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Eightieth session
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VIEWS

Communication No. 920/2000

Submitted by:	Mr. Avon Lovell (not represented by counsel)
Alleged victim:	The author
State party:	Australia
Date of communication:	2 December 1999 (initial submission)
Document references:	Special Rapporteur's rule 91 decision, transmitted to the State party on 10 April 2000 (not issued in document form)
Date of adoption of Views:	24 March 2004

On 19 March 2004, the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 920/2000. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Eightieth session

concerning

Communication No. 920/2000**

Submitted by:	Mr. Avon Lovell (not represented by counsel)
Alleged victim:	The author
State party:	Australia
Date of communication:	2 December 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 March 2003,

Having concluded its consideration of communication No. 920/2000, submitted to the Human Rights Committee by Mr. Avon Lovell under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Under rule 85 of the Committee's rules of procedure, Mr. Ivan Shearer did not participate in the examination of the case.

A dissenting opinion signed by Committee member Mr. Hipólito Solari Yrigoyen, is appended to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication dated 21 December 1999, is Avon Lovell, an Australian citizen, currently residing in Greenwood, Western Australia. He claims to be a victim of violations by Australia[1] of article 14, paragraphs 1 and 5, and article 19 of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

The facts as submitted by the author

2.1 The author was retained as an industrial advocate by a trade union, the Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Workers' Union of Australia, Engineering and Electric Division, Western Australia Branch (CEPU), when it became involved in industrial action against Hamersley Iron PTY Ltd (Hamersley) in 1992. Hamersley, represented by the law firm Freehill, Hollingdale and Page (Freehill), commenced civil proceedings in the Supreme Court of Western Australia against the CEPU and a number of its officials, seeking injunctions and compensatory damages on a number of grounds. During these proceedings, Hamersley was required to make available for discovery by the CEPU and its officials all relevant documents for which privilege could not be claimed. These documents were obtained and inspected by the author and the CEPU. Included in these documents were five documents, in relation to which Hamersley alleged that the author and the CEPU, by revealing their contents publicly in a radio interview, in newspaper articles and in a series of briefings prepared for distribution to members of the CEPU and other unions, and by using them contrary to the rules of discovery, had committed contempt of court.

2.2 On 22 May 1998, the author and the CEPU were convicted at first instance in the Full Court of the Supreme Court of Western Australia (three judges) on two accounts of contempt of court. The first was the misuse of the five discovered documents, in that the author had used them contrary to the implied undertaking not to use discovered documents which had been obtained from the other party in the civil action in the process of discovery, or to communicate their contents other than for the purposes of the litigation for which the documents were discovered. The second was the interference with due administration of justice, in that the author's conduct, by disclosing the contents of the discovered documents, was intended and placed improper pressure on Hamersley, in regard to the main proceedings, it invited public prejudgement of the issues, and had the tendency to frighten off potential witnesses.

2.3 The author's defence with regard to the first contempt charge, had been, inter alia, that the documents in question, once referred to in open court, had become part of the public domain and there was no limitation any longer on their use; that Hamersley, by responding to the allegations made by the author in reliance on material contained in the discovered documents, had waived its right to confidentiality of the discovered documents; and that publication and use of the documents was consistent with his freedom of political communication protected by the Australian Constitution. On 22 July 1998, the Court fined the author AUD$40,000 (plus costs), and the union AUD$55,000 (plus costs).

[1] The Optional Protocol entered into force for Australia on 25 December 1991 on accession.

2.4 The author subsequently sought Special Leave to Appeal to the High Court of Australia, on the following grounds:

a) that the Supreme Court of Western Australia had erred in law by not holding that a reference to discovered documents in open court removed the implied undertaking not to use such documents for purposes extraneous to the litigation;

b) that the Court should have held that the common law of Western Australia with respect to the use of discovered documents, is consistent with Federal Court Rules and with English Rules;

c) that in respect of the second contempt charge, the publications did not have any real potential to prejudice or embarrass the trial of any pending cause or action, or to interfere with or impair, the capacity of any court to administer fair and impartial justice;

d) that the Court had erred in not holding that the freedom of political communication took priority over the law of contempt;

e) that the fines imposed were manifestly excessive.

2.5 On 29 October 1999, the author was denied Special Leave to Appeal to the High Court of Australia. His application was dismissed on two grounds; first, that there was no sufficient reason to doubt the correctness of the decision of the Full Supreme Court; and secondly, that the case was not considered a suitable vehicle for determining the question of principle sought to be agitated by the applicants because it appeared unlikely that a decision of an appeal would require a determination of that issue. With this, the author claims to have exhausted all domestic remedies.

The complaint

3.1 The author claims that his right to a fair trial under article 14, paragraph 1, was violated. He claims that one of the judges on the Supreme Court of Western Australia raised at least an appearance of bias, as he had previously, as a lawyer, conducted extensive defamation litigations against the author relating to a book that he had written. He was also a former partner of the law firm prosecuting the contempt charge against the author.

3.2 The author also alleges a violation of article 14, paragraph 1, in that the prosecution, referring to Hamersley which initiated the contempt proceedings, was under no duty to act impartially or provide exculpatory evidence, and had a vested interest in obtaining a conviction.

3.3 Furthermore, the author alleges that his right to an appeal, under article 14, paragraph 5, has been violated, arguing that an application for Special Leave to Appeal is not a full appeal, as it deals only with "special leave issues", rather than the grounds of appeal themselves. Furthermore, Special Leave to Appeal is subject to certain conditions, such as public interest or discrete questions of law. His special leave hearing lasted a mere 20 minutes. Accordingly, he maintains that he is left without effective redress against the first instance conviction.

3.4 Finally, the author contends that his conviction for contempt has prevented him from exercising, as a journalist, his rights under article 19 of the Covenant, in that he was convicted and fined for publishing documents that had been referred to in an open court. In this context, he refers to the alteration of the English Supreme Court Rules following the so called "Harman case" in the United Kingdom, which is mirrored in the Federal Court jurisdiction in Australia and in the States of New South Wales and South Australia, and which implies that documents that have been read to or by an open court in open public session have ceased to be protected by an implied undertaking not to use them.

The State party's submission on the admissibility and merits of the communication

4.1 By note verbale of 10 October 2000, the State party made its submission on the admissibility and merits of the communication. It submits that the author's claims under article 14, paragraph 1, should be declared inadmissible for non-exhaustion of domestic remedies, since he failed to raise the question of impartiality before domestic courts, and for failure to substantiate his claim in that he does not allege or disclose evidence of actual bias on the part of Justice Anderson, and that his allegation of an absence of duty on the opposing party to act in a particular way does not come within the terms of article 14, paragraph 1.

4.2 With regard to the author's claim that his right to review by a higher tribunal was infringed by the High Court's refusal to grant Special Leave to Appeal, the State party submits that the author has failed to substantiate his claim, that it is incompatible with the Covenant, and, in the alternative, with regard to the second charge of contempt, that he has not exhausted domestic remedies. This claim should therefore also be declared inadmissible.

4.3 Furthermore, the State party submits that the author has failed to substantiate his claim that the law of contempt was used to prevent him from exercising his rights under article 19 of the Covenant. In the alternative, should the Committee consider the author's allegations admissible, it submits that each of the claims should be dismissed as unmeritorious, since the author has failed to submit evidence to substantiate his claims.

The author's claim under article 14, paragraph 1

4.4 The State party submits that the author advances two allegations under article 14, paragraph 1, of the Covenant; first that he did not receive a hearing by an impartial tribunal[2], and second, that in the circumstances of the case where the opposing party was not required to act impartially or divulge exculpatory material, he did not receive a fair hearing.

The author's claim that he did not receive a hearing by an impartial tribunal

4.5 With regard to the allegation that the author did not receive a hearing by an impartial tribunal because one of the judges on the Full Supreme Court had been a former adversary and a member of the law firm responsible for prosecuting the contempt charge, the State

[2] See , Communication No. 387/1989, *Karttunen v. Finland,* Views adopted on 23 October 1992, and judgments of the European Court of Human Rights in Case No. 8692/79, *Piersack v. Belgium*, adopted on 1 October 1982, Case No. 9186/80, *De Cubber v. Belgium*, adopted on 26 October 1984, and Case No. 10486/83, *Hauschildt v. Denmark*, adopted on 24 May 1989.

party submits that the author failed to raise this claim before the domestic courts, and that it should be declared inadmissible under article 5, paragraph 2 b) of the Covenant[3].

4.6 Since the author 's allegation of impartiality is based on the presence of Justice Anderson on the bench of the Full Supreme Court, it is clear that the author knew that Justice Anderson was on the bench before the commencement of the trial. The State party submits that there have been three discrete instances of failure to exhaust domestic remedies. First, the author did not apply to have Justice Anderson excuse himself, or to the Full Supreme Court to disqualify Justice Anderson, at any time before or during the hearing of his contempt charges. To the extent that the author allowed the hearing to proceed after becoming aware of this information, he may also be seen as having implicitly accepted that no issue of bias arose.

4.7 Secondly, the author failed to apply to the Full Supreme Court for a review or a reopening of the case after the decision in his case was delivered, on the ground that the decision was impugnable because of Justice Anderson's participation in the deliberations.

4.8 Finally, the author failed to apply to the High Court for a review and/or setting aside of the decision of the Full Supreme Court on the basis of Justice Anderson's participation. The State party notes that the author was represented by experienced senior counsel in the proceedings before the High Court, and that his failure to raise the question of the impartiality of Justice Anderson is demonstrative of a failure to exhaust available domestic remedies.

4.9 In the alternative, the State party submits that the communication should be declared inadmissible for non-substantiation under article 2 of the Optional Protocol, since the author submitted insufficient evidence that would constitute a *primae facie* case. In respect of the first claim of bias, that is that Justice Anderson was a party to the case or had disqualifying interest therein, the State party submits that although Justice Anderson had 16 years earlier been a member of the law firm representing Hamersley in the contempt proceedings, the author has not submitted any allegation or evidence that he had any relationship or disqualifying interest with Hamersley.

4.10 In respect of the second claim of bias, that is where circumstances would lead a reasonable observer, to reasonably claim bias, in this case based on the fact that Justice Anderson, had previously been involved in litigation against the author and that he had previously been a member of the firm involved in contempt litigation against the author, it submits that the communication discloses no evidence of partiality. The alleged involvement of Justice Anderson in litigation against the author is not sufficiently particularised to enable identification of the alleged specific action or actions.

4.11 If the Committee considers the claim of impartiality admissible, the State party submits that it should be dismissed as unmeritorious, since the author has not submitted allegations or evidence of actual bias on the part of Justice Anderson. The State party repeats that the firm of which Justice Anderson had been a member cannot properly be seen as a party to the author's case. In any case, Justice Anderson had no connection with that firm for

[3] See Communication No. 593/1994, *Holland v. Ireland*, Views adopted on 25 October 1996, paragraph 9, 3, and Communication No. 661/1995, *Triboulet v. France*, adopted on 29 July 1997, paragraph 6.2.

16 years, so that he could not be seen to be sharing an interest with it. It submits that it is highly probable that Justice Anderson, a member of the bar, had been retained on numerous occasions both for and against his former firm (one of Australia's largest firms), and that, while sitting as a judge of the Supreme Court of Western Australia, had heard many cases in which his former firm had played a role. It notes that the author has not displayed any indication of partiality towards his former firm, or that he retains a commonality of interest with the firm. The State party also emphasizes that it is common practice in Australia to appoint judges whose background includes extensive private legal practice, and it is therefore normal that judges will have an extensive history of involvement in litigation with a range of clients and a number of private legal firms.

4.12 The State party submits further that the author has not presented evidence sufficient to establish that any reasonable observer would reasonably doubt the partiality of Justice Anderson, given the presumption that a judge is able to bring an unprejudiced mind to each case. Further, even if a reasonable observer might entertain reasonable doubts as to the impartiality of Justice Anderson, this should not necessarily lead to the conclusion that the author's hearing was unfair. It refers to the jurisprudence of the European Court of Human Rights[4], which has held that it is necessary to look at the whole of the proceedings to determine the fairness of a trial and has noted that an apprehension of partiality in respect of one member of a tribunal might be counterbalanced by other members of the tribunal whose impartiality is not in question. The State party notes that the author made no allegation of bias against the two other justices of the Full Supreme Court.

The author's claim that the prosecutor was not required to act impartially or provide exculpatory evidence

4.13 In respect of the author's claim that although he was subjected to criminal proceedings, there was no duty on the prosecutor - that being the firm bringing the application for the finding of contempt against him - to act impartially or to provide exculpatory evidence, the State party submits that the author misunderstood the nature of the proceedings against him. First, the firm of solicitors did not act as prosecutors against the author, but as solicitors claiming, on behalf of their client, that his rights to the confidentiality of material disclosed by discovery for the purposes of court proceedings and to a fair trial of the main proceedings, had been infringed by the author. Secondly, it submits that the author is only partly correct in saying that the contempt arose from civil matters, since the while the contempt of misuse of documents was civil contempt; the interference with the due administration of justice gave rise to criminal contempt. However, the differences between civil and criminal contempt has limited relevance in terms of procedure under Australian law, since all proceedings for contempt are criminal in nature and must be proven beyond reasonable doubt. The State party submits that the author's communication is misconceived in that he is complaining that he has not been afforded the benefit of a higher degree of proof.

4.14 The State party submits that the author has failed to exhaust domestic remedies, since he did not bring this claim before any domestic tribunal, and that in particular he could have raised it before the Full Supreme Court of Western Australia or the High Court of Australia.

[4] See judgment of the European Court of Human Rights in Cases Nos 6878/75 and 7238/75, *Le Compte, Van Leuven and De Meyere v. Belgium*, adopted on 23 June 1981, paragraph 58.

4.15 It further considers that the author's allegation that his hearing was unfair because there was no duty on the opposing party to act impartially or to hand over exculpatory material does not fall readily within any of the minimum guarantees in article 14, paragraph 3. The allegations of unfairness resulting from restricted access to documents held by prosecuting authorities have been made in other cases under article 14, paragraph 3 b) relating to the requirement of adequate facilities for the preparation of the defence, and refers to the Committee's decision in *O.F. v. Norway*[5]. However, the author makes no allegation that documents were withheld from him, only that the opposing party had no duty to hand over documents that might have existed and might have been exculpatory. As article 14 does not give an absolute right of access to materials in the hands of the other party, and since, consequently, it does not impose a duty upon States parties to the Covenant to ensure that there is a duty for litigants correlative to this right, the State party submits that the author's allegation is incompatible with any of the rights recognised by the Covenant and should be declared inadmissible under article 3 of the Optional Protocol.

4.16 Furthermore, it submits that the author has failed to substantiate his allegations for the purpose of admissibility, since he asserts that there was no duty on the prosecutor to act impartially or to provide exculpatory evidence, but fails to allege that the opposing party did not act impartially, that it failed to provide exculpatory evidence, that there was in fact any exculpatory evidence in its hands, or that possible exculpatory material may have afforded him a better opportunity to present his defence.

4.17 If the Committee considers the claim admissible, the State party submits that it is unmeritorious, since the author failed to substantiate his claim and identify any particular unfairness in relation to conduct of the contempt proceedings.

The author's claim under article 14, paragraph 5

4.18 The State party submits that its regulation of appeals heard by the High Court does not preclude effective access to that court by applicants seeking review of decisions made by lower courts. It refers to the jurisprudence of the former European Commission on Human Rights, which has held that it is sufficient to limit a right of appeal to questions of law[6]. It also notes that the Committee, in a previous case, *Perera v. Australia*[7], observed that article 14, paragraph 5, does not require an appellate court to proceed to a factual retrial, but that a court must conduct an evaluation of the evidence presented at the trial and of the trial conduct. In that case, the author claimed that his rights under article 14, paragraph 5 were violated, since an appeal could only be heard on points of law and allowed no rehearing of facts.

4.19 The State party contends that the High Court of Australia is the most appropriate body to determine whether or not there are sufficient grounds for granting Special Leave to Appeal, and to the extent that the Committee would assess the substantive correctness of the

[5] See Communication No 158/1983, Decision adopted on 26 October 1984, paragraph 5.5.
[6] See judgment of the European Court of Human Rights in Case No. 00019715/92, *N.W v. Luxembourg,* adopted on 8 December 1992.
[7] See Communication No. 536/1993, Views adopted on 28 March 1995.

High Court decision, it would exceed its functions under the Optional Protocol. The State party invokes the Committee's decision in *Maroufidou v. Sweden*[8].

4.20 An appeal from an intermediate court shall not be brought unless the High Court grants Special Leave to Appeal. The parties may, in that case, appear and present an oral argument of 20 minutes each, plus a 5 minutes reply by the applicant, and eventual extended time as the High Court deems fit. In considering whether to grant an application for Special Leave to Appeal, the High Court may, according to the Judiciary Act, Section 35A, hear any matters that it considers relevant but shall have regard to:

"(a) whether the proceedings in which the judgment to which the application relates was pronounced, involve a question of law:

(i) that is of public importance, whether because of its general application or otherwise; or

(ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of law; and

(b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates."

4.21 The requirement for Special Leave to Appeal was instituted in 1984, partly due to the unmanageable volume of work facing the High Court, and partly due to the fact that appeals as of right to the High Court often involved issues of fact with which it was inappropriate to burden the highest appellate court with.

4.22 The State party contests the admissibility of the author's allegation under article 14, paragraph 5, on the basis that he failed to substantiate his claim and that his claim is incompatible with this provision. It contends that the author had access to the High Court[9] in that he had access to the reasoned judgment of the court from which appeal was sought; he had sufficient time to prepare his appeal; he had access to counsel; and he was entitled to, and did, make submissions to the Court. In respect of the time limit of 20 minutes, the State party notes that this limit is comparable to that allowed for parties to substantive appeals in other jurisdictions, and that, in any case, his counsel could have but did not request an extension of the time limit, and did not even exhaust the 20 minutes.

4.23 It further observes that no issue arises from a limitation of appeals to questions of law, as alleged by the author, because, firstly, the author did not seek to raise any questions requiring consideration of the facts of his case, and secondly, an application for Special Leave to Appeal to the High Court is not exclusively restricted to questions of law, although the fact that no legal questions are raised on an appeal is one factor that may induce the High Court to dismiss an application.

4.24 Finally, the State party submits that the author's claim relating to the second charge of contempt that is the interference with the due administration of justice, should be declared

[8] See Communication No. 58/1979, Views adopted on 8 April 1981, paragraph 10.1.
[9] See Communication No. 230/1987, *Henry v. Jamaica*, Views adopted on 1 November 1991.

inadmissible for non-exhaustion of domestic remedies, since he did not seek a review of the Supreme Court's finding on this contempt charge.

The author's claim under article 19

4.25 The State party submits that the law of contempt protects both the right of individuals in proceedings to privacy, and is necessary to maintain public order by ensuring the proper administration of justice. Any interference with the administration of justice or impairment of the capacity of the court to administer impartial justice is therefore a contempt of court and unlawful. It observes the duties and responsibilities these rights carry, and invokes the Committee's jurisprudence in *Ballantyne et al v. Canada* and *Jong-Kyu Sohn v. the Republic of Korea*[10]. Furthermore, it refers to the European Court of Human Rights' relevant practice of the similar article, in 10, paragraph 2 of the European Convention[11].

4.26 The State party observes that the discovery process is an essential part of the proper administration of justice, in that it allows the truth to be ascertained in litigation. Under domestic law, the High Court of Australia has held that *" In relation to documents produced by one party to another in the course of discovery in proceedings in a court, there is an implied undertaking, springing from the nature of discovery, by each party not to use any document disclosed for any purpose otherwise than in relation to the litigation in which it is disclosed."*

4.27 In respect of the author's reference to the alteration of the English Supreme Court Rules after the "Harman case" in the United Kingdom, which state that *"Any undertaking whether express or implied not to use a document for any purposes other than those of the proceedings in which it is disclosed shall cease to apply to such document after it has been read to or by the court, or referred to, in an open court, unless the court for special reasons has otherwise ordered.",* the State party notes that the Western Australian Supreme Court does not have a similar order. According to the Australian High Court, *"the implied undertaking is subject to the qualifications that once the material is adduced in evidence in court proceedings it becomes part of the public domain unless the court restrains publication of it"*. The State party submits that *"adduced in evidence"* is tendered material held to be admissible and admitted in evidence.

4.28 The State party submits that the author has not submitted sufficient evidence to substantiate his allegations, and that the case should be declared inadmissible under article 2 of the Optional Protocol. The author does not make any specific allegation of a violation of article 19, and does not specify how his conviction for contempt of court relates to any prevention of his exercise of freedom of expression under article 19 or any effect upon him in his capacity as a journalist and a writer.

[10] See Communications Nos. 359/1989 and 385/1989, Views adopted on 31 March 1993, paragraph 11.4, and Communication No 518/1992, Decision adopted on 18 March 1994, paragraph 10.4.

[11] See judgment of the European Court of Human Rights in Case No. 6538/74, *The Sunday Times v. the United Kingdom*, adopted on 26 April 1979, paragraph 47

4.29 If the Committee were to find this claim admissible, the State party submits that it should be dismissed as unmeritorious, since the law of contempt is a permissible restriction of the right to freedom of expression in that it meets the conditions set out in article 19. The purpose of the law is to ensure that the interference with an individual's private rights brought about by the discovery process, namely the invasion of privacy, is balanced by the requirement to use the documents only for the purpose of the litigation in which it is discovered. Where documents are obtained as a result of the discovery process, the obligation to use them only for the current proceedings is an obligation owed to the court, for the benefit of the parties and the benefit of the public in maintaining a fair and effective system of justice. In determining whether the law of contempt is necessary to protect due administration of justice and the rights of individuals to privacy, due weight is given to the fact that the obligation to restrict the use of material obtained as part of the discovery process is not absolute, and is qualified by (a) the court granting leave for the proposed use or disclosure, (b) the person from whom the information was obtained consenting to the use or disclosure, or (c) the information being admitted into evidence in open court. A conviction for contempt of court will not be found lightly but requires an appropriate balance between the broad right to freedom of expression and the narrow exceptions to it.

4.30 The State party submits that the author knew that the documents were obtained through the discovery process in the action between CEPU and Hamersley, and was responsible for using five of them for purposes other than litigation, thereby breaching the implied undertaking not to disclose their contents. The author asserted, as part of his defence, that the documents had been read out in open court and fell under the qualification to the law of contempt of documents adduced as evidence. But the only reason those documents were referred to in court was that the author and the CEPU applied for leave to adduce documents obtained as a result of the discovery process. However, this application was denied and the documents were not adduced in evidence. Furthermore, when the reference to these documents was made in open court for the purposes of determining the procedural application, they were not read aloud and no party other than the parties to the proceedings was present. Therefore the reference to these documents had no bearing on the validity of the implied undertaking.

4.31 The State party notes the author's argument that implied freedom of political communication under the Australian Constitution overrides the implied undertaking not to use the discovered documents for purposes other than the proceedings in which they were discovered. It contends that the exceptions referred to above also are justified in relation to freedom of political communication.

The author's comments

5.1 In his comments of 28 December 2000, the author submits in respect of his claim that one of the judges was biased against him, that at the time of the Supreme Court hearing, he did not know that this judge was a former member of the law firm representing his adversary on the contempt procedure, nor that he had been appointed to write the lead judgement, and he could not therefore raise the question of bias. He submits that a Full Court will not review the decision of another Full Court, and he could therefore not have raised this claim before the Full Supreme Court of Western Australia. However, bias not having been raised at first instance, there was no other avenue of appeal available, and this point could not be raised in the Special Leave to Appeal application.

5.2 The author contends that the allegedly biased judge still maintains connections with his former law firm, through an investment company owned by partners of the firm.

5.3 With regard to his claim that the prosecutor was partial, the author contests the State party's submission that he has been afforded the benefit of a higher degree of proof, since there was no *viva voce* evidence presented in the High Court and there was no cross examination. He reaffirms that the law firm Freehill, in the contempt proceedings against him acted, as a prosecutor without impartiality. At the time of his submission, an application had been heard in the main action (in which the contempt charges arose) in the Supreme Court to dismiss the plaintiff's action as an abuse of the process, partly on the basis of evidence that Freehill acted as advisors for political and industrial purposes.

5.4 As to the exhaustion of domestic remedies of his claim that the prosecutor was partial, the author contends that the issue of impartial prosecutor only became manifest upon delivery of the Supreme Court judgement, and that it was an inherent part of the Special Leave to Appeal application that the process was unfair. With regard to the State party's contention that the minimum guarantees in article 14, paragraph 3 do not oblige the opposing party to act impartially or to hand over exculpatory material, the author contends that it is the duty of a prosecutor to provide factual and exculpatory evidence, and that it cannot be ascertained that this right was respected insofar as his adversary's counsel acted as prosecutor.

5.5 Concerning the alleged violation of article 14, paragraph 5, the author submits that a conviction for contempt is the only one in Australia where a review by way of appeal is not available at a lower level, so that facts and law are teased out well before a Special Leave application to the High Court. He contends that the High Court did not conduct an evaluation of the evidence presented at the trial; it considered the Special Leave threshold requirements and was limited to such considerations.

5.6 With regard to the State party's submission that he did not exhaust domestic remedies in respect of the conviction for contempt of interference with due administration of justice, the author refers to his Amended Draft Grounds of Appeal, in which grounds Nos. 4, 6 and 7 relate to the contempt of interference with justice, and to the Applicant's Amended Summary, which also refers to this form of contempt. He recalls that further oral submissions relating to the appeal of this contempt were made on his behalf. The High Court did not consider this part of the appeal.

5.7 The author submits that the law of contempt is powerful because it gives to a civil litigant the power and interest of the State, and that it was misused in his case, in order to restrict his right to freedom of expression. The acts for which he was convicted are lawful in other Australian states in matters lying within the jurisdiction of the Australian Federal Court, and when a matter arises in a court in Australia and there is no guidance in law or precedent in Australia, the law and the precedent of the United Kingdom usually is relied upon as guidance. There is no reference at all in the Rules of the Western Australian Supreme Court about discovered documents. Furthermore, in the absence of a submission from counsel, a court will, and usually does, inform itself of such law and precedent so as to arrive at a just decision. The author, therefore, contests the State party's submission that because the Supreme Court of Western Australia does not have a rule similar to the United Kingdom, the pre-Harman law prevails. Neither the United Kingdom rule nor the Australian Federal Court

Rules contain any reference that the documents must be adduced in evidence in order for an undertaking not to disclose the evidence cease to apply.

5.8 The author submits that in February 1998, Hamersley initiated additional contempt proceedings against him. A trial commenced in June 2000, but was adjourned on an interlocutory point, and was to be continued in February or March 2001. These proceedings, and the probability of a sentence of imprisonment, have silenced him on matters of public interest.

5.9 To the State party's submission that he could have applied to the court for permission to use the documents, the author contends that this point was raised in the contempt hearing. His response was that in the event that he made such an application, and it had been granted, the plaintiff would have appealed the decision and he would not have had access to the documents in one or two years. This would, in his opinion, be incompatible with his understanding as a journalist that the documents were produced in open court without objection, and were quoted verbatim by him from transcripts of those proceedings.

5.10 Finally, the author refers to the application by Harman to the European Court of Human Rights against the United Kingdom concerning the above issue under the law of contempt, which was under consideration by the ECHR when the United Kingdom agreed to enter into a friendly settlement to change the law. Consequently the Rules of the Federal Court of Australia were changed.

The State party's comments

6.1 By note verbale of 15 May 2001, the State party further responded to the author's comments, and withdrew its submission that the author had not exhausted domestic remedies with respect to article 14, paragraph 5, of the Covenant.

6.2 In respect of the author's allegation that he was unaware who the Supreme Court judges were, it submits that yet as soon as he entered the courtroom and saw the alleged biased judge, he could apply for the judge to excuse himself. However he did not raise the question of bias until he lodged his communication to the Committee. In this respect, it also submits that the presiding judges agree on who will write the lead judgment, and that there is no evidence to suggest that the two other judges had not considered the case on its merits and wrote their judgements accordingly.

6.3 In respect of the author's allegation that a Full Court will not review the decision of another Full Court, the State party submits that the Full Court of the Supreme Court of Western Australia, as a superior court of record, has inherent jurisdiction to set aside any order or judgment where there has been a failure to observe an essential requirement of natural justice.

6.4 In respect of the author's reference to the fact that the Justice Anderson was an office holder in an investment company established by Freehill, the State party contends that there is no evidence or claim that this company has a present connection with the judge which would give rise to a suspicion of bias.

6.5 With regard to the author's implied allegation that because the evidence of the contempt trial was by affidavit, there was no opportunity for cross-examination of witnesses

or for him to call witnesses in his defence, the State party submits that in contempt of court proceedings, facts are usually placed before the court by affidavit, but either party may, move that the court order the attendance for cross-examination, of the person signing the affidavit. If cross-examination is granted, it will not be limited to the material in the affidavit, but may go to credibility or any issue relevant to the inquiry.

6.6 The State party reiterates that article 14, paragraph 5 does not require a factual retrial, and that the author had an opportunity to make both oral and written submissions in relation to his Special Leave application.

The author's further comments

7.1 In further letters dated 17 July and 30 November 2001, the author further comments on the State party's submission.

7.2 In respect of his claim under article 14, paragraph 5 of the Covenant, he refers to the Judiciary Act, Section 35, which limits appeals to the High Court of Australia at subsection (2): *"An appeal shall not be brought from a judgment, whether final or interlocutory, referred to in subsection (1) unless the High Court gives Special Leave to Appeal."* The criteria for granting Special Leave to Appeal listed in Section 35A of the Act (see paragraph 4.20 above), demonstrate that the avenue of Special Leave to Appeal is not an appeal within the meaning of article 14, paragraph 5 of the Covenant. In this respect, the author refers to a transcript from a case before the High Court of Australia, in which a High Court judge states that the High Court is not a general Court of Appeal, that the judges do not sit to hear any case, and that there are only about 70 cases a year that the High Court can hear, and that these include the most important cases that affect the nation.

7.3 In respect of his claim under article 19, the author contends that by virtue of his conviction for contempt of court, his freedom of expression has been subjected to such restrictions that he can no longer write about public hearings in open court and refer to documents in the public domain, for fear of yet again being in contempt of court.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.

8.3 In relation to the alleged violation of article 14, paragraph 1, of the Covenant, in that the author did not have a hearing by an impartial tribunal because one of the Supreme Court judges had previously, as partner of a law firm, conducted extensive defamation litigation against the author, that he was also a former partner of the law firm prosecuting the contempt charge against the author, and that the prosecutor was not required to act impartially or provide exculpatory evidence, the Committee notes that these issues were not raised by the

defence in the Full Supreme Court of Western Australia, nor in the application for Special Leave to Appeal to the High Court. As to the author's contention that the Full Supreme Court does not review the decision of another Full Court, and that the issue of an impartial tribunal could not be raised in the Special Leave application, the Committee has noted the State party's submission to the contrary, and that the author has submitted no evidence to substantiate his allegation that these remedies were indeed unavailable to him. The Committee notes in particular that, according to the criteria laid down in the Judiciary Act, Section 35A, invoked by the parties, the High Court of Australia may, when considering an application for Special Leave to Appeal, consider any matter that it deems relevant. The author has not demonstrated that the impartiality of the court could not be raised in an application for Special Leave to Appeal. Thus, the Committee considers that domestic remedies with respect to this matter have not been exhausted, and that this part of the communication is inadmissible under article 5, paragraph 2 b) of the Optional Protocol.

8.4 With regard to the author's claim under article 14, paragraph 5, in that he could not have his conviction and sentence reviewed fully because the application for Special Leave to Appeal to the High Court, entailed only a limited review, the Committee considers that in fact the author in his Special Leave application raised only certain specific questions of law and did not seek a full review of the conviction by the Full Court of Western Australia. Consequently, the Committee considers that the author has not substantiated, for the purpose of admissibility, his claim that the limited review of his conviction and sentence allowed under his application for Special Leave to Appeal, in the circumstances of his case, amounted to a violation of his right under article 14, paragraph 5. This part of the communication is therefore, inadmissible under article 2 of the Optional Protocol.

8.5 With regard to the author's claim under article 19 of the Covenant, the Committee considers that the author has submitted sufficient arguments to substantiate for purposes of admissibility, that the fact that he was convicted and fined for publishing documents that had previously been referred to in open court, may raise issues under this article.

8.6 The Committee therefore decides that the communication is admissible insofar as it raises issues under article 19 of the Covenant.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

9.2 With regard to the author's claim under article 19, paragraph 2, that he was convicted and fined for publishing documents that had been referred to in an open court, the Committee recalls that article 19, paragraph 2, guarantees the right to freedom of expression and includes the "*freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media*". It considers that the author, by publishing documents that were referred to in an open court, by virtue of different media, was exercising his right to impart information within the meaning of article 19, paragraph 2.

9.3 The Committee observes that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be

provided for by law, it must address one of the aims enumerated in paragraph 3(a) and (b) of article 19, and must be necessary to achieve the legitimate purpose.

9.4 The Committee notes that the institution of contempt of court is an institution provided by law restricting freedom of expression for achieving the aim of protecting the right of confidentiality of a party to the litigation or the integrity of the court or public order. Here in the present case, though the five documents were directed to be discovered on the application of the author and CEPU, they were not allowed to be adduced in evidence with the result that they did not become part of the published record of the case. It may be noted that these five documents were not read aloud in court and their contents were not made known to anyone except the parties to the litigation and their lawyers. There was clearly, in the circumstances, a restriction on the publication of these five documents, implied from the refusal of the court to allow them to be adduced in evidence and not taking them as part of the public record of the case. This restriction was provided by the law of contempt of court and it was necessary for achieving the aim of protecting the rights of, others, i.e. Hamersley, or for the protection of public order (ordre public). The Committee accordingly concludes that the author's conviction for contempt was a permissible restriction of his freedom of expression, in accordance with article 19, paragraph 3, and that there has been no violation of article 19, paragraph 2, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

APPENDIX

Individual opinion by Committee member Hipolito solari-yrigoyen (dissenting)

My dissenting views on this communication are substantiated below:

8.4 With regard to the author's claim under article 14, paragraph 5, of the Covenant that he could not have his conviction and sentence reviewed because the High Court had not granted him Special Leave to Appeal, and because the application for Special Leave to Appeal does not amount to a full appeal, the Committee observes, first, that the State party does not dispute that the author has exhausted domestic remedies or that the remedies in respect of this claim have been exhausted. It further observes that the author has duly substantiated his application for Special Leave to Appeal and to obtain a full review of his conviction. The Committee considers, therefore, that the author has sufficiently substantiated, for the purposes of admissibility, his claim that the limited review of his conviction and sentence under the procedure of application for Special Leave to Appeal may raise issues under article 14, paragraph 5, of the Covenant. Thus, this part of the communication is admissible.

Consideration of the issue as to the merits (violation of article 14, paragraph 5)

9.2 With regard to the author's claim under article 14, paragraph 5, of the Covenant, the Committee notes the State party's argument that, to the extent that the Committee would assess the substantive correctness of the decision of the High Court, it would exceed its functions under the Optional Protocol. However, it is the Committee's duty to verify whether, under the procedure of an application for Special Leave to Appeal to the High Court, the author was afforded the possibility to have his conviction and sentence reviewed in accordance with article 14, paragraph 5, of the Covenant.

9.3 The Committee observes that, in accordance with the Judiciary Act, Section 35A, the grounds on which the High Court may hear any matters that it considers relevant shall have regard to questions of law, public importance, differences of opinion between courts as to the state of law, or whether the interests of the administration of justice require consideration by the High Court of the judgement to which the application relates. The State Party has also referred to the jurisprudence of the former European Commission of Human Rights, which held that it is sufficient to restrict the right of appeal to questions of law and affirms that, while leave to appeal to the High Court is not limited to questions of law, the fact that issues of this kind are not raised in an appeal is a factor that may lead the Court to reject an appeal. Furthermore, the State party indicates that the requirement for Special Leave to Appeal was instituted in 1984, due to the unmanageable volume of work facing the High Court and to the fact that appeals often involved issues of fact with which it was inappropriate to burden the highest appellate court.

The Committee recalls its jurisprudence in *Lumley v Jamaica* and *Rogerson v Australia* that, while on the basis of article 14, paragraph 5, every convicted person has the right to have his conviction and sentence reviewed by a higher tribunal according to law, a legal system that does not allow for an automatic right to appeal may still be in conformity with article 14, paragraph 5, as long as the examination of an application for leave to appeal entails a full review, that is, both on the basis of the evidence and of the law, of conviction and sentence, and as long as the procedure allows for due consideration of the nature of the case. Thus, the question before the Committee in the case under consideration is whether the Special Leave for Appeal procedure before the High Court of Australia allows for such a full review of the conviction and sentence.

9.4 Relevant for such an evaluation are the criteria laid down in the Judiciary Act, Section 35A, invoked by both parties and mentioned in the preceding paragraph. The transcript of the author's hearing indicates that the Special Leave hearing does not amount to a review of the merits of the particular case and that the High Court of Australia has not evaluated the evidence presented at trial and in the development of the case.

9.5 The High Court itself has delineated the limits of its competence, for example, in the decision of the High Court submitted by the author, in which a judge states that "*the High Court is not a general Court of Appeal, that the judges do not sit to hear any case, and that there are only about 70 cases a year that the High Court can hear and they include the most important cases that affect the nation*". Furthermore, the High Court's grounds for dismissing the author's duly substantiated application for Special Leave to Appeal demonstrate that the Court only considered whether there was sufficient reason to doubt the correctness of the decision of the Full Supreme Court, and whether the case was a suitable vehicle for determining the question of principle advanced by the applicants because it appeared unlikely that a decision of an appeal would require a determination of that issue. The Committee finds that these grounds for dismissal do not reflect a full review of the evidence and law, nor due consideration of the nature of the author's case, in terms of article 14, paragraph 5, which confers the unrestricted right to have conviction and sentence reviewed by a higher court.

(*Signed*) Hipólito Solari-Yrigoyen
29 March 2004

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]