

Contempt
by Professor David Rolph

Book launch by
The Hon A S Bell¹
Chief Justice of New South Wales

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Banco Court

Supreme Court of New South Wales

1 This book, which it is my pleasure to launch tonight, is not dedicated to Mr Donald Trump, 45th President of the United States, but it could well have been because no one in recent times has done so much to highlight the metes and bounds of the law of contempt as he has.

2 Judges have been criticized: “The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned.”² And the judge currently hearing the damages assessment in the Southern District of New York has been described by the former President as “tyrannical and unhinged”, as a “fully biased Trump Hater” and as presiding over a “sham trial”.³

3 Judges have been accused of being corrupt:

“Democrat Judge, under control of radical Letitia James, continues to harass President Trump, doing all possible to infringe on President Trump’s First

¹ The Chief Justice acknowledges the assistance of his Researcher, Mr Jacob Lerner, in the preparation of these remarks.

²<https://www.politico.com/story/2017/02/trump-judge-james-robart-234645#:~:text=ruling%20%E2%80%9Cridiculous.%E2%80%9D-,%E2%80%9CThe%20opinion%20of%20this%20so%2Dcalled%20judge%2C%20which%20essentially.appointee%20of%20President%20George%20W.>

³<https://www.politico.com/news/2023/11/06/trump-civil-fraud-trial-00125515>;
<https://www.politico.com/news/2023/11/06/trump-civil-fraud-trial-testimony-00125458>.

Amendment right to free speech and to interfere in the 2024 Presidential Election. These corrupt efforts, directed by Crooked Joe Biden, will fail.”⁴

4 Prospective witnesses have been intimidated, both generally and individually: “IF YOU GO AFTER ME, I’M COMING AFTER YOU!”⁵

5 A former staffer, who gave evidence to Congress unfavourable to Mr Trump, stated in that evidence:

““What they said to me is as long as I continue to be a team player, they know that I’m on the team, I’m doing the right thing, I’m protecting who I need to protect, you know, I’ll continue to stay in the good graces in Trumpworld. ... And they have reminded me a couple of times that Trump does read transcripts and just keep that in mind as I proceed through my depositions and interviews with the committee. ...You know, I’d seen this world ruin people’s lives or try to ruin people’s careers.”⁶

6 So too have jurors been intimidated:

“There has rarely been a juror so tainted as the forewoman in the Roger Stone case. Look at her background. She never revealed her hatred of “Trump” and Stone. She was totally biased, as is the judge. Roger wasn’t even working on my campaign. Miscarriage of justice. Sad to watch!”⁷

7 Potential witnesses have been induced with suggested future Presidential pardons, including Paul Manafort, his former Campaign Chairman.⁸

8 Orders have been openly breached: after Judge Chutkan reinstated a gag order on Mr Trump pending his trial for alleged election interference, he called her a “TRUE TRUMP HATER”,⁹ later saying:

“RADICAL LEFT JUDGE TAKING AWAY MY RIGHT TO FREE SPEECH IN ORDER TO HELP CROOKED JOE BIDEN & HIS THIRD WORLD ELECTION INTERFERENCE SCAM. AS GOOD AS THIS SOUNDS, IT WON’T WORK!”¹⁰

⁴ <https://www.theguardian.com/us-news/2023/oct/25/trump-gag-order-judge-fraud-trial>

⁵ <https://www.politico.com/news/2023/08/04/feds-alert-judge-to-trumps-if-you-go-after-me-im-coming-after-you-post-00109944>

⁶ <https://www.washingtonpost.com/politics/2023/08/07/trump-witness-tampering-analysis/>

⁷ https://twitter.com/realDonaldTrump/status/1232395209125707776?ref_src=twsrc%5Etfw

⁸ <https://www.today.com/video/paul-manafort-pardon-not-off-the-table-trump-says-1383614019902>

⁹ <https://abcnews.go.com/Politics/judge-reinstates-trump-gag-order-jan-6-case/story?id=104466343>

¹⁰ <https://truthsocial.com/@realDonaldTrump/posts/111327885241279670>

- 9 One can see freedom of expression being invoked in defence of all of this but the First Amendment is not and has never been absolute, as both the law of libel and contempt illustrate, and as the United States Supreme Court has said on innumerable occasions.
- 10 Although various judges have shown restraint in the punishment of many flagrant contempts, some sanctions, albeit modest, have been imposed on Mr Trump. It is almost as if the former President is playing a game of “Dare”, for if the ultimate sanction of imprisonment for contempt were imposed on him, there is no doubt that that would be weaponised too, and the courts would be drawn even deeper into the civic morass that is bedevilling the United States and respect for the rule of law in that country.
- 11 This depressing overview causes one to ponder - if only Mr Trump had had the benefit of Professor David Rolph’s book on contempt! A weighty tome, both physically and intellectually; a *magnum opus* if ever there was one, a *tour de force*, to pivot to a living language.
- 12 On the subject of contempt, it is Professor Rolph and not Mr Trump who, to quote the latter, “has words, he has the best words”!
- 13 As the learned Professor says in the opening sentence of the work, the jurisdiction of a court to deal with contempt is “of fundamental importance to the administration of justice”. The law of contempt supplies a key mechanism by which Court orders may be upheld and enforced, and which, before any orders are made, interference with the administration of justice is controlled. The law of contempt is the “WD40” which is to be cautiously applied to corrosion of, or attempts to corrode, our system of justice.
- 14 This book launch is taking place in the very Banco Court where, in 1987, Chief Justice Steet, and Justices Hope, Glass, Samuels and Priestley famously joined to impose a fine of \$25,000 on the Premier of New South Wales, the Hon

Neville Wran QC MP, for contempt, and a fine of \$200,000 on Nationwide News for republishing his remarks.¹¹ Their Honours said:

“The processes of criminal justice are not subject to the opinions of leaders of the community, however eminent. The impartiality of jurors must be protected from the influence which the public expression of opinion by prominent people about the critical issue of guilt or innocence may tend to exert. It must be made plain that the courts will not tolerate the deliberate intervention of those in positions of authority who deploy their power and prestige in support of assertions of that kind.”¹²

- 15 The subject of contempt is not only important; it is complex and diverse.
- 16 Contempt of court may be committed “in court” or outside of court.
- 17 At common law, it could only be punished by a superior court of record.
- 18 It may be in relation to a specific case (*sub judice* contempt), or it may amount to a more general interference with the administration of justice.
- 19 The contempt may not be of a court but of other quasi-judicial bodies or tribunals including Royal Commissions, the newly formed National Anti-Corruption Commission, and the Australian Crime Commission.¹³
- 20 Contempt may be civil or criminal although, as the High Court in *CFMEU v Boral*¹⁴ has affirmed, proceedings for contempt only lie within the Court’s civil jurisdiction. Somewhat confusingly, however, the standard of proof is that of the criminal law, namely beyond reasonable doubt for both civil and criminal contempts: *Witham v Holloway*¹⁵ but the question of whether this standard of proof is affected by the uniform evidence legislation (see *Evidence Act 1995*

¹¹ *Director of Public Prosecutions v Wran* (1987) 7 NSWLR 616.

¹² At 640.

¹³ There is an in depth analysis, for example, of the statutory procedure in the *Australian Crime Commission Act 2002* (Cth) for referrals of contempt from that body to the Federal Court.

¹⁴ (2015) 256 CLR 375; [2015] HCA 21.

¹⁵ (1995) 183 CLR 525.

(NSW)), given that all contempt proceedings are in the civil jurisdiction, has been raised.¹⁶

21 WS Gilbert would have had a field day with these curiosities – as Little Buttercup sang to Captain Corcoran in *HMS Pinafore*: “Things are seldom what they seem; skim milk masquerades as cream”.

22 It is not surprising, then, that the law of contempt has been referred to as *sui generis*.

23 Chief Justice Gageler writes in the foreword to Professor Rolph’s work:

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

24 Professor Rolph’s book is simply but arrestingly entitled *Contempt*. Running to some 831 pages of text, it fills an undoubted void in Australian legal scholarship. There are presently no Australian textbooks on the law of contempt, and in that respect this book will be of so much use to judges and practitioners who find themselves, often at short notice, needing to deal with the difficult questions posed by contempt of court.

25 Those questions are only more difficult because, as is pointed out, dealing with contempt may involve a judge acting as prosecutor, witness and judge¹⁷ which is not the normal way we do business. There is an unavoidable invidiousness in the subject where the distinction between seeking to uphold respect for the administration of justice, on the one hand, and, in some cases at least, reacting

¹⁶ *ASIC v Sigalla (No 4)* (2011) 80 NSWLR 113 per White J.

¹⁷ At 421, citing *Keeley v Brooking* (1979) 143 CLR 162 at 173 (Stephen J); *R v Jones* (1992) 58 A Crim R 471 at 473 (Hedigan J); *Clampett v Attorney-General (Cth)* (2009) 181 FCR 473 at 481-82 (Black CJ); [2009] FCAFC 151. See especially *European Asia Bank AG v Wentworth* (1986) 5 NSWLR 445 at 452 (Kirby P).

to personalized attacks, on the other hand, may not always be clear cut. There is also a tension between the law of contempt and a common law assumption of freedom of expression,¹⁸ or what has been described as a residual liberty, albeit one constitutionalized in the context of political communication.¹⁹

- 26 There are two leading English texts in this field upon which Australian practitioners have hitherto had to draw. The first is *Arlidge, Eady & Smith on Contempt* (Sweet & Maxwell, 2017), now in its fifth edition. Its first edition was published in 1982 as *The Law of Contempt* (Sweet & Maxwell) by Anthony Arlidge and David Eady. It followed the introduction of the *Contempt of Court Act 1981* (UK).
- 27 Arlidge KC died earlier this year. His other claim to fame was that, at age 76, having left his then-partner, a Recorder of the Crown Court, he took up with a 25 year old barrister! It is not clear that this was also the cause of his death. The law of contempt, as we shall see, attracts its fair share of colourful characters. David Rolph has brought some of them to life.
- 28 *Arlidge, Eady & Smith*, while containing some reference to Australian cases, does not have any particular focus on the Australian law of contempt which is scarcely surprising since the law of contempt in the United Kingdom fundamentally lies on a statutory basis, following the Phillimore Report, which was the product of a committee led by Sir Henry Phillimore.²⁰ Despite a very substantial report a few years later by the Australian Law Reform Commission suggesting legislative reform,²¹ the law of contempt in Australia is to be found principally in the common law.
- 29 The other leading English text is Borrie and Lowe's *The Law of Contempt* (LexisNexis, 2010), now in its fourth edition. The second edition of Borrie and

¹⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564.

¹⁹ Ibid. See D Meagher :Is there a common law "right" to freedom of speech?" (2019) 43 Melbourne University Law Review 269.

²⁰ *Report of the Committee on Contempt of Court*, HMSO, London, 1977.

²¹ Australian Law Reform Commission, *Contempt* (Report No 35, June 1987).

Lowe in 1998 contained an Australian supplement, written by Arnold Shott, one-time Chief Magistrate of the Magistrates Court of Tasmania.

- 30 It is Professor Rolph's work, however, which is magisterial, and not at all supplementary. It will become the standard and authoritative Australian text on the subject and invaluable to judges, practitioners, students and academics in this country who are faced with questions of contempt.
- 31 For all its weight, *Contempt* is not without its lighter moments. Some relate to scandalising the Court, such as the journalist who was unhappy at the division of the legal profession of NSW into barristers and solicitors. That journalist – aggrieved at the “illegal and unjust act, enforced in a most ungracious and ungentlemanly manner”, “secretly procure[d]” by the judges of the Supreme Court – received a 50 pound fine and a two year good behaviour bond.²² That was in 1880.
- 32 As it turns out, in New Brunswick, Canada, it was also considered contemptuous to refer in a newspaper to a serving judge as “distinguished judicial acrobat Mr Justice Pooh-Bah”.²³ That was in 1888, three years after Gilbert & Sullivan's Pooh-Bah, the Lord High Everything Else, had been introduced to the world in *The Mikado*.
- 33 Much inventive invective is discussed. In *R v Gray*,²⁴ for instance,²⁵ the editor of the *Birmingham Daily Argus* was found guilty of contempt and fined 100 pounds by Darling J for describing the judge in his newspaper in the following way, after the judge had warned the assembled press not to publish any indecent materials that were revealed in a trial for libel over which he was then presiding:

“There is not a journalist in Birmingham who has anything to learn from the impudent little man in horse-hair, a microcosm of conceit and empty-headedness, who admonished the Press yesterday.... One is almost sorry that the Lord Chancellor had not another relative to provide for on the day that he

²² *R v Stephen* (1880) 1 NSW(L) 244 (Dowling J).

²³ *In re Hawke* (1888) 28 NBR 391.

²⁴ [1900] 82 LT 534.

²⁵ At 296.

selected a new judge from among the larrikins of the law. One of Mr Justice Darling's biographers states that "an eccentric relative left him much money." That misguided testator spoiled a successful bus conductor."

That was in 1900.

- 34 One example of contempt in the face of the Court²⁶ is seen in the Victorian decision in *Re Dakin*²⁷ in which a man was fined for refusing to comply with a direction from the presiding judge in a criminal court that the man's workers should stop hammering in the yard adjacent to the court as the noise was disrupting the trial. Closer to home, a sacristan at St James' King Street, who was directed by Stephen CJ's tipstaff to stop the persistent tolling of a bell, pleaded that he had higher orders to obey. This defence was unavailing and he was found guilty of contempt, imprisoned until the rising of the court and fined.²⁸
- 35 Chief Justice Stephen, our third Chief Justice and staring directly at me as I speak, was also the judge at the centre of the famous contretemps between two prominent Sydney barristers who spent the Christmas of 1846 behind bars for assaulting each other in Court. The Chief Justice was trying a debt action. The forthcoming history of the Supreme Court²⁹ records the following:

"Richard Windeyer took umbrage that his opponent, John Darvall, called his client 'a fellow'. Windeyer protested that his client was at least an honest fellow — more than could be said for Darvall's client. As the judge tried to dampen things down, Windeyer repeated his assertion, adding that Darvall himself was a liar. Stephen CJ reported:

'Mr Darvall then struck Mr Windeyer forcibly with the brief which he held in his hand, on the neck or face. Mr Windeyer instantly started to the floor with his fists clenched and his arms squared at Mr Darvall; when — as he was striking, but before he struck, a blow — an officer in attendance placed himself between the parties.'

Aghast at such behaviour, Stephen committed the barristers to the custody of the Sheriff and adjourned for two hours while he consulted his colleagues. When he returned, the two combatants did not dispute his account, but they tendered apologies. Unmoved, Stephen sentenced

²⁶ At 434.

²⁷ (1887) 13 VLR 522 at 541

²⁸ J. Bennett, *A History of the Supreme Court of New South Wales*, 1974 pp 9, 17–18, 65.

²⁹ K Mason and L Reid (eds), forthcoming.

Darvall to 14 days' imprisonment, Windeyer to 20; and each was placed on a good behaviour bond for two years."

36 I have pondered as to who might be our contemporary equivalents of Messrs Darvall and Windeyer but discretion requires me not to develop this theme.

37 On the subject of judicial responses to contempt, there is more than one way to address the matter. As the forthcoming history of the Supreme Court also notes:

"The *MSK* rape trial before Hidden J in 2005 saw the accused hurling pears at the wall above the jury. Later, he grabbed a glass carafe from the Bar table, smashed its top and threatened the prosecution solicitor before throwing it at the mothers of the two complainants. A glass was then thrown at the Bench, saturating the stenographer. The following week, all glassware in the Court was replaced with plastic or metal carafes and plastic glasses."³⁰

38 To return to Professor Rolph's text. The Introduction to the work is rather more than its name implies. It is an extended piece of scholarship which notes the constitutional dimensions of the subject including the interaction between the law of contempt and the constitutionally implied freedom of political communication. More intriguing in the constitutional context is the extent to which the power of a Chapter III Court or a state court exercising federal jurisdiction to punish for contempt forms an indispensable aspect of such a court, and thus within the protection of the *Kable* principle³¹ and thus not able to be cut down by statute.

39 *Contempt* teases out the fine distinctions, as well as areas of overlap between civil and criminal contempt, and engages in detailed analysis of various types of contempt, including *sub judice* contempt, scandalising the court, contempt in the face of the court and the frustration and subversion of various court orders. There are specific chapters concerned with contempt arising from disclosure of jury deliberations, and with the refusal of journalists to reveal their sources, as

³⁰ See further D Bieri, 'The Broken Glass Carafe Incident' in *Known disruptive episodes in the history of the New South Wales Supreme Court* (unpublished, copy in the Law Courts Library).

³¹ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; [1996] HCA 24.

well as chapters dealing with sanctions for contempt, penalties, imprisonment and other relief and common issues of procedure.

- 40 Where there are differences in procedure between Australian States and Territories, or specific statutory provisions which affect the law of contempt in particular jurisdictions, they are meticulously noted, and far from parochial.
- 41 The book also contains an excellent and detailed Table of Contents which, in and of itself, serves to impose structure on what may otherwise be amorphous and somewhat haphazard. The Table of Contents in turn is supplemented by a detailed and very useful index, necessary for a book of such length and detail and which underlines the fact that this book is not solely the work of a theoretician. It will be of immense practical value and, as I like to say at book launches, it would be professionally negligent for most barristers not to have a copy on his or her shelves. So too should the representatives of the press, many of whom I am pleased to see in attendance on this occasion.
- 42 A new work of great scholarship is always to be welcomed and applauded, and the Federation Press in Australia has been vital in bringing such works to the market. As I observed in my foreword to *The Law of Tracing* by Jordan English and Jaamae Hafeez-Baig, also published by Federation Press:

“Something should be said about the importance of good textbooks in a legal practitioner’s library in the modern “online” world. In that world, there is, of course, no such thing as an unreported decision and practitioners have instant and frequently free access not only to all decisions of superior courts in their own jurisdictions but also in many, many other jurisdictions, both within Australia and throughout the common law world. That is at once a boon and a burden. On the one hand, ready and rapid access to judicial decisions from around the globe means that the store of knowledge is vast but, on the other hand, the volume of case law is such that its comprehension and absorption by the busy practitioner will often be impossible. This makes it all the more imperative for practitioners to build professional libraries of well written texts so as to be able to draw upon the clear and up to date distillation of principle and authority. Federation Press has been at the forefront of publishing such texts”.

- 43 *Contempt* will be another monument in the Federation Press library.

- 44 It is what we have come to expect from Professor Rolph, a highly regarded and prodigious scholar. This is his third major book, following *Reputation, Celebrity and Defamation Law*³² and *Defamation Law*.³³ He has also contributed to many other texts as a named co-author: *Cases on Torts*,³⁴ together with the recently retired Professor Barbara McDonald to whom he generously but appropriately dedicates *Contempt, Media Law: Cases, Materials and Commentary*,³⁵ as a co-author of the first through third editions; *Gatley on Libel and Slander*³⁶ and *Balkin and Davis Law of Torts*.³⁷ He was also an editor of the *Sydney Law Review* from 2007 to 2013 and remains a highly regarded teacher of Defamation Law at the University of Sydney, as well as teaching an annual course on “Media Law: Contempt of Court and Open Justice”.
- 45 This book launch has been looked over by Sir Frederick Jordan (to my right, second from the left) whose judgment in *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd*³⁸ would come to be described by Lord Reid in the House of Lords as containing ‘no better statement of the law’ of contempt³⁹ and was similarly lauded by Sir Anthony Mason in *Hinch v Attorney-General (Vic)*⁴⁰ and by Spigelman CJ in *John Fairfax Publications Pty Ltd v Attorney-General (NSW)*.⁴¹
- 46 Professor Rolph has produced a detailed, scholarly, accurate and very readable account of the law of contempt of which Sir Frederick Jordan would approve. It is fitting that such a book is launched in his intellectually large and looming presence.
- 47 I congratulate Professor Rolph, for this is a singular achievement. I also thank him for his undertaking on behalf of the legal profession. This is a book which

³² Aldershot, 2008.

³³ Thomson Reuters, 2016.

³⁴ Federation Press, 7th ed., 2023 and 6th ed., 2017.

³⁵ Oxford University Press, 2010, 2015 and 2022.

³⁶ Sweet & Maxwell, 13th ed., 2022.

³⁷ LexisNexis, 6th ed., 2021.

³⁸ (1937) 37 SR(NSW) 242.

³⁹ *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 296.

⁴⁰ (1987) 164 CLR 15 at 18.

⁴¹ (2000) 181 ALR 694 at 714; [2000] NSWCA 198.

will quickly become the authoritative text in the field in the finest tradition of outstanding Australian legal scholarship.

48 Without further ado, it gives me great pleasure to officially launch *Contempt*.
