned an implied constitutional right of fair trial within the Commonwealth Constitution, at least in relation to Federal offences. See *Dietrich v R* (1992) 177 CLR 292, 326 (Deane J), 362–363 (Gaudron J). The right to a fair trial is said to be a fundamental human right, Mason P, above n4 at 688. See also *Universal Declaration of Human Rights*, Art 10; *International Covenant on Civil and Political Rights*, Art 14.

9 Sally Walker, *Media Law: Commentary and Materials* (2000) at 528.

10 *James v Robinson* (1963) 109 CLR 593; *Civil Aviation Authority v Australian Broadcasting Corp* (1995) 39 NSWLR 540.

11 *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15. The quoted phrases are drawn from the judgments of Wilson and Deane JJ at 34, 46. See also Toohey J at 70, 77. Mason CJ preferred the phrase 'substantial risk of serious (or real) interference,' adding however that this wording may not in fact differ significantly. Id at 27–28. The Australian Law Reform Commission has recommended the phrase 'substantial risk of prejudice.' See *Contempt*, above n2 at para 295.

12 *Contempt by Publication*, above n2 at para 2.2. See also Mason P, above n4 at 696.

influence on jurors[13] and 'prejudice induced by media reporting may not be neutralised by the evidence in court, and by judicial warnings and directions.'[14] Indeed, the Australian courts, like their British counterparts, have embraced the sentiments of Mark Twain that, no matter how intelligent, fair-minded, eager a juror is to put aside prior media exposure, 'ignoramuses alone [can] mete out unsullied justice.'[15]

B. The Public Interest Defence

The sub judice rule curtails freedom of speech by suppressing publications considered to be 'prejudicial' to the trial of an accused.[16] Freedom of expression is a fundamental human right that is embedded in our common law and, albeit restrictively, in the Constitution.[17] As freedom of speech is a valued principle in our legal system, sub judice contempt cannot be used to repress unduly the free discussion of matters of public importance. As a consequence, the common law has developed a ground of exoneration in contempt matters, commonly referred to as the public interest defence, or the *Bread Manufacturers* principle, to balance the public interest in freedom of speech with the right to a fair trial. The public interest defence was authoritatively formulated by Jordon CJ in the case of *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd.* His Honour stated that:

> [d]iscussion of public affairs and the detriment of public abuses, actual or supposed, cannot be required to be suspended merely because of the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant ... It is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by reason of the fact that the matter in question has become the subject of litigation.[18]

13 See *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 725 (Mahoney J); *Contempt by Publication*, above n2 at para 2.29–2.30.

14 *Contempt by Publication*, above n2 at para 2.2.

15 Quoted in David Flint 'The Courts and the Media: What Reforms are Needed and Why?' (1999) 1 *UTS Law Review* at 32.

16 Above n11, 22 (Mason CJ), 37 (WilsonJ) and 66 (Toohey J). See also, *Contempt*, above n2 at para 246.

17 The High Court referred to freedom of speech as a 'cardinal principle' and that speech should be free, so that 'everyone has the right to comment in good faith on matters of public importance': *Gallagher v Durack* (1983) 152 CLR 238 at 243 (Gibbs CJ, Wilson, Mason, Brennan JJ). The High Court has also ruled that the Commonwealth Constitution contains implied constitutional guarantees of political discussion. See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth of Australia* (No 2) (1992) 177 CLR 106; *Theophaneous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

18 *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) SR (NSW) 242 at 249.

The public interest defence allows Australian courts to make a finding that a media publication contains information that has a 'real and substantial risk' of causing prejudice to proceedings, but does not amount to a contempt because the information relates to a matter of great public importance and interest.

C. Judicial Application of the Public Interest Defence in Australia

There has been some uncertainty as to the practical application of Jordon CJ's words, with courts disagreeing on the manner and circumstances in which the public interest defence operates. Until the High Court decision in *Hinch v Attorney-General (Vic)*[19] there were two views as to how the defence should be applied – the 'normative view' and the 'balancing view.'[20] The 'normative view' treats the passage of Jordon CJ as a rigid legal principle. The competing public interests in fair trial and freedom of speech are balanced by the courts applying the words of the judgment strictly to the facts of each case.[21] Under this approach, a contemptuous publication will be excused on the grounds of public interest if the subject matter of the published material involves the discussion of public affairs which *pre-dates* the pending proceedings, the litigation is not the focal point of the public discussion, and any prejudice done to the trial is shown to be an *incidental and unintended* by-product of the discussion. As such, the normative approach only protects a media organisation if a publication is not occasioned by pending proceedings, nor discusses the issues to be decided at trial, but contains information that is of pre-existing public concern.[22]

The High Court in *Hinch v Attorney-General (Vic)*[23] rejected the normative approach and held that courts must now engage in a balancing exercise. The fact that there are five separate judgments makes it difficult to determine with precision the criteria of the balancing test.[24] In general however, the court must be satisfied beyond a reasonable doubt that the public interest in freedom of speech outweighs the public interest in the administration of justice. Unlike the normative approach, the balancing test is more flexible and may protect a publisher from liability even though the article features a new topic rather than a matter of pre-existing controversy, or the material is directed at the issues to be decided in litigation. The opposite is also true so that a media organisation may be found in contempt despite the article continuing public debate.

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19 Above n11.

20 These two approaches were espoused by Priestley JA in *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650 at 682–683.

21 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 60 (Gibbs CJ).

22 Sally Walker 'Freedom of Speech and Contempt of Court: The English and Australian Approaches Compared' (1991) 40 *ICLQ* at 598.

23 Above n11 at 68 and 70 (Toohey J), 83–86 (Gaudron J) and 47–48 (Deane J). Only Wilson J was opposed to formulating the test in this manner at 41.

24 See above n22 at 600; Above n4 at 14 (Spigelman J).

Where material is directed at the guilt or innocence of an accused person all members of the High Court held that the public interest in the publication would have to be *substantial* to outweigh the public interest in a fair trial.[25] Deane J formulated the matter differently suggesting that, where a media publication implies the guilt or innocence of the accused, it is *'almost impossible'* that a countervailing public interest consideration could outweigh the detriment to the administration of justice.[26] The reasoning of Deane J has been interpreted by some commentators as accepting that there can not be a countervailing public interest which may outweigh the prejudice to a trial where the publication is directed solely to the question of guilt or innocence of the accused.[27]

The question that arises from the judgments in *Hinch v Attorney-General (Vic)* is what constitutes a *substantial* public interest? The problem with the balancing approach is that what it gains in flexibility is loses in subjectivity. The High Court has only provided limited examples of what issues may tilt the scales in favour of the public interest defence, namely a 'major constitutional crisis' or 'imminent threat of nuclear disaster.'[28] Consequently, media organisations are left in a situation of uncertainty because they are unable to gauge when a court may deem a particular topic to be of sufficient public interest to escape a charge of contempt.[29]

3. *Attorney-General (NSW) v X*

A. *Facts*

On the 27 October 1997 *The Sydney Morning Herald (Herald)* published a series of leading articles about organised crime in the 1990s.[30] In particular, the articles contained numerous 'strong statements' about the behaviour of Duong Van Ia and described him as 'the top heroin distributor,' 'a drug dealer,' 'the current drug Csar', a 'drug boss,' 'your classic criminal' and 'the country's largest heroin distributor.'[31] Duong and his fellow 'drug boss' Duncan Lam featured in large colour photographs on the front page with the provocative title *Unmasked: Our New Drug Bosses*. The sub title on the front-page article stated that these two men have 'carved out a giant portion of Australia's three billion dollar heroin trade, building a network from Southern China to Sydney.' The publication stated further that Duong had been charged with supplying heroin and that he was yet to face trial.

25 Above n11 at 75–77 (Toohey J), at 45–46 (Wilson J). See also *Contempt by Publication* above n2 at para 2.6 and 8.14.

26 Id at 52 (Deane J).

27 Above n22 at 602.

28 Above n11 at 26 (Mason CJ).

29 Above n22 at 602; Des Butler and Sharon Rodrick *Australian Media Law* (1999) at 201; Richard Coleman 'Guest Lecture: *Attorney-General for the State of New South Wales v X*' University of Sydney (2 August, 2000).

30 Above n5.

31 Above n4 at 681–682 (Mason P).

The publication did more than induce public debate,[32] it caught the attention of Mr Stuart Littlemore QC, and the Attorney-General of New South Wales. The former deemed the article a contempt of court on the ABC TV program *Media Watch*, and the latter initiated contempt proceedings against the *Herald* in the Supreme Court. The Attorney-General proceeded with the application on the basis that the publication implied the guilt of Duong and so had the tendency to interfere with his criminal trial for drug related charges set down for 23 March 1998.[33] The application was rejected at first instance by Barr J in the Supreme Court and again by the Court of Appeal (Spigelman CJ and Priestley JA, with Mason P dissenting).

B. The First Instance Decision

Barr J found that the articles did not imply the guilt of Duong,[34] but was satisfied beyond a reasonable doubt that, as a matter of practical reality, the articles had the tendency to interfere with the trial of the accused.[35] The Fairfax Publication Group (Fairfax) sought to exclude the publication on two grounds. First, using expert evidence and a telephone survey of *Sydney Morning Herald* readers, Fairfax endeavoured to show that the series of articles would not prejudice Duong's pending criminal trial because potential jurors at the trial would not remember his name or face from the articles published five months earlier. Justice Barr rejected the submission, noting a fundamental difference between questions asked about a particular topic in a survey and the presentation of 'prompting information' at a criminal trial.[36] His Honour stated that, unlike an individual questionnaire, a name or face 'repeated or presented with other relevant information' in a trial will revive the memory of jurors, and also jury members can 'spark' the memory of fellow jurors.[37]

Second, the Fairfax Publishing Group sought to defend the publication using the *Bread Manufacturers* principle.[38] Justice Barr saw merit in the defendant's argument that the series of articles should be excused for contempt because they dealt with a matter of 'great public concern.'[39] The publication pointed out that

32 The story had considerable impact at the time of publishing. The publication prompted political debate and dominated talk back radio. The Premier Mr Carr also rang the Herald's then editor-in-chief, John Alexander, to congratulate him on the publication of the story. See Richard Coleman 'Court Case Puts Readers' Memories to the Test' *The Sydney Morning Herald* (4 December 1999) at 15.

33 Duong had been committed for trial in the District Court on charges of supplying 223 grams of heroine and with being knowingly concerned in the supply of 222 grams of heroin.

34 *Attorney-General for the State of New South Wales v John Fairfax Publications Pty Ltd* (NSW Supreme Court, Barr J, 9 April 1999) <http://www.austlii.edu.au/au/cases/nsw/supreme_ct/1999/318.htm> (14 May 2001). 'If the articles had been about the commission by Mr Duong or others of particular, named offences, there might have been substance in that submission. But I think that the articles were really about personalities and control.'

35 Id at para 121.

36 Id at para 43.

37 Id at para 43–44.

38 Id at para 122; Above n18 at 249.

39 Id at para 122.

'due to a cultural and financial revolution, the people controlling heroin distribution in Australia were changing, and the new ones included Duong.'[40] Justice Barr expressed concern that the publication mentioned the pending criminal charges, but his Honour did not find this fact a barrier to the operation of the public interest defence.[41] According to Barr J, the criminal charge was only mentioned and did not 'play a part' in the public discussion that focused on the individuals who control the drug trade. As such, it was 'reasonably open' for the court to find that the detriment to the trial was outweighed by the public interest in discussing new drug leaders in the drug industry.[42]

C. The Court of Appeal Decision

The issue on appeal before Spigelman CJ, Priestley JA and Mason P was whether or not Barr J had correctly addressed and applied the public interest defence in finding it open that the detriment to the criminal trial of Duong was outweighed by the public interest in the freedom of discussion of the material contained in the publication. All three judges agreed that the publication 'directly trenched upon the question of Mr Duong's guilt'[43] and so, as a matter of practical reality, the article had a tendency to interfere with the fair administration of justice. However, Spigelman CJ and Priestley JA parted company with Mason P as to whether or not the *Bread Manufacturers* defence should be available in such an instance.

(i) Spigelman CJ (Priestley JA in agreement)

According to Spigelman CJ, Barr J had correctly applied the public interest defence by balancing the public interest in a fair trial with the public interest in the information published. His Honour rejected the proposition that some kinds of interference with the administration of justice, namely 'an implication of guilt, a suggestion of guilt or canvassing of matters directly related to issues of guilt,' will *always* tilt the scales in favour of the fair administration of justice.[44] Spigelman CJ stated that there is no binding authority which clearly establishes that such a principle exists, and noted that in *Hinch v Attorney-General (Vic)* the High Court delivered five separate judgments from which no ratio decidendi can be extracted.[45]

The cases of *Director of Public Prosecutions v Wran,*[46] *Director of Public Prosecutions v Australian Broadcasting Corporation,*[47] and *Hinch v Attorney-General (Vic)* have been pointed to as authority for the principle that where a publication suggest the guilt or innocence of the accused, the *Bread Manufacturers*

40 Id at para 127; paraphrased by Stephen Gibbs, 'Herald Contempt Case Thrown Out' *The Sydney Morning Herald* (4 October 1999) at 9.

41 Id at para 133.

42 Id at para 134.

43 Above n4 at 668 (Spigelman CJ).

44 Ibid.

45 Ibid.

46 (1987) 7 NSWLR 616.

47 (1987) 7 NSWLR 588.

defence is incapable of being attracted.[48] According to Spigelman CJ, the judgments in these cases do not expressly state that where a publication implies the guilt of the accused, balancing is unnecessary. On the contrary, the judgments state that the public interest defence 'in general'[49] has no application, or will 'rarely if ever'[50] have application, and so in instances where the guilt of the accused has been stated or implied, a contempt will 'almost certainly have been committed.'[51] This indeterminate language suggests that the outcome of these cases were determined by a balancing exercise, and not a predetermined rule. In the opinion of Spigelman CJ, the balancing test only fell in favour of the public interest in a fair trial in these cases because the 'pith and substance' of the publications were directed to the very issues involved in the pending criminal trials.[52]

Spigelman CJ uses the High Court formulation of an implied freedom of political communication as yet another ground to reject the 'pre-determined balancing test.' In his judgment it is noted that, since the last contempt by publication ruling made by the Supreme Court of New South Wales, and particularly since the two judgments in *Director of Public Prosecutions v Wran*[53] and *Director of Public Prosecutions v Australian Broadcasting Corporation*,[54] the High Court has developed immunity in the Constitution with respect to freedom of communication on governmental and political matters.[55] In lieu of this development, Spigelman CJ urges that the law of contempt adapt and change to accommodate this new constitutional freedom.[56] As such, his Honour suggests that courts must now attribute equal weight to the freedom of public discussion when conducting the balancing test. The judgment makes it clear that courts should be reluctant to accept a preliminary balancing test because it has the potential to preclude the publication of matters that are the subject of political and governmental discourse.[57] By implication, his Honour suggests that a predetermined balancing test may be unconstitutional.

Having accepted that a balancing exercise is to be conducted in cases where the publication suggests the guilt of the accused, Spigelman CJ goes on to address whether or not Barr J had carried out the test accordingly. His Honour stressed that the question was not whether the conflicting public interests could be balanced in a different way, but whether the reasons provided by Barr J for his conclusion were 'appropriate and apt.'[58] It was recognised that Barr J did not underestimate the

48 *Contempt by Publication*, n2 at 33; Butler and Rodrick, above n29 at 188–189, 207–208.
49 Above n46 at 637. (Street CJ; Hope JA; Glass JA; Samuels JA; Priestley JA).
50 Id at 629.
51 Above n47 at 598.
52 Above n4 at 673 (Spigelman CJ).
53 Above n46.
54 Above n47.
55 Above n4 at 675 (Spigelman CJ).
56 Ibid. His Honour notes the High Court's determination that the law of defamation and choice of law rules must adapt to the constitutional immunity.
57 Id at 675–678 (Spigelman CJ).
58 Id at 681 (Spigelman CJ).

impact of the publication on the fair trial of the accused. The publication contained prejudicial statements that could 'scarcely' be more gratuitous, and the articles were presented in a 'striking and unusual way', which made them 'more memorable than ordinary leading newspaper articles.'[59] However, the articles were also of 'substantial public interest' because they addressed 'a major social problem', namely new drug leaders in the ever growing drug trade, and this ensued 'significant public policy implications.'[60] Spigelman CJ concluded that public interest in the information, coupled with the five month period before the trial, as well as the fact that the criminal charges were only mentioned, and did not play a role in the broader subject matter of the article, were sufficient reasons to excuse the publications on the grounds of the *Bread Manufacturers* principle.[61]

(ii) Mason P (Dissenting)

Mason P upheld the appeal, stating that the public interest defence is not available where a publication is proven beyond reasonable doubt to interfere with the fair trial of an accused by suggesting or implying guilt, or canvassing matters directly related to the central issue of guilt.[62] Mason P stressed the importance of the right to a fair trial, stating that the principle is a fundamental human right and embedded in our common law.[63] His Honour went on to clarify that the right to a fair trial is compounded when viewed in the context of criminal law, because it is the branch of law in which the 'public has the greatest concern', and its power to convict the guilty and acquit the innocent means that it requires the greatest protection from 'hysteria or mob influence.'[64] In line with this reasoning, Mason P urged that courts dispense criminal justice with 'fearless independence,' to ensure that a verdict of guilty is a product of a fair trial, and not the consequence of 'trial by media.'[65]

Given the importance of the fair administration of justice in criminal proceedings, Mason P asserts that an implication of guilt in a publication is an interference so incompatible with the right to a fair trial that the *Bread Manufacturers* defence is incapable of being attracted.[66] In his Honour's view a publication of this nature 'trenches at the very heart of the public interest in ensuring that no person is convicted of a criminal offence save by verdict given after a fair trial on the evidence given in that trial'.[67] At odds with the majority, Mason P attains there is no authority in Australia that indicates a publication suggesting or implying the guilt of the accused will not be held to constitute

59 Id at 680, quoting Barr J above n34 (Spigelman CJ).
60 Id at 681 (Spigelman CJ).
61 Id at 681 (Spigelman CJ).
62 Id at 693 (Mason P).
63 Id at 688 (Mason P).
64 Id at 689 (Mason P).
65 Ibid.
66 Id at 689–690 (Mason P).
67 Id at 693 (Mason P, quoting Gaudron J in *Hinch v Attorney-General (Vic)*, above n11 at 88–89).

contempt.[68] In fact, his Honour is of the opinion that previous case law suggests quite the opposite. As the statement by Deane J in *Hinch v Attorney-General (Vic)* contends:

> It is difficult, *if not impossible*, to envisage any situation in which countervailing public interest considerations could outweigh the detriment to due administration of justice involved in public prejudgment by the mass media of the guilt of a person awaiting trial. [emphasis added][69]

In his judgment, Mason P quotes extensively from previous case law to illustrate the limits of the *Bread Manufacturers* defence in situations where the guilt of the accused is invoked in a media publication.[70] Mason P notes the cautionary statements employed by their Honours in *Director of Public Prosecutions v Wran*.[71] In that case, it was stated that the public interest defence 'in general'[72] has no application, or will 'rarely if ever'[73] have application, in instances where there has been a publication of guilt. In the opinion of Mason P these statements do not suggest a general balancing exercise, they simply leave room for the public interest defence to operate in situations where the accused's rights are 'not directly trenched upon' or, in circumstances such as a 'major constitutional crisis' or 'imminent threat of nuclear disaster.'[74] The formulation of the defence by Mason P is extremely narrow. Whilst Spigelman CJ opined that the defence will be available so long as the *pith and substance* of the article is not directed to the guilt of the accused,[75] Mason P states that the defence will only be available if the article *does not directly* impinge upon the rights of the accused. Indeed, it is difficult to imagine a situation where a suggestion of guilt would not have an effect on the rights of an accused. Accordingly, Mason P would only allow the defence to operate in extreme and extraordinary circumstances if at all.

Mason P also found that it was not 'reasonably open' to Barr J to hold that the detriment to Duong's trial was outweighed by the public interest in the naming of him as a person involved in the drug industry. First, Barr J did not attach significant weight to the implication in the published material that Duong was guilty of the pending charge of supplying heroin.[76] His Honour notes the High Court decision in *Hinch v Attorney-General (Vic)* where it was made clear that it was difficult to envisage circumstances where implied assertions of guilt would be excused in lieu

68 Id at 690 (Mason P).

69 Id at 691 (Mason P, quoting Deane J in *Hinch v Attorney-General (Vic)*, above n11 at 58–59).

70 Id at 688–695 (Mason P).

71 Id at 694 (Mason P); Above n46.

72 Above n46 at 637 (Street CJ; Hope JA; Glass JA; Samuels JA and Priestley JA).

73 Id at 629.

74 Above n4 at 693 (Here, Mason P is referring to the two examples given by Mason CJ of a 'substantial public interest' in *Hinch v Attorney-General (Vic)*, above n11 at 26).

75 Above n4 at 673 (Spigelman CJ).

76 Id at 695 (Mason P).

of the public interest in freedom of discussion.[77] In the present case, the article dealt with a 'narrow issue of public interest' – the revelation that Duong was the 'Mr Big' in the drug trade – and could not seriously outweigh the prejudice to the accused's trial.[78] Second, the allegations in the articles were 'highly prejudicial' and so directly interfered with Duong's right to a fair trial. It did not matter that the articles did not directly imply that Duong was guilty of the offence charged. Mason P pointed out that the law of contempt proceeds on the basis that jurors are highly susceptible to all types of prejudicial information.[79] The gravity of the allegations, and there subsequent impact on Duong's trial, meant that it was not reasonably open for Barr J to find that the public interest in the naming of a new drug leader in the drug trade was of the greater public importance. Mason P used the following analogy to summarise his position:

> To state that an accused is a hired hitman is so potentially damaging that it cannot be justified by suggesting that the accused may be innocent of the particular contract killing for which he stands charged, any more than publishing details of a past conviction for sexual abuse of a child can be disconnected from an upcoming fresh charge of a similar offence.[80]

4. *The Judicial Acceptance of a Liberal Public Interest Defence*

The majority judgment of Spigelman CJ and Priestley JA in *Attorney-General (NSW) v X* is significant because it acknowledges that the right to freedom of speech is of equal value to the right to a fair trial. Prior to this decision, it had generally gone unchallenged that the public interest in a fair trial would almost always outweigh the public interest in freedom of expression.[81] The new emphasis placed on freedom of speech is a welcomed development in the law of contempt. A narrow formulation of the public interest defence, construed by Mason P, has the potential to obstruct the public unjustifiably, from engaging with information about the courts. A liberal application of the public interest defence is in harmony with the development of the implied freedom of political discussion, the principles of open justice and the lack of empirical evidence to support the judicial assumption that media publications have a prejudicial effect on jurors.

A. *Open Justice*

Open justice is one of the most fundamental and deeply rooted characteristics of the common law tradition.[82] The great majority of the public relies on the media to open the doors of the courts and provide information about the justice system.

77 Ibid.

78 Ibid.

79 Id at 696 (Mason P).

80 Id at 696–697.

81 *Contempt by Publication* n2 at para 2.6.

82 *Scott v Scott* [1913] AC 417. See also *Russell v Russell* (1976) 134 CLR 495; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47. The principles of open justice are also enshrined in the *International Covenant on Civil and Political Rights*, Art. 14(1), to which Australia is a party.

Doyle CJ makes the point that 'we should see the media as the means by which Australians exercise their democratic right of access and a means by which we can maintain public confidence in the courts.'[83] Indeed, if the press are hindered from reporting court proceedings:

> the operation of the criminal justice system may become seriously inefficient, corrupt or otherwise unsatisfactory and debates on public interest questions may be seriously impaired.[84]

The public interest defence, as formulated by Mason P, severely limits public access to information about those involved in the court processes. His Honour suggests that the defence may only be used to excuse a publication where the information does not directly impinge on the accused person's rights, or in the event of a 'major constitutional crisis' or 'imminent threat of nuclear disaster.'[85] The approach is akin to the 'normative view' whereby a publication must not comment on issues to be decided at trial, only on information that is of pre-existing public concern. Under this approach, the media would be encouraged to provide the public with only limited information about judicial proceedings to avoid a charge for contempt of court.

Whilst the prima facie principle that court proceedings should be open and reportable helps to ensure the fair and efficient administration of justice, it can also create a risk of prejudice to the fairness of the individual proceedings. The principles of open justice must not therefore allow individuals or the media to frustrate the proceedings of the court by undue interference in those proceedings.[86] The application of the public interest defence by Spigelman CJ protects open justice, and against the potential abuses of that doctrine, by allowing the public interest in criminal matters to be given due consideration, but forbidding the publication of articles in which the 'pith and substance' is directed to the guilt of the accused.[87]

B. Implied Freedom of Political Discussion

The High Court has ruled that the *Constitution* contains an implied constitutional right of political discussion. The right only guarantees freedom of communication on matters of government and politics. Since the courts are an arm of government, media reports on the processes of the courts are clearly within the scope of political discussion.[88] The common law and Commonwealth legislation cannot be made

83 The Honourable Justice John Doyle 'The Courts and the Media: What Reforms are Needed and Why?' (1999) 1 *UTS Law Review* at 28.

84 Michael Chesterman 'OJ and the Dingo: How the Media Publicity Relating to Criminal Cases Tried by Jury is Dealt with in Australia and America' (1997) 45 *American Journal of Comparative Law* at 137.

85 Above n4 at 693 (Mason P).

86 'The need to maintain some secrecy or confidentiality, or the interests of privacy or delicacy, may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court.': *Russell v Russell*, above n82 at 520 (Gibbs J).

87 Above n4 at 673 (Spigelman CJ).

88 Chris Nash 'Panel Discussion' (1999) 1 *UTS Law Review* at 159–160.

inconsistent with the implied freedoms. This has led litigants to argue that the law of sub judice contempt is incompatible with the implied freedoms because it unduly suppresses the freedom of the press to engage in political debate and discussion.[89] In considering the compatibility of the constitutional freedom with contempt by publication, the courts have stressed that the constitutional right does not abolish the protection of due process of law from undue media scrutiny.[90]

Whilst the constitutional immunity does not abolish contempt laws, courts and commentators have stated that judges are impelled to consider the immunity and scrutinise very carefully any excesses within the law of contempt.[91] In this way, the constitutional immunity imports into contempt law the need for greater judicial consideration of freedom of discussion. The liberal application of the public interest defence by Spigelman CJ sees freedom of the press being given equal consideration to right to a fair trial, and so enables the law of contempt to better accommodate the constitutional guarantee. Mason P, on the other hand, by advocating for a pre-determined balancing test, ignores the constitutional immunity and so denies the ability of contempt law to accommodate the right to political discussion. In light of the constitutional guarantees, the public interest in a fair trial can no longer be considered to be of greater value than the public interest in freedom of expression.[92]

C. Media Publicity and Its Effects on Jurors

The law of sub judice contempt rests on the premise that the media are very powerful and hold great sway over public opinion. Mahoney JA in *Ballina Shire Council v Ringland* (1994) promulgated this notion when he stated:

> The media exercises power, because and to the extent that, by what it publishes, it can cause or influence public power to be exercised in a particular way. And ... it needs no authority to say what it wishes to say or to influence the exercise of public power by those who exercise it. The media may, by the exercise of this power, influence what is done by others for a purpose which is good or bad. It may do so to achieve a public good or its private interest. It is, in this sense, the last significant area of arbitrary public power.[93]

89 *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81 at 110–111 (Kirby P); *Attorney-General (NSW) v Time Inc Magazine Co Pty Ltd* (NSW Court of Appeal, Gleeson CJ, 15 September 1994, unreported at 4).

90 *John Fairfax Publications Pty Ltd v Doe*, above n89 at 109–11 (Kirby P); *Theophaneous v Herald & Weekly Times Ltd*, above n17 at 187 (Deane J); *Attorney-General (NSW) v Time Inc Magazines Co Pty Ltd*, above n89 at 10 (Gleeson CJ).

91 Above n84 at 115.

92 *Contempt by Publication*, above n2 at para 2.6.

93 *Ballina Shire Council v Ringland*, above n13 at 725.

Media critics such as Catherine Lumby have complicated the notion of an all powerful media.[94] According to Lumby, the media does not coherently and consistently direct what people make of the information and images they receive.[95] In fact, the interaction between public opinion and words and images in the press is volatile and unpredictable – it is not a one way street.[96] Empirical evidence, obtained mainly through studies in the United States, has also shown the assumption that jurors are 'putty in the hand of the media' to be untrue.[97] Australian courts are reluctant to pay much regard to empirical studies of the likely affect of a media publication on potential members of a jury. The conclusions of Barr J at first instance clearly illustrate this stance.[98] However, in lieu of evidence that suggests that the media has only limited effect upon jury members, the public interest defence should not be applied too restrictively.

5. *The Future for Contempt by Publication*

There is reason to believe that the majority decision in *Attorney-General (NSW) v X* will not be popular with the judiciary nor the legislature. The dissenting judgment of Mason P is more in accord with the juduiciary's traditional distrust of the media's vigorous argument that the public has a 'right to know.' Whilst courts recognise that the media may have a legitimate role in drawing attention to and encouraging debate on matters in the public interest, they are quick to point out that this does not 'make the media beyond or above the law.'[99] William J displayed the stiffened resolve of the judiciary in the face of the media's cry of free speech when he said:

> The judges jeolously protect the rights of citizens against oppressive conduct by the State ... It would be unthinkable that under the guise of freedom of speech the media could trample on the rights of citizens which were inviolable as against the State.[100]

The NSW Law Reform Commission (NSWLRC) has advocated for the formulation of a new, narrower public interest defence in matters of contempt by publication.[101] The Commission stressed that a balancing act was not required

94 Catherine Lumby *Gotcha: Life in a Tabloid World* (1999) at xiv.

95 Ibid.

96 Ibid.

97 Above n15 at 32–33. David Flint claims that 'juries can be singularly impervious to the media' and this has been shown by juries delivering verdicts of innocence in the mist of media circuses. The cases of Jeremy Thorpe and the Kray Twins in the United Kingdom, and OJ Simpson in America, are cited as authority.

98 *Contempt by Publication*, above n2 at para 2.65. It should be noted that research is currently being undertaken by Michael Chesterman and Dr Jan Chan, in collaboration with the Justice Research Centre, on the impact of media publicity on jury deliberations in NSW.

99 *Whiskisoda Pty Ltd v HSV Channel 7 Pty Ltd* (Supreme Court of Victoria, MacDonald J, 5 November 1993, at 14).

100 *Emcorp Pty Ltd v Australian Broadcasting Corporation* [1988] 2 Qd R 169 at 173.

101 New South Wales Law Reform Commission, *Contempt by Publication* Discussion Paper 43 Summary (2000) at para 85.

when considering the public interest in a fair trial and freedom of speech. In fact, the proposed approach by the Commission is strikingly similar to the narrow approach rejected by the High Court in *Hinch v Attorney-General (Vic)*. It is proposed that the legislation should provide for a defence only where:

> the publication the subject of the charge was made in good faith in the course of a continuing public discussion of a matter of public affairs (other than the trial itself), or otherwise of general public interest and importance; and the discussion would have been significantly impaired if the statement creating a substantial risk of prejudice to the relevant trial had not been published at the time when it was published.[102]

The NSWLRC clearly seeks to discourage the media from liberal reporting on criminal matters. This is apparent in the proposed *Costs in Criminal Cases Amendment Bill* 1997 (NSW).[103] Under this legislation, courts can order a publisher or broadcaster of material to pay all costs of running a criminal trial if that trial is aborted because the publication is contemptuous.[104] When introducing the Bill in Parliament, the Minister for Police, Mr Wheelan, proclaimed that the scheme to recover costs from contemnors would encourage responsible media reporting 'by sending a message to the hip pocket of the media contemnor.'[105] Indeed, the money involved is so substantial that publishers will be discouraged from reporting on certain criminal matters for fear of attracting an ample costs order. However, far from encouraging 'responsible reporting', this legislation may have the damaging effect of silencing the press and so freedom of public discussion about broad issues of public concern, such as organised crime and drug policy.[106]

6. *Conclusion*

The decision in *Attorney-General (NSW) v X* represents a change in the way in which Australian courts apply the public interest defence, particularly in cases where a media publication invokes the guilt of the accused. Whilst Australian courts formerly favoured the right to fair trial over the right to freedom of press, the majority judgment suggests that courts must now balance the scales. The majority decision does not advocate for 'trial by media', it simply supports

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102 Ibid.

103 Id at paras 4–5. The Bill was introduced to Parliament 14 May 1997. The media criticised the Bill as 'discriminatory' and encouraged the Government to conduct further public consultation before proceeding with the Bill. The Bill eventually lapsed on 3 February 1999 when the Legislative Council was prorogued.

104 The costs of running a criminal trial includes monies spent on legal fees (salaries and expenses of the private legal profession, of the Legal Aid Commission, of the Director of Public Prosecutions and the Police); and those costs accumulated by the state (which must provide the court and its staff). See, *NSW Parliamentary Debates (Hansard)* Legislative Assembly (15 May 1997) at 8571.

105 Ibid.

106 *Contempt by Publication*, above n2 para 14.46.

freedom of speech being accorded *equal* weight to the right to a fair trial. Despite the renewed scope for freedom of speech, the media must be still be extremely cautious when publishing material, especially since there are limited guidelines as to what subject matter courts will deem to be of 'sufficient public interest' to escape a charge of contempt. The strong dissent by Mason P, and the proposed reforms to the law of contempt made by the NSWLRC, have the potential to discourage the media from reporting on legal proceedings. This development is undesirable, especially in lieu of the right of citizens to open justice and political discussion. To this end, a predetermined balancing test in situations where a publication invokes the guilt of an accused not only ignores the public interest in freedom of speech, but also the possibility that the jury may well forget the imputation of guilt before they even get to court.