THE PARLIAMENTARY *SUB JUDICE* CONVENTION AND THE MEDIA

(or 'The Wells of Justice, Parliamentary Poison and the Wicked Witch of the Press')

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I. INTRODUCTION

> Parliament should be the supreme inquest of the State, whilst not poisoning the wells of justice before they have begun to flow.[1]

In 1688, the right of Members of Parliament in England to speak freely was enshrined so that "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."[2] This parliamentary privilege of freedom of speech, which protects Members of Parliament in the Westminster system from liability in relation to things said in Parliament, has been described as "one of the most cherished of all parliamentary privileges, without which [P]arliaments probably would degenerate into polite but

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1 JR Odgers, *Australian Senate Practice*, Royal Australian Institute of Public Administration, ACT Division (6th ed, 1991) p 362, as quoted from the Queensland Parliament Select Committee of Privileges, *Report of the Select Committee of Privileges on the Sub Judice Convention* (Paper A83-1976). See also *Rex v Parke* [1903] 2 KB 432 at 438.

2 Article 9 of the Bill of Rights 1688 William and Mary, see s 2 c 2.

ineffectual debating societies".[3] In particular, this privilege protects Members from the legal implications which would otherwise flow, if things said in Parliament were defamatory, or amounted to contempt of court under the common law.

It is therefore interesting to explore the self-imposition by various Houses of Parliaments in Australia, of a restriction on this fundamental privilege. In relatively recent times in the Westminster system, a distinct parliamentary convention has evolved that may operate, according to the discretion of the Presiding Officer, to prevent (or permit) the discussion in Parliament of matters that are *sub judice*. In fact, it has been suggested that the scope of this convention has been influenced by the growing reach and influence of the mass media.[4]

Also, in modern times, politicians and journalists enjoy (or suffer) a symbiotic relationship. A complex aspect of this relationship is the interplay between the common law of *sub judice* (and the effect it has as a restraint on the freedom of the press), the availability of 'qualified privilege' in relation to common law contempt for fair and accurate reports by the media of parliamentary proceedings, and the parliamentary *sub judice* convention.

It is proposed to examine the purpose, scope and implementation of the parliamentary *sub judice* convention in Australia (particularly in the New South Wales and Federal Parliaments) and to consider the uncertainty that surrounds what the media may report of parliamentary proceedings where *sub judice* matters have been discussed in Parliament.

II. THE PARLIAMENTARY *SUB JUDICE* CONVENTION

A. Origin of the Convention

The origin of the parliamentary *sub judice* convention (the convention) is not clear, although it was considered in evidence given before the Select Committee of the House of Commons on Procedure.[5] Such evidence suggested that the convention may well have applied to criminal cases before 1844 (when it seems that the existence of the convention was specifically assumed by Lord John Russell and Sir Robert Peel), although its application to the discussion of "a proper, regular civil court case" in the House of Commons may have been as late as 1961.[6] In such evidence, it was also suggested that the modern media may have been responsible for the expansion of the convention to civil actions. Indeed, the

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3 E Campbell, *Parliamentary Privilege in Australia*, Melbourne University Press (1966) p 28. The privilege enshrined in Article 9 of the Bill of Rights is available in Federal Parliament by virtue of s 49 of the Commonwealth Constitution, and in New South Wales by virtue of s 6 of the *Imperial Acts Application Act* 1969 (NSW).

4 This aspect of the convention will be further discussed below.

5 House of Commons, Fourth Report from the Select Committee on Procedure, Session 1971-2, *Matters Sub Judice*, 1972.

6 *Ibid.* See Minutes of Evidence taken before the Select Committee on Procedure), p 3. However, in the *Report upon 'Sub Judice'* of the Standing Orders Committee of the Parliament of Victoria (1979), a quote is made from Todd's 'Parliamentary Government in England' (1867), Vol 1, which suggests that the convention did cover civil cases from an earlier date.

particular question was posed as to whether the Speaker's discretion "in the latter years, [had] been influenced by the expansion of media and instant news and so on?"[7] This issue was not further clarified. However, it serves to illustrate the link between the purpose and scope of the modern version of the convention and the media.

B. Purpose of the Convention

There are two recognised purposes of the convention. The first, which is very similar to the purpose of common law *sub judice* in relation to the media and the public, is to "prevent comment and debate [of Parliament] from exerting an influence on juries and from prejudicing the position of parties and witnesses in court proceedings".[8] The second purpose of the convention is to prevent parliamentary debate on matters *sub judice* so that a House of Parliament is not set up as an alternative judicial forum to a court, which could "lead to conflict between that House and the Court".[9]

Whilst Parliament may have historically exercised judicial power,[10] it is suggested that the second purpose of the convention has not been relevant in an Australian context. Internal affairs of Parliaments aside (such as the capacity to imprison for contempt of Parliament), it could never be seriously believed that modern Houses of Parliament in Australia, *as a matter of practice and convention*, would set themselves up as alternative courts with the purpose of determining and enforcing (as compared with discussing and debating) parties' rights, in the same manner as courts of law.[11] It is well accepted and understood that debate and

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7 *Ibid.*

8 AR Browning (ed), *House of Representatives Practice*, AGPS (2nd ed, 1989) p 491.

9 RP Meagher JA, "The Parliamentary Sub-Judice Rule in New South Wales"(1978) 7 *Justice* 33 at 36.

10 For example, through an act of attainder convicting a person of an offence and inflicting punishment, or impeachment, both practices of which are now obsolete: N Wilding and P Laundy, *An Encyclopaedia of Parliament*, Cassell & Company Ltd (4th ed, 1971) pp 2, 375.

11 Unless through the mechanism of legislation, the debate of which is not subject to the parliamentary *sub judice* convention. However, the power of Parliament in New South Wales to use legislation in a manner that resembles the exercise of judicial power was challenged before the High Court. Special leave was granted (on 18 August 1995) to determine the validity of the *Community Protection Act* 1994 (NSW), on the basis, inter alia, that the Act is: "ultra vires the powers of the Parliament of New South Wales as contrary to the deeply rooted principle of the New South Wales Constitution that no person can be made to suffer in person or goods except for a distinct breach of the law established in the ordinary manner before the ordinary courts". See the summary of argument of the Applicant in the High Court special leave application, between GW Kable and the Director of Public Prosecutions for New South Wales. The case was heard before the High Court on the 7th and 8th of December 1995 and judgment was delivered on 12 September 1996. *The Community Protection Act* 1994 (NSW) was held to be invalid. According to McHugh J "the Act is invalid because it purports to vest functions in the Supreme Court of New South Wales that are incompatible with the exercise of the judicial power of the Commonwealth by the Supreme Court of that State" in *Kable v The Director of Public Prosecutions for New South Wales* (unreported, High Court, Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow JJ, 12 September 1996 at 56, per McHugh J). However, for the purposes of this paper, it is recognised that parliamentary debate of the Community Protection Bill 1994 (NSW) was not concerned with a *sub judice* matter: the Bill was to apply to Kable on his release from prison. By way of contrast, parliamentary debate surrounding the Builders' Labourers Federation (Special Provisions) Bill 1986 (NSW), would have constituted discussion of a matter *sub judice*, as the legislation was introduced for the purpose of validating certain Ministerial acts (in relation to the cancellation of the registration of the Union), which were the subject of an appeal by the Union to the New South Wales Court

comment in Parliament are driven by matters of politics and policy, and not by any desire to finally determine and enforce an individual's rights. In addition, the separation of powers doctrine in Australia operates as a constitutional bar against the exercise of judicial power by the legislature. At a federal level, this doctrine operates in a fairly stringent manner as a result of the specific provision for an independent judiciary under Chapter Three of the Commonwealth Constitution. In New South Wales, it has been determined that a formal separation of powers doctrine does not exist as a constitutional fetter on parliamentary sovereignty.[12] However, a separation of powers between the legislature and the judiciary in New South Wales may well exist according to convention and practice in New South Wales. In addition, in March 1995, a referendum was passed which entrenched Part Nine of the *Constitution Act* 1902 (NSW) which provides for judicial tenure. It could be argued that this constitutional event is a public mandate for formal constitutional protection of a separate and independent judiciary in New South Wales.

In addition, the fact that the primary (if not only) purpose of the convention in Australia is the protection of matters *sub judice* from prejudice, is supported by the various documentations of parliamentary practice. Neither *House of Representatives Practice*[13] nor *Australian Senate Practice*[14] place any emphasis on the 'alternative court' purpose of the convention.[15]

This purpose was even questioned in the Fourth Report from the Select Committee on Procedure (House of Commons) in 1972 as follows:

> The concept of the House as an 'alternative forum' may be confusing to Members, as it blurs the useful distinction...between 'Parliament's debating and legislative duties and the court's judicial duties'...If 'forum' is understood to mean a court, it could scarcely be argued that Parliament can any longer act as a court of law; if by 'forum' is understood a place for public discussion, this description obviously does apply to Parliament. But unless the House of Commons attempts to decide, on a question following debate on a motion, a case currently being tried in a court, which it would be prevented by the convention from doing, it would be difficult to argue that the House was seeking to act as an alternative to that court.[16]

Finally, the link between the purpose of the convention and the media was again recognised in the statement in *House of Representatives Practice*, that "[I]t is by this self-imposed restriction that the House not only prevents its own deliberations from prejudicing the courts of justice but prevents reports of its proceedings from being used to do so".[17]

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of Appeal. The validity of this legislation (as passed) was upheld (somewhat reluctantly) by the Court of Appeal in *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372. It is also possible that without the *sub judice* convention, Parliamentary Committees could investigate matters before the courts by hearing evidence and reporting on the same. However, Parliamentary Committees could not finally determine and enforce the rights of parties (which are key features of the exercise of judicial power in courts of law).

12 *Ibid.*

13 See note 8 *supra*, p 491.

14 JR Odgers, *Australian Senate Practice*, note 1 *supra*, p 357.

15 Although a passing reference is made to this purpose in a quote reproduced in *Australian Senate Practice, ibid*, pp 359-60.

16 See note 5 *supra* at viii.

17 See note 8 *supra*, p 491.

C. Scope of the Convention

The convention is applied in a similar manner in the New South Wales and Federal Parliaments, both of which refer to their own precedents and practice and to House of Commons practice.[18]

As a guiding example, the scope (and practice) of the convention, as applied in the House of Representatives, is well summarised as follows in *House of Representatives Practice*:[19]

- Application of the *sub judice* rule [convention] is subject always to the discretion of the Chair and the right of the House to debate and legislate on matters.
- Matters awaiting or under adjudication in all courts exercising criminal jurisdiction shall not be referred to in motions, debate or questions from the moment a charge is made until the matter, including any appeal, is resolved and sentence announced.
- Matters of a civil nature shall not be referred to *from the time the case is set down for trial or otherwise brought before the court*, not from the time a writ is issued (emphasis added).
- Proceedings before a royal commission or judicial inquiry shall not be referred to in motions, debate or questions where the matter inquired into concerns issues of fact or findings relating to the propriety of the actions of specific persons.
- Proceedings before a royal commission, where the matter inquired into is intended to produce advice as to future policy or legislation, may be referred to unless such references would constitute a real and substantial danger of prejudice to the proceedings.
- Issues of national importance, such as the national economy, public order or the essentials of life, before, for example, the Conciliation and Arbitration Commission [now the Australian Industrial Relations Commission], may be referred to unless such references would constitute a real and substantial danger to the proceedings.[20]

The timing of the *sub judice* status of civil matters is a powerful example of the wide discretion of the Presiding Officer to control the operation of the convention and prevent its abuse by the public. This particular practice has evolved as a means of preventing the 'self-gagging' of Parliament through the use of a 'stop writ'. By way of example, in 1977, the Speaker of the House of Representatives[21] made it clear that the mere issue of a writ should not stop discussion by the National Parliament of any issues.[22]

III. THE PARLIAMENTARY CONVENTION AND COMMON LAW *SUB JUDICE* COMPARED

If 'qualified privilege' is available to the media to protect it from contempt proceedings in relation to fair and accurate reports of parliamentary proceedings (to be discussed below), the differences in the scope of the convention and

18 See the New South Wales Legislative Assembly, "*Sub judice* Convention- Fact Sheet No 22 on the, March 1995. Also, see *ibid.*

19 See note 8 *supra.*

20 *Ibid*, pp 491-2.

21 The Right Honourable Billy Mackie Snedden QC.

22 Australia, House of Representatives 1977, Debates, vol HR 104, p558.

common law *sub judice* may have a real effect on what the media may report of *sub judice* matters. It is not within the scope of this paper to examine the details of common law *sub judice*, although the key features will be discussed for comparative purposes.

A. Key Features of the Purpose and Scope of Common Law *Sub judice*

The purpose of common law *sub judice* is the prevention of the publication of material which interferes with, or has a tendency to interfere with the course of justice or the conduct of a fair trial. In order to protect the proper administration of justice, all relevant parties, namely the court (judges and jurors), witnesses and the parties, should be free from interference.[23] Therefore, the "underlying premise of the *sub judice* doctrine is that such influence or prejudice is likely to occur unless appropriate restraints are imposed".[24] In this way, the purpose of the common law doctrine does not differ markedly from that of the parliamentary convention. However, the interest of the public and individuals in the proper administration of justice competes with two different (but related) interests in the separate forums of courts and Parliaments: namely, open justice (as a facet of the principle of free speech), and the right of Members of Parliament to speak freely without threat of legal liability according to parliamentary privilege.

It could be said that the scope of the common law doctrine is less than clear. However, briefly, the following may be said with some certainty. At common law, criminal proceedings are "*sub judice*" "from the time that a person has been arrested upon warrant, arrested and charged, or, most probably, after a person has been arrested with a view to being charged".[25] Civil proceedings are "*sub judice*" or pending "from the issue of a writ, a statement of claim or a summons".[26]

Common law *sub judice* does not operate to prevent *all* discussion in the media of pending proceedings. In relation to criminal proceedings, it is "lawful to publish the 'bare facts' relating to a crime" which include "extrinsic ascertained facts to which any eye-witness could bear testimony" and alleged facts if they do not have the tendency of interfering with the fair trial of the accused person. In relation to civil proceedings, "similar reasoning is applied to reports describing civil disputes".[27]

The media may be immune from liability for common law *sub judice* if publications that would otherwise constitute contempt are fair and accurate reports of court proceedings, if a writ for a defamation action has been issued to 'gag' the media from further discussing an issue, or if the subject matter of a publication was a matter of public concern within the *Bread Manufacturers* principle[28] and there was no intention to prejudice a fair trial.[29] This principle states that:

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23 S Walker, *The Law of Journalism in Australia,* The Law Book Company Ltd (1989) p 50.
24 The Law Reform Commission, Report No 35, *Contempt*, 1987 at 133.
25 S Walker, note 23 *supra*, p 41.
26 *Ibid.*
27 *Ibid*, p 46.
28 *Ex Parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242.
29 *Ibid* at 67-74.

> The discussion of public affairs and the denunciation of public abuses, actual and supposed, cannot be required to be suspended merely because the discussion or denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant.[30]

This principle will be applied more narrowly where a publication involves the discussion of pending criminal proceedings. Further, the High Court, in *Hinch v Attorney-General (Vic)* (the *Hinch* case)[31] has stated that whenever this principle is raised in defence of a publication, the Court must adopt a balancing approach between the competing public interests in the administration of justice and freedom of speech.[32]

B. How Does the Parliamentary *Sub judice* Convention Differ?

The essential difference between the convention and common law *sub judice* has been thus described:

> ...the former is imposed voluntarily by Parliament upon itself and exercised subject to the discretion of the Chair, with the object of forestalling prejudice of proceedings in the courts. The courts of law on the other hand protect themselves from prejudicial comment outside Parliament by the exercise post hoc of their powers to punish contempt.[33]

The key difference is that the "application of the convention is subject *always* to the discretion of the Chair and to the right of the House to legislate on any matter" (emphasis added).[34] In addition (as mentioned above), in relation to civil matters, the convention will (normally) not be applied until the court proceedings have actually commenced. Further, even though the various rulings of Presiding Officers and parliamentary practice provide a strong guide as to the scope and implementation of the convention, the overriding discretion means that the convention is not *bound* by precedent as to its scope (as is common law *sub judice*). In this way, it is suggested that the potential parameters of the convention are fluid in a manner that may cause it to be implemented as a restriction of speech, in a narrower *or* broader fashion than the common law doctrine. For example, it is possible that the discussion of a criminal matter that is *sub judice* could be completely prohibited in Parliament, while the media may at least discuss the bare and certain alleged facts. On the other hand, in relation to the timing of the *sub judice* status of civil matters, Members may be able to freely discuss all aspects of such a matter until the court proceedings have actually commenced, while the media must be careful of publishing information that would amount to contempt of court from the date a writ or summons is issued.[35] With heavy court

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30 Ibid at 249, per Jordan CJ.

31 *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15.

32 S Walker, note 23 *supra*, pp 70-3.

33 See note 5 *supra* at vii.

34 Note 18 *supra*.

35 Unless it could be established that such writ or summons had been issued for the primary purpose of 'gagging' the media.

workloads, the difference in the timing of the *sub judice* status of a civil matter before Parliaments and the courts, could be a matter of months or years.[36]

In addition, the discretion involved in implementing the convention could be exercised in a similar manner as the courts' discretion in relation to common law *sub judice* in balancing competing public interests. In fact the *Bread Manufacturers'* principle is quoted in *Australian Senate Practice*[37] in support of the approach that the "public interest may be held to prevail over the *sub judice* doctrine".[38] However, this aspect of the discretion differs in a very interesting and important way from the role of the court in balancing competing public interests where common law *sub judice* is concerned. The Presiding Officers of Australian Houses of Parliament are not required to resign from their political party to take up the position.[39] They are therefore open to direct political pressure to make favourable rulings where the convention is exercised or raised as an issue.[40] Although motive would be difficult to prove, rulings may be made to allow discussion of matters *sub judice, in the name of* the public interest, whilst the ulterior motive is actually political expediency. In relation to New South Wales, the comment has been made (in 1978) that "contrary to what one might expect from the theoretical interest the subject generates, the *sub judice* rule does not seem to be of great political importance".[41] It is suggested to the contrary, that the convention may be a very powerful tool in the political game.

This was recently illustrated by the scathing attacks that the (then) prime minister Paul Keating launched on the Western Australian Royal Commission into the Abuse of Executive Power (the Easton Royal Commission). Jurisdictional (that is federal and state) issues aside, the *House of Representatives Practice*[42] states, in relation to discussion of matters before a royal commission, that, "Where the proceedings are concerned with issues of fact or findings relating to the propriety of the actions of *specific persons* the House should be restrained in its references".[43] The Easton Royal Commission was established to determine whether Dr Carmen Lawrence, as the then premier of Western Australia, lied to Parliament concerning her prior knowledge of a petition tabled in Parliament. This Commission was therefore clearly considering the propriety of the actions of a specific person, for whom adverse findings could (and may well) have extremely

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36 Although, in practice, the requirement of a real tendency to interfere with the proper administration of justice would probably mean that most media publications concerning civil matters would be safe if the case had not yet been set down for trial.

37 JR Odgers, note 1 *supra*, p 357.

38 *Ibid.*

39 For a discussion of the methods of electing a Presiding Officer, see G Griffith, 'Selecting a Presiding Officer: Methods of Election and the Concept of Independence', *Briefing Paper* (No 13/95), New South Wales Parliamentary Library Research Service, 1995.

40 This was apparently particularly so in the New South Wales Legislative Assembly in the 1950's under Speaker Lamb: see D Clune, "The Legislative Assembly of New South Wales: 1941 to 1991", *Occasional Paper* (No 1/93), NSW Parliamentary Library Research Service, 1993 at 3-10.

41 RP Meagher JA, note 9 *supra* at 34. However, this comment was made on the basis of empirical research into the effect of the convention on the *restriction* of parliamentary debate, rather than the use of the Presiding Officer's discretion to allow the discussion of matters *sub judice* in the public interest.

42 See note 8 *supra*.

43 *Ibid*, p 494.

serious consequences. However, because Dr Lawrence is, and was, a politician, the allowance of the unfavourable discussion of the Easton Royal Commission in Federal Parliament could have arguably been in the public interest.[44] Although, this approach was challenged and the (then) Speaker of the House of Representatives, Mr Stephen Martin MP was criticised by the Federal Opposition for allowing the prime minister's attack on the Easton Royal Commission, on the basis that it was "in clear breach of the spirit and intention of the parliamentary *sub judice* convention".[45] Such criticism illustrates the potential political impact that the implementation of the convention (one way or another) may have.

IV. 'QUALIFIED PRIVILEGE', AS REGARDS CONTEMPT OF COURT, FOR FAIR AND ACCURATE REPORTS OF PARLIAMENTARY PROCEEDINGS?

As discussed above, whilst very similar in purpose, the scope and implementation of the convention and common law *sub judice* are not necessarily identical. Thus the issue of 'qualified privilege' (as regards liability for contempt of court) for the media for fair and accurate reports of parliamentary proceedings is a crucial issue, if the discretion of a Presiding Officer is exercised in a manner that would allow parliamentary discussion of a matter *sub judice* which would otherwise constitute contempt of court at common law. Thus, the media may be able to circumvent the requirements of common law *sub judice* through a combination of a particular convention ruling and 'qualified privilege' (if the publication is a fair and accurate report of the proceedings of Parliament).

In the absence of legislation,[46] the common law still governs this issue in Australia. Uncertainty surrounds the availability of the defence to a prosecution

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44 The effect of the High Court's majority decision in *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, on the scope of common law contempt and any restrictions it places on political speech (particularly in relation to the fitness for office of a senior Government Minister) remains to be seen. It is suggested that if the operation of common law contempt in this way was found to be unconstitutional, the parliamentary *sub judice* convention should reflect such a development so that Members of Parliament would not possibly be restricted from discussing matters such as the Easton Royal Commission, that were otherwise being comprehensively covered by the Press. However, in this regard, the comments of Deane J, in his judgment in *Theophanous* (at 187) are of interest:

> ...I would make clear that nothing in this judgment should be understood as suggesting that the traditional powers of the Parliament and superior courts to entertain proceedings for contempt are not justifiable in the public interest. In that regard, it is important to remember that, while the distinction is not always as clear as it should be, the justification of proceedings for contempt of court or parliament lies not in the protection of the reputation of the individual judge or parliamentarian but in the need to ensure that parliaments and courts are able effectively to discharge the functions, duties and powers entrusted to them by the people.

45 L Taylor, et al, "Speaker under fire on Easton quote" *The Australian*, 19 September 1995, p 2.

46 See for example, s 15 of the *Parliamentary Proceedings Broadcasting Act* 1946 (Cth), which protects the Australian Broadcasting Corporation from any civil or criminal action or proceeding in relation to the broadcasting or re-broadcasting of any portion of the proceedings of either House of the Federal Parliament or of a joint sitting. Conversely, legislation may also prohibit media publications that may otherwise enjoy common law 'qualified privilege': this issue was demonstrated in 1983 with media reports of a speech given in the South Australian Parliament concerning a federal royal commission. Advice was given that this

for contempt of court that the publication was a fair and accurate report of parliamentary proceedings.[47]

In Australia, this issue has been referred to in obiter dicta in consideration of the balance between competing public interests that courts must strike when considering whether the media was justified in publishing material that technically constituted contempt. In *Attorney-General for NSW v John Fairfax and Sons Ltd and Bacon*,[48] McHugh JA (as he then was) makes the following remarks:

> ...while the public interest in the maintenance of an impartial system of justice is very great, it is not always paramount. On occasions other public interests take precedence over the public interest in the fair and unprejudiced trial of criminal and civil issues. The public interest in open justice, for example, usually takes precedence over the public interest in an unprejudiced hearing. ... Moreover, it can hardly be argued that a fair and accurate report of proceedings of Parliament, if made in good faith, constitutes an unlawful interference with the course of justice.[49]

Whilst not conclusively decided as a central issue to a particular case, it is suggested that such a balance would (and should in order to clarify the issue) be supported in future decisions. The High Court (particularly Mason CJ (as he then was) and Gaudron J), again in obiter, has expressed its support for McHugh J's approach, in its decision in the *Hinch* case.[50] In addition, in England, support has been voiced for the availability of common law protection for the media in relation to contempt, where reports of parliamentary proceedings are involved. In *Attorney-General v Times Newspapers Ltd*,[51] Lord Denning stated:

> ...as soon as matters are discussed in Parliament, they can be, and are, reported at large in the newspapers. The publication in the newspapers is protected by the law. Whatever comments are made in Parliament, they can be repeated in the newspapers without any fear of an action for libel or proceedings for contempt of court.[52]

V. THE 'WESTPAC LETTERS' - 1991

The deep uncertainty surrounding the scope and implementation of the parliamentary *sub judice* convention and its relationship with media practice was brought into sharp focus in 1991 when different rulings were made in different Australian Houses of Parliament concerning the tabling of the Westpac letters. Interlocutory injunctions had been successfully gained by Westpac to restrain the

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speech was protected by parliamentary privilege, although media reports of the same may have been in breach of specific Federal legislation: however, see the Parliament of New South Wales, Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1995 at 23-38, where the right of the media to report parliamentary proceedings without fear of prosecution for contempt was strongly supported in the following words: "If the qualified privilege of a fair and accurate report of Parliament by the media is in jeopardy, then the concept of freedom of speaking within Parliament is rendered meaningless" at 33.

47 S Walker, note 23 *supra*, p 69.

48 (1986) 6 NSWLR 695.

49 *Ibid* at 714.

50 *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 25, 83.

51 [1973] 1 QB 710.

52 *Ibid* at 741.

publication of the confidential letters by major media organisations. This case raised a number of complex legal and jurisdictional issues, including the particular issue (which was to be determined before the New South Wales Court of Appeal) as to "what parliamentary reports should a media publisher be entitled to publish".[53] However, the chance for the Court of Appeal to determine this matter was extinguished when the letters were tabled, on 7 March 1991, at a public hearing of the inquiry into banking by the House of Representatives Standing Committee on Finance and Public Administration.[54]

This event was not only a matter of *sub judice*, for example if the letters had been evidence to be given in a trial for fraud. The letters themselves were the subject of interlocutory injunctions against their publication on the grounds of breach of confidence. Thus, the potential for the media to be 'doubly' in contempt of court (according to *sub judice* and through the breach of a court order) was a possibility if the decision was made to publish. To complicate the matter further, the letters were read in the South Australian Parliament and the issue of 'qualified privilege' became 'live'.

It is not within the scope of this paper to go into the details of these events. However, it is suggested that they served to highlight the lack of clear guidelines as to the implementation of the convention, as Federal Presiding Officers disallowed the discussion of the letters, whereas discussion was allowed in the South Australian Parliament. In addition, the relevant media organisations suffered confusion as to their ability to publish under 'qualified privilege', particularly in light of the fact that they would have been in breach of a court order restraining publication. Would 'qualified privilege' (if available) of a fair and accurate report of parliamentary proceedings have protected the media from liability in this case? Should parliamentary privilege have been used in a way that potentially damaged the value of specific curial protection of confidential documents and not 'just' the administration of justice? Could the media have taken advantage of 'qualified privilege', at least in the South Australian jurisdiction?

VI. CONCLUSION

> It is desirable that the convention of Parliament as to matters *sub judice* should, as far as possible, be the same as the law administered in the courts.[55]

The availability of 'qualified privilege' for the media in relation to contempt of court and fair and accurate reports of proceedings of Parliament should be clarified

53 B Burke, "The Westpac Letters Case" (1991) 11(1) *Communications Law Bulletin* 28 at 29.

54 D Prowse, Speaker of the ACT Legislative Assembly, "*Sub judice* - Recent Developments", presented at the Twenty-Second Regional Conference of Presiding Officers and Clerks, Honiara, Solomon Islands, 23-5 July 1991 at 18.

55 *Attorney-General v Times Newspapers Ltd* [1973] 1 QB 710 at 740-74, per Lord Denning MR.

and upheld in Australia,[56] in order to overcome a source of confusion and to support the media's right to report on public matters and in particular, matters on the public record. As a consequence, Lord Denning's remarks should be heeded, as a danger arises where the parliamentary *sub judice* convention is manipulated for purely political purposes, in a way that the discretion of the courts, in an objective balancing of competing public interests cannot be. It is suggested that the powerful discretion of the Presiding Officer in implementing the convention is potentially dangerous, as the allowance in Parliament of discussion of highly sensitive and prejudicial material, which would otherwise clearly constitute contempt of court, may be reported by the media (if 'qualified privilege' is available). Indeed, in relation to the convention in New South Wales, the comment has been made that the:

> *Sub judice* rule is in a parlous state; yet it is such a crucial issue as it expresses the relationship between the legislature and the administration of justice. ...The rules seem quite regular - and then an event occurs which may or may not cause them to be abandoned in a totally unpredictable manner.[57]

The formal regulation of parliamentary practice is a highly sensitive issue due to the nature of parliamentary privilege, and the vehemence with which it is protected. However, it is suggested that the impartial and responsible exercise (in a manner that more closely reflects the common law approach to contempt of court) of the parliamentary *sub judice* convention could (and should) be more strongly supported. A constitutional requirement of politically independent Presiding Officers (as in the House of Commons) would be one way of practically assisting this aim. Otherwise, the discretion involved in the implementation of the convention, could be more stringently governed, not just by convention and practice, but also by particular Standing Orders of Parliament, or through legislation. In response to the Westpac affair, Leo McLeay has posed the following question, "Is the present state of the rule - as a convention subject always to the discretion of the Presiding Officer - right, or should some attempt be made to define it more precisely, perhaps in the form of a standing order?"[58] As a means of preventing parliamentary poisoning of the well of justice through the vessel of the wicked witch of the press, it is suggested that the answer should be 'yes'.

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56 This could be achieved through legislation, in a similar manner to the provision for qualified privilege for fair and accurate reports of parliamentary proceedings in relation to liability of the media for defamation - for example under s 24 of the *Defamation Act* 1974 (NSW).

57 Parliament of New South Wales, Legislative Assembly, *Commentary on Speakers' Rulings, Legislative Assembly of New South Wales, May 1965 to March 1976* at 162.

58 L McLeay, Speaker of the House of Representatives, "The Westpac Letters Affair - One parliamentary perspective on the *sub judice* conventional [sic] et al" (1992) 6(2) *Legislative Studies* 3 at 5.