[2012] WASCA 84

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	ALLBEURY -v- CORRUPTION AND CRIME COMMISSION [2012] WASCA 84
CORAM	**:**	McLURE P BUSS JA MAZZA JA
HEARD	**:**	13 OCTOBER 2011
FINAL SUBMISSIONS	**:**	8 NOVEMBER 2011
DELIVERED	**:**	13 APRIL 2012
FILE NO/S	**:**	CACV 19 of 2011
BETWEEN	**:**	TRISTAN ROGER ALLBEURY Appellant AND CORRUPTION AND CRIME COMMISSION Respondent
FILE NO/S	**:**	CACV 20 of 2011
BETWEEN	**:**	CLOVIS MURHABAZI CHIKONGA Appellant AND CORRUPTION AND CRIME COMMISSION Respondent

FILE NO/S	**:**	CACV 21 of 2011
BETWEEN	**:**	STEPHEN LAURENCE SILVESTRO Appellant
		AND
		CORRUPTION AND CRIME COMMISSION Respondent
FILE NO/S	**:**	CACV 22 of 2011
BETWEEN	**:**	TROY CRISPIN SMITH Appellant
		AND
		CORRUPTION AND CRIME COMMISSION Respondent

ON APPEAL FROM:

Jurisdiction	**:**	SUPREME COURT OF WESTERN AUSTRALIA
Coram	**:**	MARTIN CJ
Citation	**:**	CORRUPTION AND CRIME COMMISSION -v- ALLBEURY, SILVESTRO, CHIKONGA, SMITH [No 2] [2011] WASC 26
File No	**:**	CIV 2870 of 2010, CIV 2871 of 2010, CIV 2872 of 2010, CIV 2875 of 2010

Catchwords:

Jurisdiction - Criminal contempt - Appeals against sentence by contemnors - Whether the Court of Appeal has jurisdiction to entertain the appeals - *Corruption and Crime Commission Act 2003* (WA), s 163 - *Supreme Court Act 1935* (WA), s 58(1) - Appeals competent

Criminal contempt - Sentencing - Contempt of the Corruption and Crime Commission - Relevant principles - Error of fact by sentencing judge - Whether error of fact material - Whether sentences manifestly excessive - Whether sentencing judge erred in failing to reduce the sentence of one of the contemnors for his plea of guilty

Legislation:

Acts Amendment (Court of Appeal) Act 2004 (WA)
Acts Amendment and Repeal (Courts and Legal Practice) Act 2003 (WA), s 130(2)
Administration of Justice Act 1960 (UK), s 13
Corruption and Crime Commission Act 2003 (WA), s 7A, s 7B, s 96, s 160, s 162, s 163, pt 4,
Criminal Appeal Act 1907 (UK), s 3
Criminal Appeals Act 2004 (WA), s 23, pt 2, pt 3
Criminal Code (Qld), s 668D
Criminal Code (WA)
Criminal Code Act 1899 (Qld), s 8
Criminal Code Act 1913 (WA), s 4, s 7
Criminal Procedure Act 2004 (WA), s 183, pt 2 div 2
Criminal Procedure Rules 2005 (WA), pt 14
District Court of Queensland Act 1967 (Qld), s 118, s 129(1)
District Court of Western Australia Act 1969 (WA), s 63(1), s 79(1)
Interpretation Act 1984 (WA), s 5
Judicature Act 1873 (UK), s 47
Judicature Act 1876 (Qld), s 9, s 10, s 19
Rules of the Supreme Court 1909 (WA), O 42
Rules of the Supreme Court 1971 (WA), O 55
Sentencing Act 1995 (WA), s 3(3)(a)
Supreme Court Act 1880 (WA), s 18
Supreme Court Act 1886 (WA), s 1
Supreme Court Act 1921 (Qld)
Supreme Court Act 1935 (WA), s 4, 7(1), 16, 21, s 22(2), pt IV, s 58(1), s 58(1a), s 58(2)
Supreme Court Act 1995 (Qld), s 254
Supreme Court Act Amendment Act 1957 (WA)
Supreme Court of Judicature (Consolidation) Act 1925 (UK), s 31(1)(a)
Supreme Court Ordinance 1861 (WA)

Result:

Appeals dismissed

Category: A

Representation:

CACV 19 of 2011

Counsel:

Appellant	:	Mr L M Levy SC
Respondent	:	Mr D W L Renton & Ms T M Chung

Solicitors:

Appellant	:	S C Nigam & Co
Respondent	:	Corruption and Crime Commission of Western Australia

CACV 20 of 2011

Counsel:

Appellant	:	Mr L M Levy SC
Respondent	:	Mr D W L Renton & Ms T M Chung

Solicitors:

Appellant	:	A Padmanabham
Respondent	:	Corruption and Crime Commission of Western Australia

CACV 21 of 2011

Counsel:

Appellant	:	Mr L M Levy SC
Respondent	:	Mr D W L Renton & Ms T M Chung

Solicitors:

Appellant	:	S C Nigam & Co
Respondent	:	Corruption and Crime Commission of Western Australia

CACV 22 of 2011

Counsel:

Appellant	:	Mr L M Levy SC
Respondent	:	Mr D W L Renton & Ms T M Chung

Solicitors:

Appellant	:	S C Nigam & Co
Respondent	:	Corruption and Crime Commission of Western Australia

Case(s) referred to in judgment(s):

Ahnee v Director of Public Prosecutions [1999] 2 AC 294
Allcock v Hall [1891] 1 QB 444
Ardrey v Bartlett [2004] WASCA 256
Attorney-General (NSW) v John Fairfax & Sons Ltd (1985) 6 NSWLR 695
Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd [1986] HCA 46; (1986) 161 CLR 98
Australian Building Construction Employees' and Builders Labourers' Federation v David Syme & Co Ltd (1982) 59 FLR 48
Australian Consolidated Press Ltd v Morgan [1965] HCA 21; (1965) 112 CLR 483
Australian Iron and Steel Ltd v Greenwood (1962) 107 CLR 308
Bahar v The Queen [2011] WASCA 249; (2011) 255 FLR 80
Barmettler v Greer & Timms [2007] QCA 170
Bradshaw v Attorney-General [1998] QCA 42; [2000] 2 Qd R 7
Cameron v The Queen [2002] HCA 6; (2002) 209 CLR 339
Carter v The Managing Partner, Mallesons Stephen Jaques (Unreported, WASC, Library No 930374, 15 July 1993)
Carter v The Managing Partner, Northmore Hale Davy & Leake (Unreported, WASC, Library No 930375, 15 July 1993)
Castlecity Pty Ltd v Newvintage Nominees Pty Ltd [2003] WASCA 30
CDJ v VAJ [1998] HCA 67; (1998) 197 CLR 172

Commissioner of Main Roads v Jones [2005] HCA 27; (2005) 79 ALJR 1104
Commissioner of Stamp Duties v Permanent Trustee Co Ltd (1987) 9 NSWLR 719
Connell v The Queen (No 5) (1993) 10 WAR 424
Conway v The Queen (2002) 209 CLR 203
Corruption and Crime Commission v Allbeury, Silvestro, Chikonga, Smith [No 2] [2011] WASC 26
CSR Ltd v Della Maddalena [2006] HCA 1; (2006) 80 ALJR 458
Cullen v The Queen (Unreported, WASCA, Library No 6450, 25 September 1986)
Da Costa v Cockburn Salvage & Trading Pty Ltd [1970] HCA 43; (1970) 124 CLR 192
Davern v Messel [1984] HCA 34; (1984) 155 CLR 21
Director of Public Prosecutions v Chidiac (1991) 25 NSWLR 372
Doyle v The Commonwealth [1985] HCA 46; (1985) 156 CLR 510
Grierson v The King [1938] HCA 45; (1938) 60 CLR 431
Hammond v Aboudi [2005] WASCA 204; (2005) 31 WAR 533
Haskins v The Commonwealth [2011] HCA 28; (2011) 85 ALJR 836
Hearne v Street [2008] HCA 36; (2008) 235 CLR 125
Heedes v Legal Practice Board [2005] WASCA 166
Henderson v Taylor [2006] QCA 490; [2007] 2 Qd R 269
Hinch v Attorney-General (Vic) [1987] HCA 56; (1987) 164 CLR 15
Jemielita v The Queen (1994) 12 WAR 362
Keeley v Brooking [1979] HCA 28; (1979) 143 CLR 162
Kennedy v Lovell [2002] WASCA 226
Keramianakis v Regional Publishers Pty Ltd [2009] HCA 18; (2009) 237 CLR 268
Knight v FP Special Assets Ltd [1992] HCA 28; (1992) 174 CLR 178
Le Blanc v Queensland TAB Ltd [2002] QSC 323; [2003] 2 Qd R 65
Lim v Gregson [1989] WAR 1
Madeira v Roggette Pty Ltd (No 2) [1992] 1 Qd R 394
Microsoft Corporation v Marks (No 1) (1996) 69 FCR 117
O'Shea v O'Shea and Parnell (1890) 15 PD 59
Pang v Bydand Holdings Pty Ltd [2011] NSWCA 69
Pelechowski v Registrar, Court of Appeal (NSW) [1999] HCA 19; (1999) 198 CLR 435
Phillips v Ellinson Brothers Pty Ltd (1941) 65 CLR 221
Principal Registrar of the Supreme Court of New South Wales v Jando [2001] NSWSC 969; (2001) 53 NSWLR 527
R v Abell [2007] QCA 448
R v Ballinger [1961] QWN 24
R v Drever [2010] SASCFC 27

R v Foster; Ex parte Gillies [1937] St R Qd 67
R v Herring (Unreported, NSWSC, No 70140 of 1990, 3 October 1991)
R v Lowrie [1998] 2 Qd R 579
R v Ogawa [2009] QCA 307; [2011] 2 Qd R 350
R v Pearce (1992) 7 WAR 395
R v Queensland Television Ltd; Ex parte Attorney-General [1983] 2 Qd R 648
R v Shannon (1979) 21 SASR 442
R v Wheeldon (1978) 33 FLR 402
Re Colina; Ex parte Torney [1999] HCA 57; (1999) 200 CLR 386
Re Contempt of Court by CBD [2002] ACTSC 87
Re Macks; Ex parte Saint [2000] HCA 62; (2000) 204 CLR 158
Registrar of the Court of Appeal v Gilby (Unreported, NSWCA, 20 August 1991)
Registrar, Criminal Division, Supreme Court of New South Wales v Glasby [1999] NSWSC 846
Riebe v Riebe [1957] HCA 66; (1957) 98 CLR 212
Scott v Scott [1913] AC 417
Southside Autos (1981) Pty Ltd v Commissioner of State Revenue [2008] WASCA 208; (2008) 37 WAR 245
Stanbridge v Director of Public Prosecutions (Unreported, QCA, No 5416 of 1996, 27 May 1997)
Sweeney v Fitzhardinge [1906] HCA 73; (1906) 4 CLR 716
The Owners of the Ship 'Shin Kobe Maru' v Empire Shipping Company Inc [1994] HCA 54; (1994) 181 CLR 404
The State of Western Australia v O'Rourke [2010] WASCA 141
Thompson v Mastertouch TV Service Pty Ltd (No 3) (1978) 38 FLR 397
Tieleman v The Queen [2004] WASCA 285
Veen v The Queen (No 2) [1988] HCA 14; (1988) 164 CLR 465
Witham v Holloway [1995] HCA 3; (1995) 183 CLR 525
Wood v Staunton (No 5) (1996) 86 A Crim R 183
Worrall v Commercial Banking Co of Sydney Ltd [1917] HCA 67; (1917) 24 CLR 28

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1 **McLURE P**: I have had the advantage of reading the judgment of Buss JA. I agree with him that the appeals are competent. I also agree that the appeals should be dismissed generally for the reasons he gives. However, I propose to state my own reasons for concluding that the appeals are competent.

2 A right of appeal from a decision of a court was unknown to the common law and is entirely a creature of statute: ***Davern v Messel*** (1984) 155 CLR 21, 47. Thus, this court does not have jurisdiction to hear and determine an appeal unless a statute so provides. See also, s 20 of the *Supreme Court Act 1935* (WA) (SCA). Whether a statute so provides is a question of construction.

3 Section 58 of the SCA deals with this court's jurisdiction. It relevantly provides:

> (1) Subject as otherwise provided in this Act and to the rules of court, the Court of Appeal shall have and shall be deemed since the coming into operation of this Act always to have had jurisdiction to hear and determine -
>
> (a) applications for a new trial or rehearing of any cause or matter, or to set aside or vary any verdict, finding or judgment found given or made in any cause or matter tried or heard by a judge or before a judge and jury;
>
> (b) … appeals from a judge and from a master whether sitting in court or in chambers;
>
> …
>
> (f) applications and appeals under Part 3 of the *Criminal Appeals Act 2004* to the Court of Appeal;
>
> (g) appeals under Part 2 of the *Criminal Appeals Act 2004* that are ordered to be dealt with by the Court of Appeal;
>
> (h) applications and appeals under Part 2 of the *Criminal Appeals Act 2004* from a judge to the Court of Appeal;
>
> …
>
> (m) all causes and matters and proceedings which -
>
> (a) by any Act of this State, or the rules of court; or
>
> (b) by or under any Imperial Act, or Act of the Commonwealth of Australia,

> are required to be heard and determined by the Court of Appeal.
>
> …
>
> (2) Any appeal, application, cause, matter or proceedings referred to in subsection (1) shall lie or may be made to, or may be brought before, the Court of Appeal which, subject as aforesaid, shall hear and determine the same, and questions incidental thereto.

4 Before focussing on issues of construction, it is helpful to sketch the relevant background which includes the historical position in English law relating to contempt of court and appeals therefrom.

Background

5 In England, as in Australia, contempt of court is divided into two categories, criminal contempt and civil contempt. In the period between the commencement of the *Judicature Act 1873* (UK) in 1875 and 1960, one of the most important distinctions between criminal and civil contempts in England was that there was a right of appeal in relation to civil contempt but not in relation to criminal contempt. A right of appeal in criminal contempt was provided for in the *Administration of Justice Act 1960* (UK), s 13.

6 Prior to the *Judicature Act*, England had one set of courts administering equity and another set of courts administering the common law. The *Judicature Act* united and consolidated the superior courts of law and equity in England into one Supreme Court of Judicature which comprised two divisions, the High Court, exercising original jurisdiction, and the Court of Appeal, exercising appellate jurisdiction. Law and equity were thereafter administered together by a single court. Section 19 of the *Judicature Act* provided that the Court of Appeal had jurisdiction to determine appeals from any judgment or order of the High Court. However, s 19 was subject to s 47 which provided that 'no appeal shall lie from any judgment of the … High Court in any criminal cause or matter'.

7 In ***O'Shea v O'Shea and Parnell*** (1890) 15 PD 59, the Court of Appeal (Cotton, Lindley & Lopes LJJ) held that criminal contempt is a criminal offence punishable at common law by summary process and thus was a 'criminal cause or matter' for the purposes of s 47. Accordingly, there was no right of appeal. This characterisation of criminal contempt as a criminal cause or matter was adopted and applied by the Full Court (Burt CJ, Brinsden & Kennedy JJ) in ***Cullen v The Queen*** (Unreported, WASCA, Library No 6450, 25 September 1986). The appellant in ***Cullen***

had been convicted of, and sentenced to 6 months' imprisonment for, criminal contempt of court under s 63 of the *District Court of Western Australia Act 1969* (WA) (DCA). Section 79 of the DCA conferred a right of appeal on a party to an 'action' or 'matter' who was dissatisfied with a final or interlocutory judgment. Those terms (which were defined) were held to be confined to civil proceedings. As the Full Court characterised the conduct as a criminal cause or matter, s 79 did not apply. Rights of appeal from the District Court to the Supreme Court in connection with criminal proceedings were at that time found in s 688 of the *Criminal Code* (WA) (the Code). Section 688 of the Code was confined to appeals from indictable offences. The Full Court also concluded that there was no right of appeal under s 58(1) of the SCA. Accordingly, the appeal was said to be incompetent.

8 One of the issues in this appeal is whether the Full Court's characterisation of criminal contempt proceedings as criminal rather than civil is inconsistent with the decision of the High Court in ***Hinch v Attorney-General (Vic)*** (1987) 164 CLR 15. That was a case of criminal contempt. In considering whether the High Court should order the appellant to pay the costs of the High Court appeal, the court said:

> Notwithstanding that a contempt may be described as a criminal offence, the proceedings do not attract the criminal jurisdiction of the Court to which the application is made. On the contrary, they proceed in the civil jurisdiction and attract the rule that ordinarily applies in that jurisdiction, namely, that costs follow the event. There are many instances of the application of this rule to cases of contempt of court in this Court … (89).

9 I am not presently persuaded that the High Court in ***Hinch*** intended to assimilate criminal and civil contempts, at least for the purpose of rights of appeal. The observation, made in the context of a costs application, may mean nothing more than that criminal contempt is an offence which is punished by use of the civil procedures of the court. The existence or otherwise of a right of appeal is not a matter of procedure: ***Worrall v Commercial Banking Co of Sydney Ltd*** (1917) 24 CLR 28. Although it is unnecessary to resolve this issue for the purpose of determining the competence of this appeal, I will explain the basis of my reservation.

10 Civil contempt has always been regarded both in substance and as a matter of procedure as being within the court's civil jurisdiction. The consequence of that characterisation is that there has always been a right of appeal from both a finding of a civil contempt and the dismissal of a civil contempt application. That is not the case in relation to criminal

contempt. A statute conferring a general right of appeal which includes contempt will not be construed to confer a right of appeal from the *dismissal* of an application for criminal contempt: ***Thompson v Mastertouch TV Service Pty Ltd (No 3)*** (1978) 38 FLR 397, 412 (Deane J); ***Davern v Messel*** (33, 45 - 61). This results from the application of the rule of statutory construction to the effect that a statutory provision will not be understood to confer a right of appeal from a decision dismissing a criminal charge unless it does so distinctly: ***Davern v Messel*** (32).

11 The question whether there was a right of appeal from the dismissal of a contempt application arose for determination by the Full Court of the Federal Court (Beaumont J, Lindgren & Lehane JJ agreeing) in ***Microsoft Corporation v Marks (No 1)*** (1996) 69 FCR 117, 126 - 137. Microsoft had commenced Federal Court proceedings against the respondent for breach of copyright. The respondent consented to an injunction. Microsoft brought contempt proceedings alleging that the respondent had breached the consent orders. The trial judge dismissed the application and Microsoft appealed. There were allegations of contumelious conduct which may (but not must) transform what would otherwise be a civil contempt into a criminal contempt. The question was whether the general statutory right of appeal (in s 24 of the *Federal Court of Australia Act 1976* (Cth)) included an appeal from a dismissal of a contempt of court claim. After considering all relevant authorities, including ***Hinch***, the court concluded that there would be no right of appeal if the respondent's conduct constituted a criminal contempt (137). Beaumont J said:

> I share the misgivings expressed by Samuels JA in ***Chidiac*** as to the utility of describing any contempt proceedings as 'quasi-criminal'. In the interests of certainty in this area, I further agree with his Honour that for present purposes it is necessary to place the alleged conduct in question in one category or the other, that is, civil or criminal. For some purposes (eg costs and retrials) the distinction between civil and criminal contempt remains important. In other areas (eg the standard of proof and the scope of the accrued federal jurisdiction …[)] the distinction is now seen to be less important. But it has not been suggested in any of the authorities that the distinction should be ignored for the purpose of determining whether an appeal lies …
>
> It follows, in my opinion, that Microsoft had a right to appeal here against the trial judge's decision if the proceedings were truly of a civil kind.
>
> … In the whole of the circumstances, although a difficult question, the case should, in my opinion, be treated as civil, rather than criminal.
>
> It follows that I would reject the objection to competency (137).

12 None of this analysis would have been necessary if ***Hinch*** was authority for the proposition that an action for criminal contempt is a civil proceeding for, inter alia, appeal purposes.

Construction of s 58 of the SCA

13 Against that background, I turn to the construction of s 58 of the SCA. The first issue is whether pars (f), (g) and (h) of s 58(1) are intended to cover the field in relation to criminal offences at common law. With the exception of the common law of contempt, all criminal offences in this jurisdiction derive from statute. Section 67 of the *Interpretation Act 1984* (WA) deals with 'offences'. It provides that: offences are of two kinds, indictable and simple; an offence designated as a crime or misdemeanour is an indictable offence; an offence not otherwise designated is a simple offence; and the procedure for prosecuting and dealing with offences is set out in the *Criminal Procedure Act 2004* (WA).

14 Criminal contempt falls outside the scope of the *Criminal Procedure Act*. Indeed, s 183 of the *Criminal Procedure Act* provides that it does not affect the authority of a court to deal with and punish a person summarily for an act or omission that is a contempt of the court, but a person cannot be so punished and also punished for an offence under that Act constituted by the same act or omission. This is in recognition of the fact that there is scope for overlap between criminal contempt at common law and s 178 of the Code: see ***The State of Western Australia v O'Rourke*** [2010] WASCA 141.

15 The procedure for contempt of court, civil and criminal, is provided for in the civil procedure rules: see O 55 of the *Rules of the Supreme Court 1971* (WA) (the Rules). Indeed, prior to an amendment to the Rules in April 2005, the Full Court had, with specified exceptions, sole jurisdiction to order that a person in contempt be committed to prison.

16 The *Criminal Appeals Act 2004* (WA) covers the field in relation to appeals from (statutory) offences as defined in the *Interpretation Act*. Part 3 of the *Criminal Appeals Act* deals with appeals from superior courts, defined to mean the District Court and Supreme Court. Part 3 is confined to appeals in relation to offenders who are charged with (s 26) or convicted (or acquitted) of an offence on indictment. An 'indictment' is a document that contains one or more charges of an indictable offence and is lodged with a superior court: *Criminal Appeals Act*, s 4(1); *Criminal Procedure Act*, s 3(1). Part 3 of the *Criminal Appeals Act* is not intended to cover the field in relation to criminal contempts at common law.

Moreover, in this jurisdiction there is currently no statutory equivalent to s 47 of the *Judicature Act* which expressly excludes a right of appeal.

17 The remaining question is whether there is a right of appeal from a conviction or sentence for criminal contempt of court under any paragraph of s 58(1) of the SCA.

18 The text of s 58(1)(b) is very wide. It is not in terms confined by reference to any subject matter or category of decisions. In particular, it is not confined to civil proceedings and I see no justification for reading it down to exclude a decision that is sui generis. Indeed, it is inappropriate to read down provisions conferring jurisdiction by imposing limitations not found in the express words unless there is something to indicate to the contrary: ***The Owners of the Ship 'Shin Kobe Maru' v Empire Shipping Company Inc*** (1994) 181 CLR 404, 421; ***Knight v FP Special Assets Ltd*** (1992) 174 CLR 178, 205. Section 58(1)(b) is wide enough to confer a right of appeal in this case, being an appeal from a judgment of conviction and sentence by a judge of the Supreme Court.

19 For these reasons I conclude that this court has jurisdiction to hear and determine these appeals under s 58(1)(b) of the SCA. This conclusion is not inconsistent with ***Cullen*** which concerned an appeal from a decision of a judge of the District Court.

20 However, I am not persuaded that s 58(1)(a) is the source of jurisdiction to appeal from a conviction or sentence for contempt of court or, indeed, the source of any appellate jurisdiction at all. Section 58(1) relates to this court's jurisdiction in general, not just its appellate jurisdiction. Only pars (b), (f), (g), (h) and (i) of s 58(1) confer appellate jurisdiction. Those paragraphs identify the decisions and/or the decision-makers from which or from whom an appeal lies. Paragraph (a) of s 58(1), which refers to 'applications' not appeals, does not do so. If par (a) of s 58(1) was a source of appellate jurisdiction, it would be unrestricted in terms of subject matter and decision-maker. That is obviously not the legislative intent. The parties were unable to assist in identifying the scope and purpose of s 58(1)(a). Arguably, it has two purposes. The first is to confer power on the Court of Appeal to grant relief of the type specified therein, as appropriate, in a proceeding in which it has jurisdiction under s 58(1). There is some support for that view: ***CSR Ltd v Della Maddalena*** (2006) 80 ALJR 458 [14] - [18]; ***Commissioner of Main Roads v Jones*** (2005) 79 ALJR 1104 [71] - [72]; ***Ardrey v Bartlett*** [2004] WASCA 256 [29] - [30] (O 63 of the Rules was repealed in April 2005). However, it is not the sole source of power. See

for example *Criminal Appeals Act*, s 30 - s 34. If s 58(1)(a) does not itself confer power, it confirms the existence of the inherent power necessary to the effective exercise of the jurisdiction granted: ***Keramianakis v Regional Publishers Pty Ltd*** (2009) 237 CLR 268 [35]- [36].

21 The second purpose is to preserve any original jurisdiction that the Full Court had at the commencement of the SCA in 1935 not otherwise expressly referred to in s 58(1). The nature of any such jurisdiction is likely to be found in English legal history.

22 The English courts had original jurisdiction to correct error in the absence of statutory appellate jurisdiction. The correction of error was undertaken by a full court ('the court in banc') which was not an appeal court. The nature and extent of this English jurisdiction has been considered by the High Court: ***Phillips v Ellinson Brothers Pty Ltd*** (1941) 65 CLR 221, 228 - 229; ***Conway v The Queen*** (2002) 209 CLR 203 [7] - [29]; ***Australian Iron and Steel Ltd v Greenwood*** (1962) 107 CLR 308, 315; ***CDJ v VAJ*** (1998) 197 CLR 172 [95] - [96]. See also ***South Eastern Railway Co v Smitherman*** (1883) 47 JP 773; ***Allcock v Hall*** [1891] 1 QB 444, 446 - 447; Baker JH, *An Introduction to English Legal History* (2002) 82 - 85, 136 - 141; Windeyer WJV, *Lectures on Legal History* (1938) 102 - 103.

23 That s 58(1)(a) is also a reference to historical non-appellate proceedings is supported by s 59(2), (4) and (6), which relevantly provide:

> (2) Subject to the provisions of this Act, any *application* for a new trial may be made on any ground on which a new trial could be ordered in an action at law immediately before the commencement of this Act.
>
> …
>
> (4) On the hearing of any such *application* the Court of Appeal shall have and may exercise all such powers as are exercisable by it upon the hearing of an appeal …
>
> …
>
> (6) Except as may be otherwise provided by the rules of court every *application* -
>
> (i) for a new trial; or
>
> (ii) to set aside a verdict, finding or judgment,

> in any cause or matter where there has been a trial by a judge sitting without a jury, shall be made by way of appeal to a Court of Appeal in accordance with the rules of court. (emphasis added)

24 It is apparent from s 59(6) that not all applications to exercise the powers in s 58(1)(a) are required to be made by way of appeal. See the second reading speech for the bill that became the 1935 SCA: Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 November 1935, 1790 (Mr JC Willcock, Minister for Justice). However, it is well beyond the needs of this case to attempt to identify what, if any, original jurisdiction not otherwise specified falls within s 58(1)(a). It is sufficient to say that it does not confer any rights of appeal.

25 **BUSS JA**: On 4 February 2011, Martin CJ sentenced each of the appellant in CACV 19 of 2011 (Mr Allbeury), the appellant in CACV 20 of 2011 (Mr Chikonga), the appellant in CACV 21 of 2011 (Mr Silvestro) and the appellant in CACV 22 of 2011 (Mr Smith) to terms of immediate imprisonment as punishment for contempt of the respondent (the Commission).

26 By s 163(3) of the *Corruption and Crime Commission Act 2003* (WA) (the CCC Act), relevantly, the Supreme Court has jurisdiction to punish a contempt of the Commission as if the contempt were a contempt of that court.

27 Mr Allbeury was sentenced to a total of 2 years 3 months' imprisonment as punishment for two separate contempts of the Commission. The contempts were constituted by:

(a) during an examination being conducted by the Commission, failing to answer questions that were relevant to an investigation being conducted in relation to 'section 5 offences' under the CCC Act; and

(b) insulting the Commission during the examination.

The individual sentence for the first contempt was 2 years' imprisonment and the individual sentence for the second was 3 months' imprisonment. His Honour ordered that the sentences be served cumulatively.

28 Each of Mr Chikonga, Mr Silvestro and Mr Smith was sentenced to 2 years' imprisonment as punishment for a single contempt of the Commission. Each contempt was constituted by his refusal to be sworn or

affirmed at the Commission with the consequence that no questions were put to him.

29 The appellants have appealed to this court against sentence.

Overview of the facts and circumstances of the contempts

30 At the material time, the Commission was exercising the powers conferred on it by pt 4 of the CCC Act. Part 4 is headed, 'Organised crime: exceptional powers and fortification removal'.

31 The Commission summonsed numerous people to appear and give evidence in relation to the investigation. The people summonsed included each of the appellants.

32 Mr Allbeury was served with a summons under s 96 of the CCC Act to appear before the Commission on 12 November 2010. On that date he attended at the Commission and was affirmed. However, he refused to answer any of the questions put to him by the Commissioner or counsel assisting the Commission. In addition to this refusal, Mr Allbeury repeatedly said, in response to questions, 'get fucked' or 'fuck off'.

33 Mr Chikonga was served with a summons under s 96 of the CCC Act to appear before the Commission on 12 November 2010. On that date he attended at the Commission. However, he refused to be sworn or affirmed and remained mute. As a consequence, no questions were put to him.

34 Mr Silvestro was served with a summons under s 96 of the CCC Act to appear before the Commission on 11 November 2010. On that date he attended at the Commission. However, he refused to be sworn or affirmed and remained mute. As a consequence, no questions were put to him.

35 Mr Smith was served with a summons under s 96 of the CCC Act to appear before the Commission on 17 November 2010. Mr Smith attended and reported to the Commission on 18 November 2010. A warrant which was signed on 17 November 2010 for his arrest was not executed as he attended voluntarily on 18 November 2010. The Commissioner held that Mr Smith was at the Commission, on 18 November 2010, under the force of the summons (ts 18/11/10, page 647). However, he refused to be sworn or affirmed and remained mute. As a consequence, no questions were put to him.

The Supreme Court contempt proceedings

36 On 22 November 2010, the Commission filed an originating motion in the Supreme Court against each appellant, pursuant to s 163 of the CCC Act and O 55 r 2 and r 4 of the *Rules of the Supreme Court 1971*, for an order that he be punished for contempt.

37 Each of the appellants (except Mr Chikonga) appeared on 25 November 2010, and entered a plea of not guilty. The hearing of the Commission's applications was adjourned to 13 December 2010.

38 On 25 November 2010, Martin CJ issued a warrant for Mr Chikonga's arrest as a result of his failure to appear on that date, and adjourned his case to 13 December 2010.

39 The trial of the appellants (except Mr Chikonga) proceeded on 13 December 2010. The evidence adduced by the Commission comprised certificates and affidavits which had previously been served. None of the deponents was required for cross-examination. Mr Allbeury, Mr Silvestro and Mr Smith did not give evidence. Each of them relied solely on legal submissions.

40 On 13 December 2010, his Honour found each of the appellants (except Mr Chikonga) guilty of the alleged contempts.

41 The warrant for Mr Chikonga's arrest was not executed until 15 December 2010. On 21 January 2011, he appeared before Martin CJ and was convicted on his plea of guilty.

42 Each of the appellants was sentenced on 4 February 2011. On that date, his Honour published written reasons for decision. See ***Corruption and Crime Commission v Allbeury, Silvestro, Chikonga, Smith [No 2]*** [2011] WASC 26.

The grounds of appeal

43 Each of Mr Allbeury, Mr Silvestro and Mr Smith relies on a single ground of appeal. Mr Chikonga relies on two grounds of appeal. The single ground relied on by Mr Allbeury, Mr Silvestro and Mr Smith, and ground 1 of Mr Chikonga's grounds, are identical. It is alleged that Martin CJ erred in law by imposing a sentence that was manifestly excessive 'in light of the standards of sentencing customarily observed with respect to these crimes, the place which the criminal conduct

occupies in the scale of seriousness of crimes of this type, and all of the appellant's personal circumstances'.

44 Ground 2 of Mr Chikonga's grounds asserts that his Honour erred in law by failing to give him 'any credit for his plea of guilty and thereby failed to reduce the sentence imposed'.

The Commission's preliminary issue as to jurisdiction

45 The Commission raised a preliminary issue as to this court's jurisdiction to entertain the appeals.

46 Counsel for the Commission submitted that there is no right of appeal from a decision of a Supreme Court judge that an alleged contemnor is guilty of contempt or from the sentence imposed in respect of the contempt.

47 Counsel for the appellants, in his written submissions filed before the hearing of the appeal, submitted that this court had jurisdiction to hear the appeal under s 58(1)(a) of the *Supreme Court Act 1935* (WA). He did not rely on any other provision of s 58(1).

48 At the hearing, I inquired of counsel for the appellants why he did not rely on s 58(1)(b) of the Act (appeal ts 4 - 7). During the hearing, counsel broadened his submissions to rely on s 58(1)(b). Pursuant to leave granted by this court, the appellants and the Commission filed supplementary written submissions after the hearing in relation to s 58(1)(b).

The organisation of the balance of these reasons

49 It is convenient, first, to deal with the preliminary issue raised by the Commission and then with the grounds of appeal relied on by the appellants.

Preliminary issue: the Supreme Court's jurisdiction under s 163(3) of the CCC Act

50 Section 160(1) of the CCC Act provides that a person served with a summons under s 96 of that Act requiring the person to attend and give evidence who:

(a) refuses or fails to be sworn or make an affirmation; or

(b) fails to answer any question relevant to the investigation that the Commission requires the person to answer,

is in contempt of the Commission.

51 By s 162(1)(a) of the CCC Act, a person who insults the Commission while the Commission is conducting an examination is in contempt of the Commission.

52 The issue of whether a person is in contempt of the Commission is determined by applying the relevant provisions of the CCC Act (in the present case, s 160(1) and s 162(1)(a)) to the relevant facts and circumstances.

53 In the present case, Mr Chikonga, by his plea of guilty, admitted that he was in contempt of the Commission, as alleged. The other appellants were convicted of their alleged contempts after a trial.

54 By s 163(1) of the CCC Act, where a contempt of the Commission is alleged to have taken place, the Commission may present to the Supreme Court a certificate setting out the details of the act or omission that the Commission considers constitutes the alleged contempt. By s 163(2), such a certificate is prima facie evidence of the matters certified in it.

55 Section 163(3) of the CCC Act provides that 'the Supreme Court has jurisdiction' to punish a contempt of the Commission 'as if the contempt were a contempt of that Court'.

56 The words 'as if' in s 163(3) are a deeming device.

57 In ***Re Macks; Ex parte Saint*** [2000] HCA 62; (2000) 204 CLR 158, McHugh J said:

> In ***R v Hughes*** ((2000) 202 CLR 535 at 551 [24]), this Court said that the use of the phrase 'as if' was 'a convenient device for reducing the verbiage of an enactment'. But the expression always introduces a fiction or a hypothetical contrast. It deems something to be what it is not or compares it with what it is not [115].

See also ***Haskins v The Commonwealth*** [2011] HCA 28; (2011) 85 ALJR 836 [95] (Heydon J).

58 The words 'as if' in s 163(3) create a statutory fiction. Each contempt in question is to be taken to be a contempt of the Supreme Court. Jurisdiction is conferred on the Supreme Court to punish each appellant

for his contempt of the Commission on the deemed basis that the contempt was a contempt of that court. Order 55 of the *Rules of the Supreme Court 1971* (WA) therefore applies. See ***Hammond v Aboudi*** [2005] WASCA 204; (2005) 31 WAR 533 [22] (McLure JA, Wheeler JA & Le Miere AJA agreeing).

59 Neither s 163(3) nor any other provision of the CCC Act distinguishes between the General Division of the Supreme Court and the Court of Appeal.

60 Consistently with the deeming device in s 163(3):

(a) the contempt of the Commission which is brought before the Supreme Court is to be classified, if necessary, as a criminal contempt or a civil contempt in accordance with the principles that govern this classification under the law relating to contempts of the Supreme Court;

(b) the contempt is to be classified, if necessary, as a contempt in the face of the Commission or another kind of contempt in accordance with the principles that govern this classification under the law relating to contempts of the Supreme Court; and

(c) the nature and extent of the jurisdiction conferred on the Supreme Court under s 163(3) is commensurate with the nature and extent of any original jurisdiction of the General Division, and any original or appellate jurisdiction of the Court of Appeal, under the law relating to contempts of the Supreme Court.

Preliminary issue: the distinction between civil and criminal contempt

61 There is a distinction between civil and criminal contempt of court. This distinction is based on the difference between proceedings which are remedial or coercive in the interest of a private individual (civil contempt) and proceedings in the public interest to vindicate judicial authority or maintain the integrity of the judicial process (criminal contempt). See ***Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd*** [1986] HCA 46; (1986) 161 CLR 98, 106 (Gibbs CJ, Mason, Wilson & Deane JJ); ***Witham v Holloway*** [1995] HCA 3; (1995) 183 CLR 525, 530 (Brennan, Deane, Toohey & Gaudron JJ).

62 The critical point is whether the contempt proceedings are in essence punitive (in which case they will be classified as 'criminal') or whether they are in essence remedial or coercive (in which case they will be

classified as 'civil'). See ***Hearne v Street*** [2008] HCA 36; (2008) 235 CLR 125 [22] (Kirby J), [132] - [133] (Hayne, Heydon & Crennan JJ).

63 In ***Witham***, Brennan, Deane, Toohey and Gaudron JJ said that the differences upon which the distinction between civil and criminal contempt is based are, in significant respects, 'illusory' (534). Other judges of the High Court have described the distinction as 'unsatisfactory' (***Mudginberri Station*** (107)) and have said that it occasions 'very great difficulty' (***Mudginberri Station*** (108)).

64 In ***Hinch v Attorney-General (Vic)*** [1987] HCA 56; (1987) 164 CLR 15, Deane J expressed the view that all proceedings for contempt which seek the imposition of punishment upon an alleged contemnor for a past or continuing breach of the law 'must realistically be seen as *essentially* criminal in nature' (49). (emphasis added) This was endorsed by Brennan, Deane, Toohey and Gaudron JJ in ***Witham*** (534). The view that proceedings for contempt must realistically be seen as, in essence, criminal in nature underpinned the High Court's conclusion that all charges of contempt must be proved beyond reasonable doubt. See ***Witham*** (534); ***Hearne*** [132].

Preliminary issue: criminal contempt as a common law offence and the nature of the court's jurisdiction

65 There is a long line of authority that a criminal contempt of court is a common law offence whereas a civil contempt of court does not involve an offence. See, for example, ***Doyle v The Commonwealth*** [1985] HCA 46; (1985) 156 CLR 510, 516 (Gibbs CJ, Mason, Wilson, Brennan & Dawson JJ); ***Australian Consolidated Press Ltd v Morgan*** [1965] HCA 21; (1965) 112 CLR 483, 497 - 498 (Windeyer J); ***Ahnee v Director of Public Prosecutions*** [1999] 2 AC 294, 306 (PC).

66 In Western Australia, a summary procedure is adopted for the trial of an alleged criminal contempt. The historical evolution from trial on indictment to summary trial of alleged criminal contempts in England and New South Wales is outlined by McHugh JA in ***Attorney-General (NSW) v John Fairfax & Sons Ltd*** (1985) 6 NSWLR 695, 707 - 708. See also ***Re Colina; Ex parte Torney*** [1999] HCA 57; (1999) 200 CLR 386 [12] - [14] (Gleeson CJ & Gummow J) in relation to the use of the procedure in other Australian jurisdictions.

67 In ***Australian Building Construction Employees' and Builders Labourers' Federation v David Syme & Co Ltd*** (1982) 59 FLR 48, a Full Court of the Federal Court (Bowen CJ, Evatt & Deane JJ) said that

proceedings for criminal contempt are, in some respects, sui generis, but they are nevertheless 'criminal in character', and a finding of guilt of criminal contempt is a 'conviction' of an 'offence' (53).

68 Although a criminal contempt is a distinct offence, it attracts remedies which are sui generis. It is not part of the ordinary criminal law at common law. See ***Mudginberri Station*** (115); ***Ahnee*** (306).

69 In ***Mudginberri Station***, Gibbs CJ, Mason, Wilson and Deane JJ said that there was 'much to be said for the view that all contempts should be punished as if they are quasi-criminal in character' (109). The difficulties with the concept of 'quasi-criminality' were adverted to by Samuels JA (Mahoney & Meagher JJA agreeing) in ***Director of Public Prosecutions v Chidiac*** (1991) 25 NSWLR 372, 376 - 377. See also ***Microsoft Corporation v Marks (No 1)*** (1996) 69 FCR 117, 137 (Beaumont J, Lindgren & Lehane JJ agreeing).

70 In ***Hinch***, the appellants were convicted of multiple counts of contempt by interfering with the proper administration of justice. They published material in circumstances where the publication tended to prejudice the fairness of pending criminal proceedings. Each of the contempts was a criminal as distinct from a civil contempt. Upon the High Court dismissing the appellants' appeals, it was submitted on the appellants' behalf that, in the exercise of its discretion, the court should not make any order for costs. The appellants sought to draw an analogy between their case and an application for special leave to appeal following a trial on indictment for a criminal offence. In the latter case, the established practice is for the court not to make any order for costs, except where the Crown or the State is an unsuccessful applicant. The High Court rejected the suggested analogy. Mason CJ, Wilson, Deane, Toohey and Gaudron JJ made these observations as to the procedural nature of proceedings for criminal contempt and the nature of the jurisdiction of the court that is attracted by such proceedings:

> Notwithstanding that a contempt may be described as a criminal offence, the proceedings do not attract the criminal jurisdiction of the court to which the application is made. On the contrary, they proceed in the civil jurisdiction and attract the rule that ordinarily applies in that jurisdiction, namely, that costs follow the event (89).

71 Brennan, Deane, Toohey and Gaudron JJ emphasised in ***Witham*** that proceedings for contempt (although *essentially* criminal in nature) are not to be equated with the trial of a criminal charge (534). Their Honours

noted the 'clear procedural differences' between each form of proceeding (534).

72 In ***Microsoft***, the appellant had applied to a single judge of the Federal Court for committal of the respondent to prison, or other punishment, for contempt arising from alleged breaches by the respondent of orders made in the course of copyright proceedings between the parties. The primary judge found that the alleged contempt was not made out on the evidence and *dismissed* the application for committal. On appeal to a Full Court of the Federal Court, Beaumont J (Lindgren & Lehane JJ agreeing) rejected the respondent's contention that the appeal was not competent.

73 The appellant in ***Microsoft*** relied on s 24(1)(a) of the *Federal Court of Australia Act 1976* (Cth), whereby, relevantly, the Full Court was invested with jurisdiction to hear and determine, amongst other things, appeals from a judgment of the Federal Court constituted by a single judge.

74 Beaumont J applied the ***Mastertouch*** principle, namely, that the Full Court's appellate jurisdiction under s 24(1)(a) does not extend to permit an appeal from an *acquittal* in criminal proceedings. See ***Thompson v Mastertouch TV Service Pty Ltd (No 3)*** (1978) 38 FLR 397, 412 - 413 (Deane J, Smithers & Riley JJ agreeing). See also ***Davern v Messel*** [1984] HCA 34; (1984) 155 CLR 21, 33 (Gibbs CJ, Wilson J agreeing).

75 Beaumont J said:

> [I]f, in substance, the proceedings at first instance were criminal in the sense that their object were to punish then … no appeal could lie. On the other hand, if the substance and object of the proceedings were remedial, then an appeal was competent as in any case of an alleged civil contempt (136).

That is, his Honour decided that 'the test for appealability' under s 24(1)(a), in the context of an appeal against the *dismissal* of an application for committal for contempt, should be whether the alleged conduct in question was a civil contempt or a criminal contempt (137).

76 In the result, Beaumont J was of the view that the appeal was competent in that the proceedings before the primary judge should 'be treated as civil, rather than criminal' (137).

77 In ***R v Ogawa*** [2009] QCA 307; [2011] 2 Qd R 350, Keane JA (Chesterman JA & Jones J agreeing) cited ***Hinch*** as authority for the

proposition that 'proceedings for contempt belong to the civil jurisdiction of the court' [167]. Similarly, in ***Re Contempt of Court by CBD*** [2002] ACTSC 87, Miles CJ referred to ***Hinch*** in support of the proposition that 'contempt proceedings are on the civil side of the Court' [14]. In each of ***Ogawa*** and ***CBD***, the alleged contempt was criminal rather than civil.

78 In ***Pelechowski v Registrar, Court of Appeal (NSW)*** [1999] HCA 19; (1999) 198 CLR 435, Gaudron, Gummow and Callinan JJ made an order for costs in relation to a contempt proceeding in the Court of Appeal of New South Wales. Their Honours said that the contempt proceeding in the Court of Appeal was 'criminal in nature but it was not a criminal prosecution' [58] (footnotes omitted).

79 Hayne J emphasised in ***Re Colina*** that although it is correct to refer to an 'offence' of contempt, the use of that term must not obscure 'the significant differences between the powers that are invoked against an alleged contemnor and those that are set in train under the criminal law' [109]. His Honour then referred to the passage in ***Hinch*** set out at [70] above. Hayne J went on to observe that there are many forms of contempt: 'there is no single "offence" of the kind that the criminal law knows' [109].

Preliminary issue: the source of a right of appeal

80 A right of appeal is a creature of statute. It is not a common law remedy. See ***Grierson v The King*** [1938] HCA 45; (1938) 60 CLR 431, 435 - 436 (Dixon J); ***Da Costa v Cockburn Salvage & Trading Pty Ltd*** [1970] HCA 43; (1970) 124 CLR 192, 201 - 202 (Windeyer J).

81 Accordingly, at common law there is no right of appeal against a decision concerning contempt of court.

82 In ***Hearne***, Hayne, Heydon and Crennan JJ said that the conclusion of the High Court in ***Witham*** (534), that all charges of contempt must be proved beyond reasonable doubt, eliminated one possible difference between civil and criminal contempt. However, their Honours then said that this conclusion 'does not affect the question of appellate rights' [132].

83 An issue arose in ***Hearne*** as to whether an appeal to the Court of Appeal of New South Wales against the decision of the primary judge *dismissing* applications for contempt was competent. The determination of that issue turned upon the meaning and effect of s 101(5) and s 101(6) of the *Supreme Court Act 1970* (NSW). Section 101(6) assumed that there was a difference, in the context of appellate rights, between civil and

criminal contempts [132]. Hayne, Heydon and Crennan JJ said that under this legislative framework the distinction between civil and criminal contempts remained in relation to rights to appeal against the *dismissal* of contempt proceedings [132]. See also ***Pang v Bydand Holdings Pty Ltd*** [2011] NSWCA 69 [71] (Beazley JA, McColl JA agreeing).

Preliminary issue: s 4 and s 7 of the *Criminal Code Act 1913* (WA)

84 By s 4 of the *Criminal Code Act 1913* (WA), no person shall be liable to be tried or punished in Western Australia as for an offence, except under the express provisions of the *Criminal Code* or, relevantly, some other statute of Western Australia.

85 Section 7 of the *Criminal Code Act* contains a savings provision in respect of contempt of court. It provides:

> Nothing in this Act or in the Code shall affect the authority of courts of record to punish a person summarily for the offence commonly known as 'contempt of court'; but so that a person cannot be so punished, and also punished under the provisions of the Code for the same act or omission.

86 The effect of s 7 is to preserve criminal contempt of court as a common law offence triable summarily. Section 7 differentiates contempt of court and sets it apart from the structure of the *Criminal Code*. See ***Henderson v Taylor*** [2006] QCA 490; [2007] 2 Qd R 269 [5] (Mackenzie J), [76] (Philip McMurdo J).

Preliminary issue: s 23 of the *Criminal Appeals Act 2004* (WA)

87 Section 23(1) of the *Criminal Appeals Act 2004* (WA) confers rights of appeal to this court on an offender who has been convicted of 'an offence on indictment'. Section 23(2) of that Act confers rights of appeal on an offender 'convicted by a court of summary jurisdiction and sentenced by a superior court'.

88 In the present case, none of the appellants was convicted of an offence 'on indictment'. Nor were they convicted by a court of summary jurisdiction. Therefore, there is no right of appeal to this court under s 23.

89 The *Criminal Appeals Act* does not confer any right of appeal on a person who has been convicted in the Supreme Court of the common law offence of criminal contempt, whether committed in the face of the court or out of court.

Preliminary issue: s 183 of the *Criminal Procedure Act 2004* (WA)

90 Section 183 of the *Criminal Procedure Act 2004* (WA) provides that the *Criminal Procedure Act* does not affect the authority of a court to deal with and punish a person summarily for an act or omission that is a contempt of the court, but a person cannot be so punished and also punished for an offence under that Act constituted by the same act or omission.

91 Neither the *Criminal Procedure Act* nor the *Criminal Procedure Rules 2005* (WA) make any provision with respect to appeals by persons who have been convicted in the Supreme Court of the common law offence of criminal contempt. The provisions of the *Criminal Procedure Rules* with respect to appeals are confined to appeals under pt 2 div 2 of the *Criminal Appeals Act*. See pt 14 of the Rules.

Preliminary issue: s 3(3)(a) of the *Sentencing Act 1995* (WA)

92 Section 3(3)(a) of the *Sentencing Act 1995* (WA) provides that that Act does not apply to or in respect of a person being punished by the Supreme Court or any other court for or as for contempt of court.

Preliminary issue: the history of rights of appeal in England against decisions concerning criminal contempt

93 As Mason and Brennan JJ noted in ***Davern***, before the introduction of the *Criminal Appeal Act 1907* (UK), there was no right of appeal in England from either a conviction or an acquittal of an accused who had been tried on indictment (47). There were methods of review available. These comprised reserving a case for the Court for Crown Cases Reserved, applying for a new trial where the proceedings were tried in the Court of Queen's Bench and appealing by means of a writ of error to a court of error (47).

94 Before the enactment of the *Administration of Justice Act 1960* (UK), there was no right of appeal in England against a decision concerning criminal contempt, whether committed in the face of the court or out of court. The absence of such a right of appeal was not a deliberate decision of the Parliament, but an anomalous or purely fortuitous position resulting from inadequately drafted legislation. See Justice, British Section of the International Commission of Jurists, *Contempt of Court*, Report (1959) 35- 36; Miller CJ, *Contempt of Court*, 3rd ed (2000) [2.25]; Borrie & Lowe, *The Law of Contempt*, 3rd ed (1996) 531.

95 Although the *Criminal Appeal Act 1907* (UK) conferred a general right of appeal in criminal cases to the Court of Criminal Appeal, s 3 of that Act limited those appeals to cases of conviction on indictment, and therefore excluded cases of criminal contempt dealt with summarily. Section 31(1)(a) of the *Supreme Court of Judicature (Consolidation) Act 1925* (UK) excluded from the jurisdiction of the Court of Appeal 'any criminal cause or matter' on appeal from the High Court except as provided by the *Criminal Appeal Act 1907* or that Act. Case law established that a criminal contempt was a 'criminal cause or matter' within that provision.

96 In ***Scott v Scott*** [1913] AC 417, the appellants were found guilty of contempt of court for publishing copies of a transcript of proceedings in contravention of an order that the proceedings be heard in camera. Bargrave Deane J ordered the appellants to pay the costs of the motion for contempt. The House of Lords held that the order for costs was not a judgment in a 'criminal cause or matter' within s 47 of the *Judicature Act 1873* (UK) and, accordingly, no appeal lay from it. Lord Shaw of Dunfermline observed:

> In the year 1908 Parliament interposed to give a right of appeal in criminal causes. The Court of Appeal in the present case has held that no appeal lies from the judgment of Bargrave Deane J, because the decision of the learned judge is in a criminal cause or matter. Grant, accordingly, that this is so; yet, nevertheless, the Criminal Appeal Act, 1907, affords no remedy to the unfortunate appellants.
>
> Under the argument against them they have been denied a civil appeal because their conduct was indictable, and under the Act of 1907 they can obtain no remedy by way of criminal appeal because they have not been convicted on indictment. In juggles of that kind the rights of the citizen are lost (486 - 487).

97 The *Administration of Justice Act 1960* was enacted in response to the recommendations in Justice, British Section of the International Commission of Jurists, *Contempt of Court*, Report (1959). By s 13 of that Act, there is a right of appeal in the United Kingdom in all cases of civil or criminal contempt dealt with summarily. It creates a right of appeal from any order or decision in the exercise of jurisdiction to punish for contempt of court. See *Committee on Contempt of Court*, United Kingdom, Final Report (1974) [189].

Preliminary issue: s 16(1)(a) of the *Supreme Court Act 1935* (WA)

98 Since the *Supreme Court Act 1935* (WA) was enacted, s 16(1)(a) of that Act has provided:

> Subject as otherwise provided in this Act, and to any other enactment in force in this State, the Supreme Court -
>
> (a) is invested with and shall exercise such and the like jurisdiction, powers, and authority within Western Australia and its dependencies as the Courts of Queen's Bench, Common Pleas, and Exchequer, or either of them, and the Judges thereof, had and exercised in England at the commencement of the *Supreme Court Ordinance 1861*;
>
> … (footnote omitted).

99 The Supreme Court's jurisdiction to punish for contempt of court is conferred by s 16(1)(a), it being a jurisdiction similar to that which the Court of Queen's Bench had exercised in 1861. See ***Cullen v The Queen*** (Unreported, WASC, Library No 6450A, 25 September 1986) 7 (Burt CJ).

Preliminary issue: s 16(2) of the *Supreme Court Act 1935* (WA)

100 When the *Supreme Court Act 1935* (WA) was enacted, s 16(2) of that Act provided:

> There shall be vested in the Supreme Court and the Judges thereof all original and appellate jurisdiction which, under and by virtue of any statute which came into force in Western Australia after the commencement of the *Supreme Court Act 1880*, and is not repealed, was immediately before the commencement of this Act vested in or capable of being exercised by the Court or a Judge thereof, and such other jurisdiction as by and under this Act or any subsequent statute is conferred on or vested in the Court and the Judges thereof. (footnote omitted).

See also s 21(3) and s 21(4).

101 By the *Supreme and District Courts (Miscellaneous Amendments) Act 1991* (WA), the words 'or otherwise' were inserted after the phrase 'under this Act or any subsequent statute' in s 16(2).

102 No imperial statute which came into force in Western Australia after the commencement of the *Supreme Court Act 1880* (WA) and before the commencement of the *Supreme Court Act 1935* (WA), and was not repealed, vested in the Supreme Court or the judges thereof any appellate jurisdiction in relation to criminal contempt. As I have mentioned, before

the enactment of the *Administration of Justice Act 1960* (UK), there was no right of appeal in England against a decision concerning criminal contempt, whether committed in the face of the court or out of court.

103 In ***Lim v Gregson*** [1989] WAR 1, 4 - 11, a judgment of the Full Court of the Supreme Court of Western Australia, Malcolm CJ reviewed the legislation in Western Australia which established the Supreme Court and conferred its civil, criminal and appellate jurisdiction.

104 The Supreme Court was established by the *Supreme Court Ordinance 1861*. The jurisdiction of the court was consolidated by the *Supreme Court Act 1880*. As Malcolm CJ noted, the origins of s 58(1)(b) of the *Supreme Court Act 1935* (WA) may be found in s 18 of the *Supreme Court Act 1880*.

105 By s 18:

> Every order made by a Judge in Chambers (except orders made in the exercise of such discretion as aforesaid) may be set aside or discharged upon notice by the Full Court.

106 In ***Lim***, Malcolm CJ observed in relation to s 18:

> This was not formulated in terms of a provision for an appeal as such, although it seems to have been intended to provide a right of appeal, being based upon s 50 of the Judicature Act 1873. The exception related to orders as to costs only which, by s 17 were not 'subject to any appeal, except by leave of the Court or the Judge making such order': cf s 49 of the Judicature Act. Section 27 of the Act preserved 'the practice and procedure in all criminal causes and matters' subject to any rules of court to be made under the Act (10).

107 The *Supreme Court Act 1886* (WA) clarified the jurisdiction of the Full Court as a court of appeal. Section 1 of that Act provided:

> The Full Court as constituted by 'The Supreme Court Act 1880' shall be a Court of Appeal, and shall have jurisdiction and power to hear and determine appeals from any judgment or order of the Supreme Court or of any Judges or Judge thereof, subject to the provisions of the said Act, and to such rules and orders of Court now in force for regulating the terms and conditions on which appeals shall be allowed, or as may from time to time be made, in accordance with the provisions of the said Act.

108 In ***Lim***, Malcolm CJ expressed the view that s 18 of the 1880 Act, read with s 1 of the 1886 Act, was sufficient to confer on the Full Court jurisdiction to set aside or discharge, by way of appeal, any order made by (relevantly to the decision in ***Lim***) a judge in chambers (10).

109 His Honour also made these comments about the statutory provisions in Western Australia with respect to criminal appeals in force before the commencement of the *Supreme Court Act 1935* (WA):

> The *Criminal Code Act* [1902] and the 1902 Code were repealed by the *Criminal Code Act Compilation Act* 1913 and replaced by the *Criminal Code Amendment* [sic] *Act* 1913 and the *Criminal Code*. Chapter LXIX of the Code introduced the initial provisions for appeal to the Full Court sitting as a Court of Criminal Appeal from conviction or sentence: see ss 687 and 688 (11).

Preliminary issue: the original s 58(1) of the *Supreme Court Act 1935* (WA) and the 1957 amendments

110 The *Supreme Court Act 1935* (WA) consolidated and amended the law relating to the Supreme Court.

111 Section 58(1) of the original 1935 Act provided, relevantly:

> Subject as otherwise provided in this Act and to the Rules of Court, the Full Court shall hear and determine -
>
> (a) Applications for a new trial or re-hearing of any cause or matter, or to set aside or vary any verdict, finding or judgment found given or made in any cause or matter tried or heard by a Judge or before a Judge and jury;
>
> (b) Appeals from a Judge whether sitting in court or in chambers;
>
> …
>
> (g) Appeals to the Court of Criminal Appeal under and subject to Chapter LXIX of the Criminal Code;
>
> …

Section 58(1) appeared in pt IV of the original 1935 Act. Part IV was headed, 'Sittings and Distribution of Business'.

112 In ***Riebe v Riebe*** [1957] HCA 66; (1957) 98 CLR 212, the High Court decided that s 58(1)(b) of the original 1935 Act did not confer appellate jurisdiction on the Full Court in relation to an order made under the *Matrimonial Causes and Personal Status Code 1948* (WA). Section 111 of the original 1935 Act had conferred a full right of appeal on either party to a matrimonial cause. However, s 111 and the other provisions of pt VI of the original 1935 Act were repealed and replaced only by s 51 of the *Matrimonial Causes and Personal Status Code*. It was

therefore necessary for the respondent in ***Riebe*** to rely on other provisions of the *Supreme Court Act*, in particular, s 58(1)(b).

113 Dixon CJ, Webb and Taylor JJ outlined some of the legislative history of the establishment of the Supreme Court and the conferral on it of jurisdiction. Their Honours said:

> It may be remarked that the *Supreme Court Act 1880* contained the provisions of the *Judicature Act 1873* of the United Kingdom. Then followed the *Supreme Court Act 1886*, the purpose of which appeared from the preamble which recited that by the *Supreme Court Act 1880* due provision had not been made for the purpose of facilitating appeals in bankruptcy and other matters to the Full Court. The Act provided that the Full Court as constituted by the *Supreme Court Act 1880* should be a court of appeal and should have jurisdiction and power to hear and determine appeals from any judgment or order of the Supreme Court or of any judges or judge thereof, subject to the provisions of the said Act and to such rules and orders of the court now in force for regulating the terms and conditions on which appeals should be allowed or as might from time to time be made in accordance with the provisions of the said Act. It will be noticed that under this provision the appellate jurisdiction of the Full Court is described as relating to 'any judgment or order of the Supreme Court or of any judge or judges thereof'. These words do not, according to their legal meaning, include a decree in divorce (219 - 220).

114 Dixon CJ, Webb and Taylor JJ held that s 58(1)(b) merely provided for the distribution of business:

> In the enactment of s 58(1)(b) of the *Supreme Court Act* it seems reasonably clear that no more was intended than to provide for the distribution of business, as the heading of the Part in which the section stands seems to show (220 - 221).

115 By the *Supreme Court Act Amendment Act 1957* (WA), and in response to the High Court's decision in ***Riebe***, s 58(1) of the original 1935 Act was amended by substituting for the passage, 'shall hear and determine', in the chapeau, the passage, 'shall have and shall be deemed since the coming into operation of this Act always to have had jurisdiction to hear and determine'.

116 Also, the 1957 amending Act added subsection (2), as follows:

> (2) Any appeal, application, cause, matter or proceedings referred to in subsection (1) of this section shall lie or may be made to, or may be brought before, the Full Court which, subject as aforesaid, shall hear and determine the same, and questions incidental thereto.

117 In ***Lim***, Malcolm CJ said in relation to the effect of the 1957 amending Act:

> Subsection (2) … made it clear that an appeal from a judge sitting in court or in chambers shall lie to the Full Court. Thus, whatever the source of jurisdiction conferred on the judge, Parliament made it clear that there was to be an appeal to the Full Court which had jurisdiction to hear and determine the appeal. It is to be observed that the matters referred to in s 58(1) which may be the subject of appeal to the Full Court include both civil and criminal proceedings (11).

118 Kennedy J made this observation in ***Lim*** about the 1957 amending Act:

> In consequence of the 1957 amendments, it appears to me to be clear that s 58 does confer jurisdiction upon the Full Court in the matters referred to therein … (23).

Preliminary issue: s 58(1)(a) of the *Supreme Court Act 1935* (WA)

119 Section 58(1)(a) of the original 1935 Act, as amended by the 1957 amending Act, conferred a right to apply to the Full Court for 'a new trial or re-hearing of any cause or matter, or to set aside or vary any verdict, finding or judgment found given or made in any cause or matter tried or heard by a Judge or before a Judge and jury'.

120 Before the commencement of the *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003* (WA), the terms 'action' and 'cause' were defined in s 4(1) of the *Supreme Court Act 1935* (WA), as follows:

> '**Action**' means a civil proceeding commenced by writ or in such other manner as may be prescribed by Rules of Court, *but does not include any criminal proceeding by the Crown*; (emphasis added)
>
> '**Cause**' *includes* any action, suit or other original proceeding between a plaintiff and defendant, and *any criminal proceeding by the Crown*. (emphasis added)

121 By s 130(2) of the *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003* (WA), the definitions of 'action' and 'cause' were amended by deleting 'by the Crown'.

122 When these amendments are considered in the context of other amendments made by the *Amendment and Repeal (Courts and Legal Practice) Act 2003* (WA), it is readily apparent that the amendments were made to remove nomenclature relating to the Crown or the monarch from legislation affecting the courts. For example, as a result of the

amendments, indictments have been proceeded upon in the name of the State rather than the Queen. It is plain that the deletion of the words 'by the Crown' in the definitions of 'action' and 'cause' in s 4(1) of the *Supreme Court Act 1935* (WA) was not intended to modify the substance of the jurisdiction embodied within the phrase 'any criminal proceeding by the Crown'.

123 Since the *Supreme Court Act 1935* (WA) was enacted, the term 'Matter' has been defined in s 4(1) of that Act to include 'every proceeding in the Court, not in a cause', the term 'Court' has been defined to mean 'the Supreme Court of Western Australia', and the term 'Suit' has been defined to include 'action'.

Preliminary issue: s 58(1)(b) of the *Supreme Court Act 1935* (WA)

124 Section 58(1)(b) of the original 1935 Act, as amended by the 1957 amending Act, conferred a right of appeal to the Full Court 'from a Judge whether sitting in court or in chambers'.

125 Section 5 of the *Interpretation Act 1984* (WA) provides that in that Act, and every other 'written law', the term 'judge' means a judge, acting judge or auxiliary judge of the Supreme Court. The term 'written law' is defined in s 5 of the *Interpretation Act* to mean 'all Acts for the time being in force and all subsidiary legislation for the time being in force'.

126 The Full Court held in ***Lim*** that s 58(1)(b) of the original 1935 Act, as amended by the 1957 amending Act, conferred a right of appeal to the Full Court from a decision of a Supreme Court judge refusing bail. See the reasons of Malcolm CJ (11), Kennedy J (23) and Rowland J (34).

127 In ***Connell v The Queen (No 5)*** (1993) 10 WAR 424, the appellant sought leave to appeal from a decision of a Supreme Court judge dismissing the appellant's application for a permanent stay of a criminal trial on indictment, alternatively for an adjournment of the trial. The Crown contended that no appeal lay from the decision. The Full Court held that the appeal was incompetent.

128 Malcolm CJ (Franklyn J agreeing) said in ***Connell (No 5)*** that the criminal proceedings against the appellant were governed by the *Criminal Code* and that the *Criminal Code* conferred no right of appeal against the dismissal of an application for a permanent stay of a criminal trial on indictment, alternatively for an adjournment of the trial (431). His Honour added:

> Putting on one side questions of leave, the only rights of appeal to the Full Court (sitting as the Court of Criminal Appeal) under Ch 69 of the *Criminal Code* are given to a person who has been convicted on indictment against his conviction or against his sentence, to the prosecution in the circumstances set out in s 688(2) and to a person charged on indictment who has been acquitted on account of unsoundness of mind (431).

129 Malcolm CJ accepted the Crown's submissions that:

(a) there was no right of appeal from any decision made in the course of criminal proceedings brought by the Crown on indictment, other than the statutory rights of appeal conferred by ch 69 of the *Criminal Code*; and

(b) although the language of s 58(1)(b) of the *Supreme Court Act 1935* (WA) was, on the face of it, broad enough to confer a wider right of appeal in such proceedings, Parliament would not have intended that there should be a general right of appeal to the Full Court, including a right of appeal from interlocutory orders made in the course of a criminal trial, other than those specifically provided for in the *Criminal Code* (431).

130 After a lengthy historical analysis of the legislation in Western Australia concerning appeals against decisions in criminal proceedings on indictment, Malcolm CJ referred in ***Connell (No 5)*** to the following observation he had made in ***Lim*** (439):

> There never has been in this State any limitation on the right of appeal to the Full Court in criminal matters, of the kind enacted in England or in Victoria. In this respect the position in Western Australia under s 58(1)(b) of the *Supreme Court Act* is similar to that under s 10 of the *Judicature Act* 1876 (Qld) referred to in ***R v Malone*** [1903] QSR 140 (11).

131 His Honour then acknowledged that his observation in ***Lim*** was erroneous:

> At that time, my research into the matter had not uncovered s 3 of the *Criminal Law Appeal Act*. In my opinion, however, the effect of the repeal of that Act by s 3 of the *Supreme Court Act* is that since 1935 the statutory provisions had to be construed in the context of a legal framework which did not include any general exclusion of any right of appeal 'in any criminal cause or matter' (439).

132 Malcolm CJ added that the existence of s 3 of the *Criminal Law Appeal Act* between 1893 and 1935 had no effect on the conclusion in

Lim that there was a right of appeal in that case under s 58(1)(b) of the *Supreme Court Act 1935* (WA) (439).

133 A little later, however, in ***Connell (No 5)*** his Honour said that, on the assumption that the conclusions of Kennedy J and himself in ***Lim*** 'on the appeal point' were correct, it did not follow that there was a general right of appeal under s 58(1)(b) of the *Supreme Court Act 1935* (WA) 'in respect of the residue of decisions or orders made in relation to criminal proceedings not covered by the specific appeal provisions in the *Criminal Code*' (440). His Honour elaborated:

> In my opinion, given that the appeal provisions in the *Criminal Code* were enacted to provide a similar regime of appeals in Western Australia to that introduced in England in 1907, against a background where there was otherwise no relevant right of appeal and an express exclusion of any such right by statute, the appeal provisions in the code should themselves be regarded as a code of appellate rights *in relation to criminal proceedings governed by the Criminal Cod*e (440). (emphasis added)

134 In ***Carter v The Managing Partner, Northmore Hale Davy & Leake*** (Unreported, WASC, Library No 930375, 15 July 1993), the Full Court considered whether there was a right of appeal to the Full Court from:

(a) an order upholding the respondents' objections to producing documents in response to service on them of a subpoena duces tecum on the ground of legal professional privilege; or

(b) an order setting aside such a subpoena on the ground of oppression.

It was unnecessary for the Full Court to decide any of these issues.

135 In ***Carter v The Managing Partner, Mallesons Stephen Jaques*** (Unreported, WASC, Library No 930374, 15 July 1993), the Full Court dismissed as incompetent an appeal against an order for costs against an accused in favour of the person served with the subpoena in the previous case.

136 In ***Connell (No 5)***, Malcolm CJ referred to the ***Carter*** cases, and said:

> Assuming, without deciding, that there is such a right, it would be found to have been created in s 58(1) of the *Supreme Court Act*. The recognition of such a right would not involve recognition of any right of appeal, as asserted by the appellant in this case, in relation to the residue of orders and decisions in criminal proceedings not covered by the rights of appeal

> in the *Criminal Code*. A writ of subpoena is an originating process by which proceedings to compel the attendance of a witness to testify or to produce documents may be commenced, albeit the proceedings may be regarded as ancillary proceedings and involving a step in the principal proceedings. *They are not themselves criminal proceedings by the Crown which are governed by the Criminal Code*. Neither the *Criminal Code* or [sic] the *Criminal Practice Rules* have anything to say about proceedings commenced by the issue of a writ of subpoena. Such proceedings fall within the description of a 'criminal cause or matter' in s 37(2) of the *Supreme Court Act* because they take their character from the underlying criminal proceedings by the Crown (442). (emphasis added).

137 In my opinion, the critical point decided in ***Connell (No 5)***, for present purposes, was that the rights of appeal conferred by the *Criminal Code* exhaustively stated the rights of appeal available in respect of decisions in criminal proceedings on indictment.

138 The rights of appeal now available in respect of decisions in criminal proceedings on indictment are embodied in pt 3 of the *Criminal Appeals Act*.

139 The decision in ***Lim*** that there was a right of appeal under s 58(1)(b) of the *Supreme Court Act 1935* (WA) from a decision of a Supreme Court judge refusing bail, was published after the *Bail Act 1982* (WA) was passed but before it was proclaimed to come into operation.

140 In ***Jemielita v The Queen*** (1994) 12 WAR 362, the Full Court (Pidgeon J, Owen & White JJ agreeing) held that 'the ratio of ***Lim v Gregson*** so far as it relates to a right of appeal [from a decision of a Supreme Court judge refusing bail] remains applicable' (364).

141 In ***Tieleman v The Queen*** [2004] WASCA 285, Murray J (Templeman J agreeing) said, in the context of appeals against a decision of a Supreme Court judge refusing bail:

> The appeals against the decisions made by Roberts-Smith J were undoubtedly competent: ***Jemielita v The Queen*** (1994) 12 WAR 362, applying ***Lim v Gregson*** [1989] WAR 1. The oddity, of course, is that although the question of the grant or refusal of bail arises squarely in the exercise of the Court's criminal jurisdiction, an appeal against such a decision is made under the *Supreme Court Act 1935* (WA), s 58(1)(b), to the Full Court [6].

142 I note, for completeness, that the *Bail Act* was amended by the *Bail Amendment Act 2008* (WA). Relevantly, the amending Act inserted s 15A and s 15B, which expressly provide for a right of appeal in relation to a

'bail decision', as defined in s 15A(1). Also, the amending Act inserted a new s 58(1a) into the *Supreme Court Act 1935* (WA) to provide that an appeal does not lie to the Court of Appeal under s 58(1)(b) against a bail decision.

Preliminary issue: the Rules of the Supreme Court of Western Australia

143 The *Rules of the Supreme Court 1971* (WA) replaced the *Rules of the Supreme Court 1909* (WA).

144 The 1909 Rules did not contain any provisions relating to committal for contempt of court. Order 42 was headed, 'Attachment'. It merely provided that a writ of attachment had the same effect as a writ of attachment issued in Equity had previously had, and that no writ of attachment could be issued without the leave of the court or a judge, to be applied for on notice to the party against whom the attachment was to be issued.

145 The 1971 Rules introduced a new Order, being O 55, to codify the practice that had been established in relation to the punishment of contempt of court. See the introduction to the original 1971 Rules, published in Western Australia, *Government Gazette*, No 98 (18 November 1971) xviii.

146 Order 55 of the 1971 Rules, in its original form, provided, relevantly:

> …
>
> 2. (1) Subject to the Act the power of the Court or Full Court to punish for contempt of Court may be exercised by an order of committal.
>
> (2) Subject to paragraph (3) an order of committal may be made only by the Full Court.
>
> (3) Where contempt of court is committed in the face of the Court or in the hearing of the Court, or consists of disobedience to a judgment or order of the Court or a breach of an undertaking to the Court, an order of committal may be made by a single Judge.
>
> 3. (1) When it is alleged or appears to the Court on its own view that a person is guilty of contempt of court committed in the face of the Court or in the hearing of the Court, the presiding Judge may, by oral order, direct that the contemnor be arrested and brought before the Court as soon thereafter as the business of

the Court permits, or may issue a warrant under his hand for the arrest of the contemnor.

…

(4) The powers given by this Rule are exercisable, *mutatis mutandis*, by a Judge sitting in chambers except that the contemnor must be brought before the Court sitting in court, and the Court shall hear and determine the charge and make the order.

4. (1) In a case to which the last preceding Rule does not apply, and subject to paragraph (2), application for punishment for contempt of court must be made by motion on notice to the contemnor, for an order that he be committed to prison for his contempt.

(2) Applications for committal for contempt of court consisting of disobedience to judgments or orders of the Court made by a Judge, or orders of the Court made by the Master, may be made by summons to a Judge in chambers.

5. (1) The notice of motion or summons (as the case may be) must specify the contempt of which the contemnor is alleged to be guilty, and be entitled in the proceeding, if any, with reference to which the contempt is alleged to have been committed or if it is not alleged to have been committed with reference to a particular proceeding, shall be entitled 'The Queen against' the contemnor (naming him) *ex parte* the applicant.

(2) Unless the Court otherwise orders, the notice of motion or summons accompanied by a copy of the affidavit in support of the application must be served personally on the contemnor.

…

147 On 29 April 2005, O 55 r 2 was amended to read:

Subject to the Act, the power of the Court to punish for contempt of court may be exercised by an order of committal made by a Judge, or judge of appeal, sitting alone.

148 On 19 April 2005, O 55 r 5(1) was amended to delete the words 'The Queen against' and replace them with 'The State of Western Australia against'.

149 So, before 29 April 2005:

(a) where a contempt of court was committed in the face of the Supreme Court or in the hearing of the court, or consisted of disobedience to a judgment or order of the court or a breach of an undertaking to the court, a single judge was empowered to make an order of committal; and

(b) an order of committal in any other circumstances could be made only by the Full Court.

150 Since 29 April 2005, the power of the Supreme Court to punish for contempt of court has been exercisable by an order of committal made by a judge of the General Division, or a judge of appeal, sitting alone.

151 The *Supreme Court (Court of Appeal) Rules 2005* (WA) do not contain any provisions specifically dealing with appeals against a conviction or sentence for contempt of court.

Preliminary issue: Queensland statutory provisions and case law as to rights of appeal against decisions concerning criminal contempt

152 There are legislative provisions in Queensland which are comparable to those in Western Australia in relation to criminal contempt of court as a common law offence triable summarily and in relation to rights of appeal generally (formerly to the Full Court and now to the Court of Appeal).

153 Section 8 of the *Criminal Code Act 1899* (Qld) is similar to s 7 of the *Criminal Code Act 1913* (WA). See ***Henderson*** [5] (Mackenzie J), [76] (Philip McMurdo J). Also, like ch 69 of the *Criminal Code* (WA) (repealed), the rights of appeal against conviction and sentence conferred by s 668D of the *Criminal Code* (Qld) are confined to persons convicted on indictment.

154 Section 10 of the *Judicature Act 1876* (Qld) (repealed) provided:

> An appeal shall lie to the Full Court from every order made by a judge in Court or Chambers except orders made in the exercise of such discretion as aforesaid.

The reference to discretion related to orders for costs under s 9 of that Act.

155 Section 254 of the *Supreme Court Act 1995* (Qld) materially reproduced s 10 of the *Judicature Act 1876*.

156 In ***R v Foster; Ex parte Gillies*** [1937] St R Qd 67, the majority of the Full Court of the Supreme Court of Queensland (Webb &

Henchman JJ, Blair CJ dissenting) held that s 10 of the *Judicature Act* conferred a right of appeal on the appellants against a judgment of conviction for contempt of court (for publishing certain material relating to a pending Supreme Court action) entered by a Supreme Court judge.

157 In ***Foster***, the Full Court referred to s 19 of the *Judicature Act* (repealed), which provided:

> The practice and procedure in all criminal causes and matters whatsoever in the Court including the practice and procedure with respect to Crown cases reserved shall be the same as the practice and procedure in similar causes and matters before the commencement of this Act.

Section 19 was repealed by the *Supreme Court Act 1921* (Qld).

158 The Full Court noted in ***Foster*** that before the passing of the *Judicature Act*, as in England, no appeal was available in Queensland from the summary order of a court of record convicting a person for criminal contempt of that court (88).

159 Henchman J was of the view that the *Judicature Act*, as originally passed, did not confer any right of appeal in any 'criminal cause or matter' (91). His Honour elaborated:

> Although the language of s 10 enacting that an appeal shall lie to the Full Court from every order made by a Judge in court or chambers, except orders made in the exercise of 'the discretion' referred to in s 9, is wide enough to include orders made in criminal matters, s 19 seems to me definitely to limit the operation of the Act to civil matters. It enacts that the practice and procedure *in all criminal causes and matters whatsoever*, including the practice and procedure with respect to Crown cases reserved, shall be the same as the practice and procedure in similar causes and matters before the commencement of this Act. That is a definite pronouncement by Parliament that the practice and procedure in all criminal causes and matters is to be unaffected by the new Act. The effect is that, in the framework of the original Act, the word 'order' in s 10 was not to include orders made in a criminal cause or matter (91).

160 Henchman J concluded that s 10 did not 'cover an order such as that now sought to be appealed from, which seems to me clearly to be an order made in a criminal matter' (91).

161 However, his Honour was of the view that the scope of the operation of s 10 of the *Judicature Act* was enlarged by the repeal of s 19 of that Act, 'so as to include orders made by a judge in court or chambers in a criminal cause or matter such as the present' (96).

162 The reasoning of the other member of the majority, Webb J, was similar to that of Henchman J.

163 In ***R v Ballinger*** [1961] QWN 24, the Full Court (Brown J, Wanstall & Stable JJ agreeing) held that a person convicted of contempt of court, and sentenced to imprisonment for the contempt, had no right of appeal against sentence to the Court of Criminal Appeal, in that any rights of appeal to that court were confined by s 668D of the *Criminal Code* to persons convicted on indictment. The conviction for contempt in that case was not on indictment. His Honour said that '[the appellant], if he has any rights of appeal, can approach the Full Court in its civil jurisdiction, and exercise those rights' (31).

164 In ***R v Queensland Television Ltd; Ex parte Attorney-General*** [1983] 2 Qd R 648, the Full Court (Kelly & McPherson JJ, Campbell CJ dissenting in the result) followed ***Foster*** and held that an appeal against a conviction for contempt of court (involving an interference with the due course of justice in relation to a criminal trial) lay to the Full Court.

165 In ***Madeira v Roggette Pty Ltd (No 2)*** [1992] 1 Qd R 394, the Full Court (Thomas, Moynihan & Ambrose JJ) dismissed an appeal by the appellant against a conviction, and a sentence of 2 months' imprisonment, for contempt of a Supreme Court judge's order restraining a company, of which the appellant was a director, from interfering with its tenant's use, occupation and quiet enjoyment of certain premises. The availability of a right of appeal was not challenged by the respondent. The point was not discussed in the reasons of the Full Court.

166 In ***Stanbridge v Director of Public Prosecutions*** (Unreported, QCA, No 5416 of 1996, 27 May 1997), the appellant was convicted in the District Court of Queensland of wilfully insulting a judge of the District Court during his sitting in court, contrary to s 129(1) of the *District Court of Queensland Act 1967* (Qld). He was sentenced to 9 months' imprisonment, to be suspended after he had served 3 months. The Court of Appeal (Fitzgerald P, McPherson JA & Moynihan J) dismissed the appellant's appeal against conviction but allowed his appeal against sentence. It was not suggested that a right of appeal was unavailable, and there was no discussion in the reasons of the Court of Appeal as to the statutory source of the right of appeal.

167 In ***Bradshaw v Attorney-General*** [1998] QCA 42; [2000] 2 Qd R 7, the applicant was charged with and convicted of wilfully insulting a District Court judge during his sitting in court, contrary to s 129(1) of the

District Court of Queensland Act. Section 118(1)(b) of the *District Court of Queensland Act* granted a right of appeal to the Court of Appeal from judgments of the District Court 'in the exercise of its criminal jurisdiction'. Section 118(3) provided for an appeal by leave of the Court of Appeal from judgments of the District Court in other cases. The Court of Appeal held that it had no power to grant leave or entertain an appeal against the judgment of conviction for contempt. This conclusion was not explained by any reasoning. However, the court removed the matter into its jurisdiction by making a certiorari order. See the reasons of Thomas JA (12). The reasons delivered by each member of the court in ***Bradshaw*** did not refer to the earlier decision in ***Stanbridge***.

168 In ***R v Lowrie*** [1998] 2 Qd R 579, the majority of the Court of Appeal (Davies & Pincus JJA, Shepherdson J dissenting) held that there was no right of appeal to the Court of Appeal against interlocutory orders made by a Supreme Court judge in respect of criminal trials on indictment. An application for leave to appeal against a decision refusing to stay proceedings on indictment or to quash the indictment was dismissed as incompetent. Davies JA decided that the reasoning of the majority in ***Foster*** was wrong. However, his Honour found it unnecessary to consider whether, on any other basis, the Full Court in ***Foster*** had jurisdiction to determine the appeal before it (582 - 583). Pincus JA distinguished ***Foster*** and ***Queensland Television***. His Honour said that neither of those cases was an appeal against an interlocutory order made in relation to a criminal trial on indictment (588 - 589). Shepherdson J referred to ***Foster*** but did not express a view as to the correctness of the reasoning or the decision in that case (594).

169 In ***Henderson***, the Court of Appeal (Mackenzie, Philippides & Philip McMurdo JJ) held that there was no right of appeal against the *dismissal* of a proceeding for punishment of an alleged criminal contempt of the Supreme Court. Both McMurdo and Philippides JJ said that the prevailing view in Queensland was that an appeal lies against a *conviction* of contempt under s 254 of the *Supreme Court Act 1995* (which, as I have mentioned, materially reproduced s 10 of the *Judicature Act 1876*) ([25] Philippides J, [75] Philip McMurdo J). That view was not questioned in ***Henderson***. Rather, ***Henderson*** was concerned with whether there was a right of appeal against the *dismissal* of a proceeding for punishment of alleged contempt. Philippides and Philip McMurdo JJ relied on the rule of construction that general words conferring jurisdiction to hear appeals do not abrogate the fundamental principle of the common law that a person be spared the jeopardy of an appeal from an acquittal after a

hearing on the merits of a criminal charge by a court of competent jurisdiction ([26] Philippides J, [75] Philip McMurdo J). Their Honours held, in substance, that s 254 of the *Supreme Court Act*, properly construed, did not confer a right of appeal against an *acquittal* on a charge of criminal contempt ([29] Philippides J, [78] - [79] Philip McMurdo J).

170 In ***Barmettler v Greer & Timms*** [2007] QCA 170, the Court of Appeal (McMurdo P, Williams & Gerrard JJA) referred to ***Bradshaw***, without questioning its correctness:

> In … ***Bradshaw v A-G*** [1998] QCA 42, this Court held that s 118(3) of the *District Court [of Queensland] Act* no longer allowed for an appeal to this Court in circumstances such as those facing Mrs Barmettler; the correct procedure was to apply for an order of certiorari under the *Judicial Review Act 1991* (Qld). Mrs Barmettler did not purport to appeal the finding of contempt, but can apply for a certiorari order under the *Judicial Review Act*, removing the matter of what appears to be a conviction for contempt into the Court of Appeal [30].

171 In ***Ogawa***, the appellant applied to the Court of Appeal for leave to appeal against her conviction for contempt of court and the sentence imposed. The appellant had been charged with contempt pursuant to s 129 of the *District Court of Queensland Act 1967* (Qld). The essence of the contempt was her disruptive conduct during a criminal trial in which she was the accused. The Court of Appeal (Keane JA, Chesterman JA & Jones J agreeing) doubted the correctness of the view in ***Bradshaw*** that s 118(3) of the *District Court of Queensland Act* does not provide for an appeal, by leave of the Court of Appeal, in respect of a contempt of the District Court. Keane JA said:

> Section 118(1)(b) of the *District Court [of Queensland] Act* permits an appeal from judgments of the District Court 'in the exercise of its criminal jurisdiction.' Section 118(3) provides for an appeal by leave of this court in other cases. The decision of the High Court in ***Hinch v A-G (Vic)*** establishes that proceedings for contempt belong to the civil jurisdiction of the court ((1987) 164 CLR 15, 19). Accordingly, s 118(3) of the *District Court [of Queensland] Act* applies in this case.
>
> In ***Bradshaw v A-G*** this court proceeded on the footing that, with respect to convictions for contempt of court, 'it had no power to grant leave or to entertain an appeal against such a judgment'([2000] 2 Qd R 7, 12 per Thomas JA). Thomas JA, who delivered the leading judgment, did not articulate the legal analysis underlying that conclusion. In ***Bradshaw*** the court removed the matter into its jurisdiction by an order in the nature of certiorari. (This Court uncritically accepted the approach adopted in ***Bradshaw*** in ***Barmettler v Greer & Timms*** [2007] QCA 170, [30].) Significantly, Thomas JA did not advert to the circumstance that this Court

> had previously exercised the jurisdiction to hear such an appeal (***Stanbridge v Director of Public Prosecutions*** [1997] QCA 131). Because an appeal is a creature of statute, it is necessary to look closely at the terms in which an appeal to this court is permitted by the *District Court [of Queensland] Act*.
>
> Section 118(3) of the *District Court [of Queensland] Act* provides for appeals from judgments of the District Court to this Court with the leave of this Court. Whether this Court may grant leave to appeal against a conviction for the contempt turns on whether that conviction constitutes a 'judgment of the District Court'. 'Judgment' is broadly defined in s 3 of the Act as including 'a judgment, order, or other decision or determination of the court' (the definition was amended by s 10 and Sch 1 of the *Justice and Other Legislation (Miscellaneous Provisions) Act 2002* (Qld), which replaced 'a judge' with 'the court') …
>
> …
>
> Accordingly, upon the passing of sentence in consequence of a conviction for contempt, there is a 'judgment' for the purposes of s 3 and s 118(3) of the *District Court [of Queensland] Act*. That judgment would be amenable to an application for leave to appeal pursuant to s 118(3) of that Act.
>
> I respectfully incline to the view, contrary to the view in ***Bradshaw***, that s 118(3) of the *District Court [of Queensland] Act* does provide an avenue of appeal by leave to this court with respect to contempt of the District Court. It is not necessary to express a concluded view on this point, however, because I consider that even if s 118(3) does provide the appellant with an avenue of appeal, leave to appeal would not be granted in the circumstances of this case [167] - [173].

Preliminary issue: its merits

172 On 1 February 2005, the Court of Appeal was established by the *Acts Amendment (Court of Appeal) Act 2004* (WA), which made amendments to the *Supreme Court Act 1935* (WA).

173 Since 1 February 2005, by s 7(1) of the *Supreme Court Act*, the exercise of the Supreme Court's jurisdiction has been divided between the General Division and the Court of Appeal. Section 16(1) specifies matters falling within the General Division's jurisdiction. Section 58(1) specifies matters falling within the Court of Appeal's jurisdiction, subject to the restrictions in s 60.

174 At the material time, s 58(1) provided, relevantly:

> Subject as otherwise provided in this Act and to the rules of court, the Court of Appeal shall have and shall be deemed since the coming into operation of this Act always to have had jurisdiction to hear and determine -
>
> (a) applications for a new trial or rehearing of any cause or matter, or to set aside or vary any verdict, finding or judgment found given or made in any cause or matter tried or heard by a judge or before a judge and jury;
>
> (b) subject to subsection (1a) appeals from a judge and from a master whether sitting in court or in chambers;
>
> …
>
> (f) applications and appeals under Part 3 of the *Criminal Appeals Act 2004* to the Court of Appeal;
>
> (g) appeals under Part 2 of the *Criminal Appeals Act 2004* that are ordered to be dealt with by the Court of Appeal;
>
> (h) applications and appeals under Part 2 of the *Criminal Appeals Act 2004* from a judge to the Court of Appeal;
>
> …
>
> (m) all causes and matters and proceedings which -
>
> (a) by any Act of this State, or the rules of court; or
>
> (b) by or under any Imperial Act, or Act of the Commonwealth of Australia,
>
> are required to be heard and determined by the Court of Appeal.

175 As have mentioned, s 58(1a) was inserted into the *Supreme Court Act* in 2008 to provide that an appeal does not lie to the Court of Appeal under s 58(1)(b) against a 'bail decision' as defined in s 15A(1) of the *Bail Act*.

176 At the material time, s 58(2) provided:

> Any appeal, application, cause, matter or proceedings referred to in subsection (1) shall lie or may be made to, or may be brought before, the Court of Appeal which, subject as aforesaid, shall hear and determine the same, and questions incidental thereto.

177 Each of the Full Court and this court has heard and determined on its merits an appeal by a person convicted of contempt by a Supreme Court

judge. ***Castlecity Pty Ltd v Newvintage Nominees Pty Ltd*** [2003] WASCA 30 (Murray, Anderson & Steytler JJ) was an appeal against sentence. ***Heedes v Legal Practice Board*** [2005] WASCA 166 (Owen, Wheeler & Roberts-Smith JJA) was an appeal against conviction. The issue as to whether the Full Court or this court had jurisdiction to entertain the appeal was not raised or considered in either of those cases. It does not appear to have been considered in any other decision of the Full Court or this court.

178 In the present case, each appellant committed a contempt or contempts in the face of the Commission. The Supreme Court has jurisdiction under s 163(3) of the CCC Act in respect of each contempt on the deemed basis that the contempt was a contempt in the face of that court.

179 Each contempt was a criminal (as distinct from a civil) contempt in that the object of the proceedings before Martin CJ and the remedy sought was, in essence, punitive. They were proceedings in the public interest to vindicate or maintain the integrity of the Commission.

180 Each of the criminal contempts was an offence at common law. However, although the substantive character of the proceedings before Martin CJ was *essentially* criminal, they were not criminal prosecutions.

181 A criminal contempt is a distinct offence, but it is not part of the ordinary criminal law at common law. Criminal contempt at common law is, to a significant extent, an offence of its own kind. It attracts its own remedies. See ***Mudginberri Station*** (109, 115); ***Witham*** (534); ***Ahnee*** (306); ***Pelechowski*** [58]; ***Re Colina*** [109].

182 Although the substantive character of criminal contempt proceedings is *essentially* criminal, the procedural character of the proceedings is civil rather than criminal. See ***Hinch*** (89); ***Re Colina*** [109]. Compare each of ***Re Contempt of Court by CBD*** [14] and ***Ogawa*** [167], where it was held, in the context of a criminal contempt, that proceedings for contempt are within the civil jurisdiction of the court. Also compare ***Microsoft***, where the Full Court of the Federal Court held that the availability of a right of appeal under s 24(1)(a) of the *Federal Court of Australia Act* against an *acquittal* on a charge of contempt depended on whether, as a matter of substance, the primary proceedings were 'truly of a civil kind' (137); in other words, the distinction between civil and criminal contempt was critical under the applicable statutory provision and in the context of the

Mastertouch principle and a purported appeal against an *acquittal* on a charge of contempt.

183 By s 58(1)(b), read with s 58(2), of the *Supreme Court Act*, this court has jurisdiction to hear and determine 'appeals from a judge … whether sitting in court or in chambers'.

184 It is now well-established in Western Australia that, despite the expansive and general language of s 58(1)(b), there is no right of appeal to this court from any decision of a Supreme Court judge made in the course of criminal proceedings on indictment (including from any interlocutory order made in the course of such proceedings), other than the statutory rights of appeal previously conferred by ch 69 of the *Criminal Code* and now conferred by the *Criminal Appeals Act*. See ***Connell (No 5)*** (431 - 432, 440).

185 However, the proceedings before Martin CJ were not criminal proceedings on indictment. The common law offences charged against the appellants were not governed by or subject to the *Criminal Code*, the *Criminal Appeals Act*, the *Criminal Procedure Act*, the *Sentencing Act* or any other form of relevant statutory regulation, except s 163 and other provisions of pt 10 of the CCC Act, the *Supreme Court Act* and the *Rules of the Supreme Court 1971*.

186 There is no doubt that where two or more statutory enactments comprise an overlapping legislative scheme, the enactments should be construed accordingly. See ***Sweeney v Fitzhardinge*** [1906] HCA 73; (1906) 4 CLR 716, 726 (Griffith CJ); ***R v Wheeldon*** (1978) 33 FLR 402, 405 - 406 (Bowen CJ, Blackburn & Fisher JJ); ***Commissioner of Stamp Duties v Permanent Trustee Co Ltd*** (1987) 9 NSWLR 719, 722 - 724 (Kirby P); ***Le Blanc v Queensland TAB Ltd*** [2002] QSC 323; [2003] 2 Qd R 65 [42] (Muir J); ***Southside Autos (1981) Pty Ltd v Commissioner of State Revenue*** [2008] WASCA 208; (2008) 37 WAR 245 [64] (Buss JA).

187 In ***Commissioner of Stamp Duties v Permanent Trustee Co Ltd***, Kirby P said:

> Upon the hypothesis (which is admittedly often sorely tried) that there is a rational integration of the legislation of the one Parliament, it is proper for courts to endeavour to so construe inter related statutes as to produce a sensible, efficient and just operation of them in preference to an inefficient, conflicting or unjust operation. This is the approach which I take to the task of statutory interpretation in hand (722).

188 Various provisions of the *Criminal Appeals Act*, the *Criminal Procedure Act*, the *Sentencing Act* and the *Supreme Court Act* create an overlapping legislative scheme governing appeals to this court from judgments or decisions of a Supreme Court judge in relation to criminal offences created by statute. For example, by s 3 of the *Criminal Appeals Act*, that Act is to be read with the *Criminal Procedure Act*.

189 Section 58(1)(a), (f), (g), (h) and (m) and s 58(2) of the *Supreme Court Act*, read with pt 2 and pt 3 of the *Criminal Appeals Act*, confer this court's jurisdiction to entertain an appeal against a conviction or sentence recorded or imposed by a Supreme Court judge for a *statutory* criminal offence. However, those provisions do not cover the field in relation to this court's jurisdiction to entertain appeals against conviction and sentence for *all* criminal offences tried or heard before a Supreme Court judge, including criminal contempt of court as a common law offence triable summarily.

190 It is plain that Parliament intended that criminal contempt of court, as a common law offence, should be set apart from the legislative provisions creating statutory criminal offences, regulating the trial of and the pre-trial procedures for statutory offences, dealing with the sentencing of people who commit statutory offences, and providing for appeals against conviction and sentence for statutory offences.

191 Martin CJ, in accordance with the ordinary practice and procedure of the Supreme Court, heard the originating motions while sitting in court.

192 The order of committal dated 4 February 2011 and signed by Martin CJ in respect of Mr Silvestro provided:

> And it appearing to the satisfaction of the Court that the defendant, Stephen Laurence Silvestro, has been guilty of contempt of court for refusing or failing to be sworn or make an affirmation on 11 November 2010.
>
> **It is ordered that**:
>
> **1. The contemnor be committed for two years' imprisonment, to be backdated to have effect from 14 December 2010**.

His Honour also signed an order of committal in respect of each of the other appellants. For present purposes, each order of committal was relevantly in identical terms. The orders were in accordance with O 55 r 7(4) and Form No 66 of the *Rules of the Supreme Court 1971*.

193 Each order of committal signed by Martin CJ constituted a determination of guilt by his Honour pursuant to his finding of guilt, in the case of Mr Allbeury, Mr Silvestro and Mr Smith, and his acceptance of the plea of guilty, in the case of Mr Chikonga. Also, the sentence embodied in each order of committal was part of the record of the Supreme Court.

194 The appeal notice filed by each appellant in this court was an originating process by which the appellant sought, by way of appeal, to set aside or vary the sentence imposed by Martin CJ.

195 The appeals referred to in s 58(1)(b) include, on the face of it, appeals from any judgment or decision given or made by a Supreme Court judge in a proceeding within the judge's jurisdiction, whether sitting in court or in chambers. The breadth of the statutory language extends to an appeal by a contemnor against a judgment of conviction and, also, a sentencing decision, given or made by a Supreme Court judge in criminal contempt proceedings tried summarily. There is no reason in principle or policy, or in the text of s 58 or the Act as a whole, for the language of s 58(1)(b) to be read down so as to exclude appeals by contemnors against such judgments or decisions. Although Parliament has exhaustively stated, in s 58(1) of the *Supreme Court Act* and the *Criminal Appeals Act*, this court's jurisdiction to entertain appeals from judgments or decisions of a Supreme Court judge in relation to statutory offences (see pt 2 and pt 3 of the *Criminal Appeals Act*; s 58(1)(a), (f), (g), (h) and (m) and s 58(2) of the *Supreme Court Act*; ***Connell (No 5)*** (440)), this statement has not embraced criminal contempt as a common law offence triable summarily. It is inappropriate to read provisions such as s 58(1)(b), which confer jurisdiction on a court, by making implications or imposing limitations which are not found in the express words. See ***Knight v FP Special Assets Ltd*** [1992] HCA 28; (1992) 174 CLR 178, 205 (Gaudron J); ***The Owners of the Ship 'Shin Kobe Maru' v Empire Shipping Company Inc*** [1994] HCA 54; (1994) 181 CLR 404, 421 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron & McHugh JJ).

196 In my opinion, this court has jurisdiction under s 58(1)(b) to hear and determine the present appeals against sentence. It is unnecessary to decide whether this jurisdiction extends to appeals against an acquittal on a charge of criminal contempt or against a sentence for criminal contempt which is alleged to be manifestly inadequate.

197 Also, it is unnecessary, in the circumstances, to consider whether this court also has jurisdiction in the present case under s 58(1)(a).

Preliminary issue: the decision of the Full Court in *Cullen*

198 In ***Cullen***, the appellant was convicted and punished by a District Court judge for the statutory offence of contempt of court, contrary to s 63(1) of the *District Court of Western Australia Act 1969* (WA). The contempt was committed while the appellant was being tried before the judge and a jury on four counts in an indictment. The contempt comprised the appellant's persistent refusal to answer a question while he was under cross-examination in the course of giving evidence. The Full Court dismissed the appellant's appeal against his conviction and sentence for contempt on the ground that the appeal was incompetent.

199 Burt CJ's reasoning (Brinsden & Kennedy JJ agreeing) for deciding that the Full Court did not have jurisdiction to entertain the appeal was this:

> The appellate jurisdiction of this Court must be founded upon a statute. It is not for present purposes to be found within s 688(1) of the Criminal Code because the appellant is not 'a person convicted on indictment'. Nor can it be found within s 79 of the [District Court of Western Australia Act 1969 (WA)] because the appellant is not 'a party to an action or matter' within the definition of either word to be found in s 6 of the Act. See ***O'Shea v O'Shea and Parnell*** (1980) [sic: 1890] 15 PD 59. And the right of appeal cannot be brought within any of the matters specifically mentioned in s 58(1) of the Supreme Court Act and it cannot be drawn in by para (m) of that sub-section.
>
> I therefore conclude that the appeal is not competent (9).

200 Earlier in his reasons, Burt CJ had made these observations as to the nature of proceedings for contempt of court:

> Proceedings for contempt of court are criminal in character. A finding of guilt of criminal contempt is a 'conviction' and it is 'an offence'. ***BLF v David Syme***, (1982) 40 ALR 518 at p 522. But it is not an indictable offence. It is an offence tried summarily … (8).

201 The decision of the Full Court in ***Cullen*** is distinguishable. ***Cullen*** involved a purported appeal to the Full Court by an appellant who had been convicted and punished by a District Court judge for the statutory offence of contempt of court, contrary to s 63(1) of the *District Court of Western Australia Act*. The term 'judge', in s 58(1)(a) and s 58(1)(b), refers to a Supreme Court judge. The term does not include a District Court judge. See the definition of 'judge' in s 5 of the *Interpretation Act*. The term 'matter' in s 58(1)(a) is concerned with proceedings in 'the Court'. See the definition of 'matter' in s 4(1) of the *Supreme Court Act*.

The right of appeal in s 79(1) of the *District Court of Western Australia Act* in relation to a 'matter' is formulated differently from s 58(1)(a). Also, the term 'court' is defined in s 4(1) of the *Supreme Court Act* to mean the Supreme Court of Western Australia. The District Court is not included within the term.

Preliminary issue: s 22(2) of the *Supreme Court Act 1935* (WA)

202 I should refer to s 22(2) of the *Supreme Court Act*. At the material time, s 22(2) provided:

> Subject to the *Criminal Procedure Act 2004* and rules of court made under that Act that apply to the Supreme Court, the practice and procedure in all criminal causes and matters whatsoever in the Supreme Court shall be the same as the practice and procedure in force at the commencement of this Act in relation to similar causes and matters.

203 Section 22(2) is similar to s 19 of the *Judicature Act 1876* (Qld) (repealed), which was considered by the Full Court of the Supreme Court of Queensland in ***Foster***.

204 However, criminal contempt proceedings in the Supreme Court of Western Australia are, procedurally, civil in character, and at all material times the practice and procedure in O 55 of the *Rules of the Supreme Court* has applied to them.

Preliminary issue: specific reference to some of the Commission's arguments

205 Finally, in relation to the preliminary issue, I will make specific reference to those arguments advanced on behalf of the Commission which I have not already dealt with, in substance, in these reasons.

206 Counsel for the Commission referred to this passage in the Law Reform Commission of Western Australia's Report entitled, '*Review of the Law of Contempt*', Project No 93, June 2003:

> In the case of contempt committed in the face of the Supreme Court, or the analogous offence in the District Court, the alleged offender is likely to be without any effective rights of appeal. This is because the rights of appeal in criminal cases from those courts are provided for by s 688 of the *Criminal Code* which, as was indicated in Part II, only applies where a person is 'convicted on indictment' (*Criminal Code* (WA) s 688). A finding of guilt of criminal contempt may be a criminal conviction but it is not 'on indictment' (***Cullen v The Queen*** (Unreported, Full Court of the Supreme Court of Western Australia, Library No 6450,

> 25 September 1986) 9 (Burt CJ). As a result, an appeal to the Court of Criminal Appeal from such a conviction is incompetent.
>
> The right to appeal to the High Court in relation to contempt in the face of the court committed in the Supreme Court is conferred by s 73 of the *Australian Constitution* (for an example of the attempted exercise of such rights see ***Lovell v Hamersley Iron Pty Ltd*** (Unreported, High Court of Australia, 20 October 1999, P35 of 1998)). Given the restriction on rights of appeal from contempt convictions generally in the Supreme Court, an appeal to the High Court may be the only remedy available. In this regard the ability effectively to appeal to the High Court is, of course, subject to the requirements of the grant of special leave under s 35(2) of the *Judiciary Act 1903* (Cth) (78 - 79).

207 The Law Reform Commission recommended, in Recommendation 42, relevantly, that '[a]ppeals from contempt in the face of the court offence convictions and sentences … by a single judge of the Supreme Court should be to the Court of Criminal Appeal' (79).

208 In the present case, counsel for the Commission pointed out that Recommendation 42 was not adopted by the Parliament when it established the Court of Appeal (pursuant to the *Acts Amendment (Court of Appeal) Act*) or when it enacted the *Criminal Appeals Act*. It was submitted that if Parliament was 'minded to provide for a right of appeal in relation to [a conviction or sentence for contempt], it would be expected that such a right would be contained within the *Criminal Appeals Act*'. See Respondent's Answer dated 29 April 2011 par 27.

209 In my opinion, although it is at least arguable that it may be desirable for rights of appeal in relation to convictions and sentences for contempt to be included in the *Criminal Appeals Act*, the views of the Law Reform Commission as to the availability of 'effective rights of appeal' are not persuasive. The provisions of the *Supreme Court Act* (in particular, s 58(1)(b)) in relation to rights of appeal were not analysed either in the Law Reform Commission's Report or in its earlier discussion paper entitled, '*Contempt in the Face of the Court*', Project No 93(1) (2001). The Full Court's decision in ***Cullen*** was the only case referred to on this issue in the Report and the Discussion Paper.

210 In any event, the views of the Law Reform Commission, and the failure of the Parliament to adopt Recommendation 42 and implement it in legislation, cannot influence or affect the proper construction of s 58(1)(b) of the *Supreme Court Act*.

211 Counsel for the Commission referred to ***Keeley v Brooking*** [1979] HCA 28; (1979) 143 CLR 162 and the observations of Barwick CJ as to difficulties and inconvenience that might arise in primary proceedings if a right of appeal were available from a conviction or sentence for criminal contempt (170 - 171). None of the other justices who sat in ***Keeley*** referred to any such difficulties or inconvenience. With great respect to Barwick CJ, I am not persuaded that, in the contemporary age, the difficulties or inconvenience referred to by his Honour are incapable of proper management by primary and appeal courts. His Honour's comments were by way of an explanation for what he referred to as 'the continuing absence of any right of appeal' from a finding of contempt or the imposition of a punishment for contempt (170). These comments were made in the context of the legislation of Victoria then in force.

Each appellant's ground of appeal alleging manifest excess: general principles

212 Each appellant alleges that Martin CJ erred in law by imposing a sentence that was manifestly excessive.

213 A ground of appeal which asserts that a sentence imposed for an offence created by statute is manifestly excessive asserts the existence of an inferred error. It is necessary, in determining whether a sentence for a statutory offence is manifestly excessive, to examine it from the perspective of the maximum sentence prescribed by law for the relevant offence, the standards of sentencing customarily observed with respect to that offence, the place which the criminal conduct occupies on the scale of seriousness of offences of the kind in question, and the personal circumstances of the offender.

214 The guidance afforded by comparable cases is flexible rather than rigid. The mere fact that a sentence for a statutory offence is within the range of other sentences imposed for similar offences does not necessarily establish that there was an appropriate exercise of the sentencing discretion in the particular case. Similarly, the mere fact that a sentence for such an offence is outside that range does not necessarily establish that the exercise of the sentencing discretion in the particular case miscarried.

215 In Western Australia, the sentencing of offenders for statutory offences is governed by the *Sentencing Act*. However, as I have mentioned, a criminal contempt of court is a common law offence triable summarily and, by s 3(3)(a) of the *Sentencing Act*, that Act does not apply to or in respect of a person being punished for or as for contempt of court.

The question of punishment for a criminal contempt is entirely a matter within the discretion of the court. See ***R v Pearce*** (1992) 7 WAR 395, 431 (Malcolm CJ, Pidgeon & Rowland JJ agreeing); ***Kennedy v Lovell*** [2002] WASCA 226 [5] (Malcolm CJ, Murray J agreeing and Steytler J substantially agreeing).

216 In ***Wood v Staunton (No 5)*** (1996) 86 A Crim R 183, the defendant was found guilty of contempt of the Royal Commission into the New South Wales Police Service. The contempt was the defendant's refusal to answer a series of questions at the Royal Commission. Dunford J said that relevant matters for consideration in assessing the proper punishment for this type of contempt included:

1. the seriousness of the contempt proved;

2. whether the contemnor was aware of the consequences to himself of what he did;

3. the actual consequences of the contempt on the relevant trial or inquiry;

4. whether the contempt was committed in the context of serious crime;

5. the reasons for the contempt;

6. whether the contemnor has received any benefit by indicating an intention to give evidence;

7. whether there has been any apology or public expression of contrition;

8. the character and antecedents of the contemnor;

9. general and personal deterrence; and

10. denunciation of the contempt (185).

See also ***Principal Registrar of the Supreme Court of New South Wales v Jando*** [2001] NSWSC 969; (2001) 53 NSWLR 527 [16] - [18] (Studdert J). In that case, Studdert J also cited ***Registrar of the Court of Appeal v Gilby*** (Unreported, NSWCA, 20 August 1991), which referred to 'whether the contempt was motivated by fear of harm should evidence be given' [16].

217 The factors identified by Dunford J in ***Wood [No 5]*** were referred to with approval, and taken into account, by Malcolm CJ in ***Kennedy*** in

deciding upon the punishment to be imposed on the respondent for three counts of contempt in relation to a Royal Commission conducting an inquiry into whether there had been any corrupt or criminal conduct by any Western Australian police officers [14] - [15].

218 There is, of course, no maximum penalty applicable to the common law offence of criminal contempt. However, because this offence is essentially criminal in nature (***Hinch*** (49)), a decision as to the appropriate punishment for the contemnor must take into account factors ordinarily relevant to the punishment of criminal offences generally, and the offence of criminal contempt in particular. The principles in relation to manifest excess which have been developed in the context of sentencing for statutory offences apply, by analogy, to sentencing appeals in relation to the punishment of the common law offence of criminal contempt.

Each appellant's ground of appeal alleging manifest excess: the policy underpinning pt 4 of the CCC Act

219 By s 7A(a) of the CCC Act, a main purpose of that Act is to combat and reduce the incidence of organised crime. By s 7B(2), the achievement of that purpose is facilitated by empowering the Commission to authorise the use of investigative powers not ordinarily available to the police service to effectively investigate particular cases of organised crime.

220 Part 4 of the CCC Act is headed, 'Organised crime: exceptional powers and fortification removal'. It comprises s 45 - s 83. Part 4 was enacted to provide the Commission with exceptional powers to be used in the investigation of organised crime.

221 Divisions 2 to 5 of pt 4 comprise s 48 - s 66. By s 47(1), the purpose of div 2 - div 5 is to facilitate the investigation of a 'section 5 offence'. Section 5 defines 'section 5 offence' to mean, in essence, an offence described in sch 1 committed in the course of organised crime. By s 47(3), div 2 - div 5 apply only if the Commission has made an 'exceptional powers finding' in respect of the s 5 offence concerned in accordance with s 46.

222 Martin CJ held that the punishment to be imposed on each of the appellants 'must be significant enough to discourage prospective witnesses from making a calculated choice to suffer a penalty rather than give evidence, and thereby frustrate the achievement of the important policy objectives' embodied in those provisions of the CCC Act which are concerned with the investigation of organised crime [31].

Each appellant's ground of appeal alleging manifest excess: the facts and circumstances of the contempts

223 As I have mentioned, the contempts were committed in the course of the Commission's exercise of its power to facilitate the investigation of organised crime. The Commission was conducting an inquiry into a brawl which occurred on 3 October 2010 between members of two motorcycle gangs during a public sporting event at Kwinana. Two of the appellants, Mr Silvestro and Mr Smith, were seriously injured in the brawl. The Commission found that there were reasonable grounds for suspecting that two or more serious offences were committed in the course of organised crime, namely, the serious assaults upon Mr Silvestro and Mr Smith. The other two appellants, Mr Allbeury and Mr Chikonga, are members of the same motorcycle gang as Mr Silvestro and Mr Smith. All of the appellants persistently refused to provide information which could assist in charging and convicting the persons who committed the serious offences in question in the course of organised crime.

224 Martin CJ made findings in relation to each of the factors identified by Dunford J in ***Wood [No 5]***. I note the following:

(a) Each of the contempts was extremely serious. The appellants persistently defied the authority of the Commission in the performance of its function of facilitating the investigation of organised crime [37].

(b) The Commissioner warned each of the appellants, on a number of occasions, of the likely consequences of his persistent refusal to comply with his obligations under the CCC Act. Each appellant was aware of the consequences to himself of his conduct and admitted as much through his counsel. Further, Martin CJ warned each of the appellants that if he failed to take advantage of opportunities provided to purge his contempt, then that would be a factor affecting the punishment to be imposed [39].

(c) The contempts impeded and delayed the Commission's conduct of its investigation [40].

(d) Each contempt was committed in the context of an investigation of serious crimes committed in the course of organised crime [41]. Martin CJ was unable to pass sentence on the basis that the reason for the contempts was the appellants' fear of retribution. There was no evidence, either from the appellants or otherwise, to support a finding of the existence of a fear of retribution or that

any such fear was well-founded [42] - [43]. In any event, his Honour found that the achievement of the public policy objective which underpins the conferral on the Commission of its exceptional powers would be impeded if significant mitigating weight were to be given to an assertion of a fear of retribution as a reason for refusing to provide information [43].

(e) There was no evidence as to whether any of the appellants had received a benefit by refusing to give evidence [44].

(f) None of the appellants had apologised or publicly expressed any contrition for the commission of his contempt [45]. Mr Chikonga did, however, plead guilty when he appeared before Martin CJ on 21 January 2011. His Honour dealt elsewhere in his reasons with the significance of that plea upon the sentence to be imposed on him.

(g) Martin CJ dealt separately in his reasons with the character and antecedents of each appellant.

(h) Martin CJ said that general deterrence was the most significant factor to be taken into account when passing sentence for these contempts [47].

(i) It was appropriate publicly to denounce the seriousness of the appellants' contempts because of their wilful and persistent denial of the Commission's authority [48].

Each appellant's ground of appeal alleging manifest excess: the trial of each appellant except Mr Chikonga

225 As I have mentioned, each of the appellants, except Mr Chikonga, was convicted after a trial. Mr Chikonga pleaded guilty. It was submitted on behalf of each of the appellants who went to trial that he had facilitated the course of justice by not challenging the factual basis of the Commission's case. However, this submission must be evaluated in the context of the nature of the case and the supporting evidence advanced by the Commission.

226 The Commission relied principally upon the certificate of the Commissioner (see s 163(1) and s 163(2) of the CCC Act) and a DVD of each appellant's examination before the Commission. Factually, there was little or nothing for each appellant to challenge.

227 Although the appellants who went to trial did not challenge the factual basis of the Commission's case, they did not make any admissions in relation to that case. It remained necessary for the Commission to prove its case.

Each appellant's ground of appeal alleging manifest excess: the standards of sentencing customarily observed with respect to the offence

228 As Martin CJ noted in his reasons, the circumstances giving rise to the offence of criminal contempt are many and varied. There is a wide breadth of sentencing discretion because it is necessary to deal with the wide breadth of facts and circumstances which might give rise to a conviction for the offence [34].

229 Counsel for the appellants and counsel for the Commission referred to numerous cases. All of them (except ***Kennedy***) were decided in other States, mainly New South Wales. Counsel for the appellants relied, in particular, on ***R v Herring*** (Unreported, NSWSC, No 70140 of 1990, 3 October 1991) (Slattery AJ); ***Wood [No 5]***; ***Registrar, Criminal Division, Supreme Court of New South Wales v Glasby*** [1999] NSWSC 846; ***Kennedy***; ***R v Abell*** [2007] QCA 448; ***R v Drever*** [2010] SASCFC 27.

230 In ***Herring***, the defendant was convicted of contempt in the face of the Supreme Court, committed in the course of a criminal trial in which he was the accused. He escaped from the dock, climbed onto the bench and threatened the presiding Judge. The defendant's intention was to attack the judge. However, his progress was impeded and, before he could commence the attack, the judge was able to avoid the defendant. The defendant was forcibly restrained and taken back into custody. Counsel were present and the jury was about to enter the courtroom when the contempt occurred. The defendant was sentenced to 2 years' imprisonment.

231 In ***Wood [No 5]***, the defendant was convicted on two counts of contempt of the Royal Commission. The contempts were committed on different dates. On each count, the defendant was initially committed to prison until further order, with liberty to apply. Eventually, the defendant purged his contempt and answered questions before the Royal Commission. The matter then came before Dunford J for the purpose of fixing a determinant sentence for each contempt. His Honour imposed a sentenced of 11 months' imprisonment for the first contempt and 8 months' imprisonment for the second. Each sentence was back-dated to

the date on which the defendant was taken into custody for the relevant contempt.

232 In ***Glasby***, the defendant was convicted of contempt of court for refusing to answer a number of questions directed to her as a witness in a murder trial. Adams J found that the defendant intended to interfere with the administration of justice. She undoubtedly knew facts about the murder and the implication of the accused (her husband) which were of great importance in the trial. However, disclosure of this material was not vital to the prosecution case because the accused was convicted on other, largely circumstantial, evidence. The defendant evinced no contrition. She was 'very much under the influence of her husband who … was "a brutal and vicious man"'. To some extent, she was motivated by a sense of misplaced loyalty to her husband together with a foolish bravado. There was some prospect of future rehabilitation. The defendant had a history of illicit drug and alcohol abuse and had made two previous attempts at suicide. The judge sentenced the defendant to 6 years' imprisonment.

233 In ***Kennedy***, the respondent was convicted of three counts of contempt of the Royal Commission. The first was that, without reasonable excuse, he failed to attend the Commission as required by a summons served on him. The second was that, having attended and reported to the Commission on a later date, he refused to be sworn or make an affirmation. The third was that, after attending and reporting to the Commission on that later date, he left the Commission and failed to attend thereafter without having been released from attendance. Each contempt involved a contravention of a provision of the *Royal Commissions Act 1968* (WA). The application to punish the respondent for contempt was made returnable before the Full Court. The matter did not come before the Full Court as an appeal.

234 The Full Court in ***Kennedy*** reviewed the facts and circumstances relevant to the offending and the respondent by reference to all of the factors identified in ***Wood [No 5]***. Malcolm CJ said:

> After taking into account all of the matters to which I have referred and [the respondent's] undertaking to the Royal Commissioner and to this Court to comply with the requirements of the Royal Commissioner regarding his attendance, his obligation to answer questions relevant to the inquiry and the lawful direction of the Royal Commissioner in the future, I have concluded, after some anxious consideration, that [the respondent] should be fined rather than imprisoned [40].

The court imposed a fine of $10,000 for each contempt, being a total of $30,000.

235 In ***Abell***, the appellant was convicted, after a trial, of one count of refusing to answer a question at an Australian Crime Commission examination, contrary to s 30(2)(b) of the *Australian Crime Commission Act 2002* (Cth). By s 30(6) of that Act, the maximum available penalty was a fine not exceeding 200 penalty units or imprisonment for a period not exceeding 5 years. The appellant was sentenced to 12 months' imprisonment with an order directing his release after serving 4 months upon him giving security by recognisance in the sum of $2,000 on condition that he be of good behaviour for a period of 3 years. The Court of Appeal of Queensland dismissed his appeal against sentence. McMurdo P (Holmes & Muir JJA agreeing) said:

> In passing sentence the judge observed that [the appellant] had shown no remorse and that he was not entitled to any credit for cooperation with the authorities. In the circumstances, a sentence of imprisonment was the only appropriate sentence. [The appellant's] refusal to answer questions obstructed proper enquiry into the drug trade. A deterrent penalty had to be imposed.
>
> The judge rightly noted that [the appellant] was not cooperative with the administration of justice and had shown no remorse. He was, both at sentence and when he offended, a mature man. He had a significant criminal history. There was no evidence placed before the court to suggest that he had promising rehabilitative prospects [32] - [33].

236 In ***Drever***, the appellant pleaded guilty to three counts of refusing to answer a question at an Australian Crime Commission examination, contrary to s 30(2) of the *Australian Crime Commission Act*. At the examination, the appellant answered many questions, but refused to answer three questions relating to his involvement in the manufacture of methylamphetamine as part of an ongoing business of making and selling the drug. The maximum penalty for the offence was 5 years' imprisonment or a fine of 200 penalty units. The appellant was sentenced to 12 months' imprisonment, to be released after serving 6 months upon entry into a recognisance in the sum of $1,000 to be of good behaviour for 2 years. A reduction of 20% had been made to recognise the appellant's plea of guilty. The sentence of 12 months' imprisonment was ordered to commence at the expiration of an existing State non-parole period of 2 years 8 months which the appellant was then serving. The Full Court of the Supreme Court of South Australia dismissed the appellant's appeal

against sentence. It held that the sentence imposed was an appropriate exercise of the sentencing discretion.

Each appellant's ground of appeal alleging manifest excess: the personal circumstances of Mr Allbeury

237 Mr Allbeury attended the Commission in answer to a summons. He was sworn to give evidence. However, he persistently refused to answer any question of substance. Also, in refusing to answer 18 separate questions from the Commissioner and counsel assisting the Commission, especially those from the Commissioner, Mr Allbeury answered by telling the Commissioner to 'fuck off' or 'get fucked' [51]. Unlike the other appellants, Mr Allbeury was convicted of two offences of contempt.

238 When sentenced, Mr Allbeury was aged 29 years. He has an extensive criminal record and has been sentenced to significant terms of imprisonment on numerous occasions and for a variety of serious offences. Although his prior criminal record does not aggravate his contempts, he is unable to rely on any mitigation arising from prior good behaviour.

239 Medical reports before Martin CJ indicated that Mr Allbeury suffers from a number of medical conditions, including bipolar disorder. As a result of these conditions, his behaviour is erratic and, on occasions, aggressive, violent and antisocial. His Honour found, however:

> While these conditions might go some way to explaining Mr Allbeury's offending, in my view, they do not justify or mitigate the seriousness of his quite deliberate behaviour in any way. It is clear from the DVD which I have viewed, that Mr Allbeury was in complete control of his senses and faculties at the time he committed the offences, and was well aware of what he was doing and of the likely consequences [56].

240 Martin CJ concluded that none of the matters personal to Mr Allbeury mitigated the punishment otherwise appropriate for his offending [57].

Each appellant's ground of appeal alleging manifest excess: the personal circumstances of Mr Silvestro

241 Mr Silvestro attended the Commission in answer to a summons, but he refused to be sworn or to take an affirmation for the purpose of giving evidence. He was therefore not asked any questions in the course of the Commission's investigation.

242 When sentenced, Mr Silvestro was aged 42 years. He has an extensive criminal record, although his last conviction was in 1994. In 1994 Mr Silvestro was convicted of attempting to defeat or pervert the course of justice, for which he was sentenced to 2 years' imprisonment.

243 Martin CJ found that none of the matters personal to Mr Silvestro mitigated the punishment otherwise appropriate for his offending [62].

Each appellant's ground of appeal alleging manifest excess: the personal circumstances of Mr Smith

244 Mr Smith attended the Commission in answer to a summons, but he refused to be sworn or to take an affirmation for the purpose of giving evidence. He was therefore not asked any questions in the course of the Commission's investigation.

245 When sentenced, Mr Smith was aged 37 years. He has an extensive criminal record, although he has not previously been sentenced to a term of imprisonment. A number of his prior convictions are for drug offences.

246 Martin CJ found that there was nothing in the character or personal antecedents of Mr Smith which would mitigate the punishment otherwise appropriate for his contempt [65].

Each appellant's ground of appeal alleging manifest excess: the personal circumstances of Mr Chikonga

247 Mr Chikonga attended the Commission in answer to a summons, but he remained mute. He failed to respond to any and all requests that he be sworn or make an affirmation. He was therefore not asked any questions in the course of the Commission's investigation.

248 When sentenced, Mr Chikonga was aged 24 years. Despite his relative youth, he has an extensive criminal record. Notably, he has a number of convictions for serious offences for which he has been sentenced to terms of imprisonment. Mr Chikonga had a 'troubled upbringing'. However, Martin CJ said it was 'far from exceptional' and did not justify his behaviour.

249 Martin CJ found that there was nothing in the character or personal antecedents of Mr Chikonga which would mitigate the punishment otherwise appropriate for his contempt [71].

250 However, unlike the other appellants, Mr Chikonga pleaded guilty. It was therefore necessary for Martin CJ to assess whether the punishment to be imposed on him should be mitigated as a result of that plea.

Each appellant's ground of appeal alleging manifest excess: its merits

251 It is apparent from my review of the cases principally relied upon by counsel for the appellants that the great variation that is possible in the facts and circumstances of offences of criminal contempt and of contemnors precludes the establishment of a tariff or a sentencing range. In addition, some contempts are common law offences without a maximum penalty (as in the present case) whereas other contempts are statutory offences with a maximum penalty. The punishment to be imposed in a particular case must be appropriate to the facts and circumstances of the particular offence and the particular contemnor.

252 At common law, a sentence must be proportional to the offence. See ***Veen v The Queen (No 2)*** [1988] HCA 14; (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson & Toohey JJ), 486 (Wilson J), 490 - 491 (Deane J).

253 The contempt or contempts committed by each of the appellants was extremely serious. Each appellant evinced an intentional defiance of the Commission's authority, purpose and functions. Each contempt was contumacious.

254 Before Martin CJ imposed sentence, each appellant was given ample opportunity to purge his contempt by giving evidence on oath or affirmation at the examination being conducted by the Commission. Each appellant had access to legal advice. At all material times, the appellants were represented by the same senior counsel and solicitor. None of the appellants purged his contempt despite an appreciation of the consequences of failing to purge. Each appellant, through his counsel, clearly and unequivocally indicated to his Honour that he had no present intention of purging his contempt in the future by cooperating with the Commission [14], [21].

255 Martin CJ comprehensively examined the relevant facts and circumstances and, in my respectful opinion, correctly applied those facts and circumstances to the factors identified by Dunford J in ***Wood [No 5]***.

256 A matter to be taken into account in evaluating whether any of the sentences in question was manifestly excessive is the right of each appellant to make an application to the court under O 55 r 9 of the *Rules*

of the Supreme Court 1971 for discharge, notwithstanding that the term for which he has been committed to prison has not expired. Order 55 r 9 provides:

> (1) The Court may, on application of any person committed to prison for contempt of court, discharge him, notwithstanding that the term for which he may have been ordered to be committed has not expired.
>
> (2) An application for the discharge of a person committed to prison for contempt, and any order made thereon, shall be served on the sheriff by the person making the application.

257 The principal sentencing factors in the present case were appropriate punishment, general and personal deterrence, and public denunciation of the conduct of each of the appellants.

258 In my opinion, the sentence imposed on each of Mr Allbeury, Mr Silvestro and Mr Smith bears a proper relationship to the criminality of his offending, after having regard to all relevant circumstances including Martin CJ's unchallenged findings of fact and the personal antecedents of each of Mr Allbeury, Mr Silvestro and Mr Smith. The sentencing outcome was not plainly unreasonable or unjust, and there is no basis for inferring error.

259 Similarly, but subject to my consideration of the merits of Mr Chikonga's additional ground of appeal, in my opinion Mr Chikonga's sentence bears a proper relationship to the criminality of his offending, after having regard to all relevant circumstances including Martin CJ's unchallenged findings of fact and Mr Chikonga's personal antecedents. Subject to my consideration of his additional ground, the sentencing outcome was not plainly unreasonable or unjust, and there is no basis for inferring error.

260 Each ground of appeal alleging manifest excess fails.

Mr Chikonga's ground of appeal concerning his plea of guilty

261 Mr Chikonga, in addition to alleging that the sentence imposed on him was manifestly excessive, alleges that Martin CJ 'erred in law by failing to give [Mr Chikonga] any credit for his plea of guilty and thereby failed to reduce the sentence imposed'.

262 Martin CJ set out in his reasons his understanding of the facts and circumstances in which Mr Chikonga's plea of guilty was entered. His Honour said:

> Mr Chikonga failed to attend court upon the first return of the summons which had been served upon him. As a result, I issued a warrant for his arrest, and adjourned the summons to be tried on 13 December 2010. The warrant was not executed prior to that date, and Mr Chikonga failed to appear at the time his trial was listed for hearing. As a result, I further adjourned his trial indefinitely, and the warrant for his arrest remained in force. The trial of the other contemnors proceeded on 13 December 2010. The evidence for the Commission took the form of certificates and affidavits which had previously been served. That evidence established conclusively what had occurred when the contemnors appeared before the Commission. None of the contemnors gave evidence. Their defence consisted entirely of legal submissions, which I rejected in reasons which I delivered that day.
>
> Mr Chikonga was arrested and taken into custody following his involvement in the motor vehicle accident to which I have referred on 15 December 2010. It is reasonable to infer that, but for his involvement in that accident, he would have continued to endeavour to evade apprehension and arrest.
>
> Following his arrest, Mr Chikonga was brought before the court. He was remanded in custody to appear before the court on 21 January 2011, when his case was listed for trial. Some days prior to the date listed for trial, the court was notified that Mr Chikonga intended to plead guilty [72] - [74].

263 Martin CJ said that Mr Chikonga's failure to appear to answer the charge of contempt gave him the benefit of knowing, before his case was tried, the outcome of the legal submissions advanced unsuccessfully on behalf of the other appellants [75]. His Honour concluded that, when Mr Chikonga entered his plea of guilty, he must have been aware, 'and would presumably have been advised', that:

> (a) his conduct said to constitute contempt of the Commission would be established unequivocally by the evidence which would be tendered to the court;
>
> (b) in those circumstances, no point or purpose would be served by him giving evidence;
>
> (c) all the legal arguments which had been advanced on behalf of the other contemnors in opposition to their conviction had failed [75].

264 Martin CJ made these findings:

(a) Mr Chikonga's plea of guilty was nothing more than a recognition of the inevitable outcome of his trial;

(b) if Mr Chikonga had not pleaded guilty, his trial would have been perfunctory and would have occupied no more than a few minutes; and

(c) in these circumstances, the plea of guilty produced no significant saving of time or cost for either the Commission or the court, and did not alleviate any inconvenience to witnesses, as none would have been called [76].

265 His Honour also noted Mr Chikonga's continuing attitude of defiance and the absence of any remorse or contrition:

> Like the other contemnors, Mr Chikonga has maintained his refusal to cooperate with the Commission, and indicated that he does not intend to change his position. In these circumstances, it is impossible to draw any inference of remorse or contrition from the entry of his plea of guilt, nor was there any identifiable saving of time, cost or convenience to anyone as a result of that plea. In those circumstances, it would seem to me to be quite inappropriate to give Mr Chikonga any discount of sentence, as compared to the other contemnors, particularly given that the only reason he is in any different position from them is the result of his failure to present himself to the court in answer to the summons served upon him [77].

266 Martin CJ concluded that in 'the unusual circumstances of Mr Chikonga's case', there was no reason in principle why he should receive a discount as a result of his plea of guilty [85]. His Honour said that he was not 'legally obliged to apply such a discount' [85], and then elaborated:

> Accordingly, in the exercise of my discretion as to sentence, I do not propose to discount the sentence imposed upon Mr Chikonga as a consequence of his plea of guilt. Such a discount would appear to me to be quite anomalous, when compared to the sentence which I propose to impose upon those who voluntarily presented themselves to the court in answer to the summons served upon them, unlike Mr Chikonga [85].

Mr Chikonga's ground of appeal concerning his plea of guilty: Martin CJ's error of fact

267 Martin CJ's reasons reveal an error of fact in relation to the service on Mr Chikonga of the summons requiring him to appear in the Supreme Court.

268 His Honour's error is contained in the following passage:

> *Mr Chikonga did not attend court on 25 November 2010, despite having been served with a summons requiring his attendance on that date.* As a result of his failure to appear, I issued a warrant for his arrest, and adjourned his case until 13 December 2010. The warrant was not executed before that date, and Mr Chikonga failed to appear. I adjourned his trial, and maintained the warrant for his arrest, which was executed on 15 December 2010, when he came to attention because of his involvement in a serious motor vehicle accident. He has been in custody since then. On 21 January 2011, he pleaded guilty to the charge brought against him, and was convicted on that plea [4]. (emphasis added).

His Honour repeated the substance of these observations later in his reasons [72] - [74].

269 The relevant error of fact is Martin CJ's statement that Mr Chikonga had been served with a summons requiring his attendance at the Supreme Court on 25 November 2010. Mr Chikonga was not in fact served with a summons before 25 November 2010. At the hearing of these appeals, counsel for the Commission properly conceded the existence of the error (appeal ts 23 - 24, 48).

270 The question for this court is whether the error of fact is material. In particular, whether this court is of the opinion that, notwithstanding the error, no different sentence should have been imposed.

Mr Chikonga's ground of appeal concerning his plea of guilty: its merits

271 In ***Cameron v The Queen*** [2002] HCA 6; (2002) 209 CLR 339, Gaudron, Gummow and Callinan JJ referred to the common law rule that a person should not be penalised for exercising the right to trial [18]. A little later, their Honours explained the rationale for the rule that a plea of guilty may be taken into account in mitigation. They said:

> [T]he issue is to what extent the plea is indicative of remorse, acceptance of responsibility and willingness to facilitate the course of justice [22].

272 In ***Bahar v The Queen*** [2011] WASCA 249; (2011) 255 FLR 80, McLure P (Martin CJ & Mazza J agreeing) referred to ***Cameron*** and then said:

> The practical consequence of the fact that a plea of guilty is mitigatory is that, all other sentencing considerations being equal (which they usually never are), an offender who pleads guilty will ordinarily receive a lesser sentence than a co-offender who pleads not guilty. However, as explained by the High Court in ***Cameron***, *it is not the mere plea of guilty that*

> *produces that outcome but rather the fact that the plea supports an inference of remorse, acceptance of responsibility and a willingness to facilitate the course of justice* [41]. (emphasis added)

273 In the present case, Martin CJ was entitled, in the exercise of his discretion and generally for the reasons he gave, not to reduce the sentence imposed on Mr Chikonga on account of his plea of guilty.

274 There was no basis in the material before his Honour for any inference that the plea indicated, to any extent, remorse or an acceptance of responsibility or a willingness to facilitate the course of justice.

275 Indeed, to the contrary, there was evidence of a continuing refusal by Mr Chikonga (and the other appellants) to facilitate the course of justice. There was a complete and ongoing absence of cooperation with the Commission's investigative process. In all the circumstances, Mr Chikonga was continuing to defy (rather than facilitate) the course of justice.

276 On the basis of Martin CJ's unchallenged findings of fact, the only inference reasonably open is that Mr Chikonga (and the other appellants) did not have any remorse or accept any responsibility for their contemptuous behaviour.

277 The utilitarian value of Mr Chikonga's plea was, for the reasons his Honour gave, insignificant.

278 Mr Chikonga's plea was merely a recognition of the inevitable. See ***R v Shannon*** (1979) 21 SASR 442, 453 (King CJ).

279 In my opinion, Martin CJ's error of fact is, in all the circumstances, unimportant in the context of the sentencing outcome. After evaluating and weighing all relevant sentencing factors, I am satisfied that, notwithstanding the error, no different sentence should have been imposed.

280 There is no merit in Mr Chikonga's ground of appeal alleging that Martin CJ erred in law by failing to give Mr Chikonga any credit for his plea of guilty.

Conclusion

281 I would dismiss each of the appeals.

282 **MAZZA JA**: I agree with McLure P and Buss JA that the appeals are competent. I also agree with their Honours that the source of this court's jurisdiction to determine the appeals is s 58(1)(b) of the *Supreme Court Act 1935* (WA) (the Act). On this issue, I respectfully agree with the reasons of McLure P. It is therefore unnecessary to decide the scope and effect of s 58(1)(a) of the Act, and I prefer not to do so, given the absence, in this case, of full argument from the parties as to the scope and purpose of this subsection.

283 As to the merits of the appeals, for the reasons given by Buss JA, each must be dismissed.