proper acknowledgment and with a recitation of the defendant's case together with a reasoned rejection of it. It is only in that way that unnecessary appeals can be avoided and the litigant be satisfied that he has received the justice that is his due'.[25]

### Endnotes

1. *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90 at [81] citing *Allianz Australia Insurance Ltd v Kerr* [2012] NSWCA 13 at [53] and *Wu Shan Liang v Minister for Immigration* [1994] FCA 926.
2. At [25]. The full court noted at [40] that counsel for the appellants had not appeared in the matter before the tribunal which may provide some explanation on their part. But counsel for the commissioner had appeared.
3. At [43] to [80].
4. At [50], [52], [53].
5. At [76].
6. At [74] and [75].
7. At [77].
8. At [81].
9. At [98].
10. At [98].
11. At [146].
12. At [128].
13. At [129].
14. At [130].
15. At [41]-[42].
16. *Crinion v IG MarketsLtd* [2013] EWCA Civ 587 at [4].
17. At [11].
18. At [13] citing *R v Sussex Justices ex p. McCarthy* [1924] KB 256 at 259.
19. At [14].
20. At [37].
21. At [16] and [17].
22. At [18].
23. At [37].
24. At [40].
25. At [44].

## Verbatim

Justice Owen in T*he Bell Group Ltd (in liq) v Westpac Banking Corporation [No.9]*, [2008] WASC 239, paragraph 960.

I will ignore the old adage about lies and statistics and add a further set of numbers to the record. The transcript of the hearing extends over 37,105 pages and the parties' written closing submissions take up 36,933 pages. I am not going to say that I read each and every page but I did have cause to examine and consider an uncomfortably large percentage of them. The task could hardly be described as gelogenic and if I never hear the terms cash flow, insolvency or subordination again and never meet a Mr Barnes or a Mr Addy or the Earl of Chesterfield, it will still be too soon.

Justice Scalia in *United States* v *Windsor,* handed down on 26 June 2013.

This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.

The court is eager—hungry—to tell everyone its view of the legal question at the heart of this case. Standing in the way is an obstacle, a technicality of little interest to anyone but the people of We the People, who created it as a barrier against judges' intrusion into their lives. They gave judges, in Article III, only the 'judicial power,' a power to decide not abstract questions but real, concrete 'cases' and 'controversies.' Yet the plaintiff and the government agree entirely on what should happen in this lawsuit. They agree that the court below got it right; and they agreed in the court below that the court below that one got it right as well. What, then, are we doing here?

# Verbatim

In *McQuigginn*, *Warder v Perkins*, handed down 28 May 2013, the US Supreme Court examined a US statute, the Antiterrorism and Effective Death Penalty Act or AEDPA, which limits the circumstances in which a person can make application for habeas corpus. The court held by majority that the AEDPA was subject to an exception to allow a prisoner such as the respondent (convicted of first degree murder, serving life without parole) to bring such an application if among other things fresh evidence had emerged giving him or her a convincing claim of actual innocence. What follows is an extract from the vigorous dissenting judgment of Scalia J (references omitted), who addressed the reasoning of the majority directly. Hart & Wechsler, by the way, is a popular US legal textbook on the topic of federal courts and jurisdiction.

Congress clearly anticipated the scenario of a habeas petitioner with a credible innocence claim and addressed it by crafting an exception (and an exception, by the way, more restrictive than the one that pleases the court today). One cannot assume that Congress left room for other, judge-made applications of the actual-innocence exception, any more than one would add another gear to a Swiss watch on the theory that the watchmaker surely would have included it if he had thought of it. In both cases, the intricate craftsmanship tells us that the designer arranged things just as he wanted them.

The court's feeble rejoinder is that its (judicially invented) version of the 'actual innocence' exception applies only to a "severely confined category' of cases. Since cases qualifying for the actual-innocence exception will be rare, it explains, the statutory path for innocent petitioners will not 'be rendered superfluous.' That is no answer at all. That the court's exception would not entirely frustrate Congress's design does not weaken the force of the state's argument that Congress addressed the issue comprehensively and chose to exclude dilatory prisoners like respondent. By the court's logic, a statute banning littering could simply be deemed to contain an exception for cigarette butts; after all, the statute as thus amended would still cover something. That is not how a court respectful of the separation of powers should interpret statutes.

Even more bizarre is the court's concern that applying AEDPA's statute of limitations without recognizing an a textual actual-innocence exception would 'accord greater force to a federal deadline than to a similarly designed state deadline.' The court terms that outcome 'passing strange,' but it is not strange at all. Only federal statutes of limitations bind federal habeas courts with the force of law; a state statute of limitations is given effect on federal habeas review only by virtue of the judge-made doctrine of procedural default.

With its eye firmly fixed on something it likes—a shiny new exception to a statute unloved in the best circles—the court overlooks this basic distinction, which would not trouble a second-year law student armed with a copy of Hart & Wechsler. The court simply ignores basic legal principles where they pose an obstacle to its policy-driven, free-form improvisation.

The court's statutory-construction blooper reel does not end there.