THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 90

Professional Privilege For Confidential Communications

REPORT

MAY 1993

based. The High Court held that for such an application to succeed the applicant must show that it is necessary in the interests of justice to order the respondent to disclose the information. If an applicant has an effective remedy against a media organisation, an order will not be made for preliminary discovery of the name of the source.

3. OTHER JURISDICTIONS COMPARED

4.13 Some of the overseas jurisdictions reviewed by the Commission have introduced some form of statutory protection for the confidential identity of sources of journalists' information. Most of these provisions give a court a discretion to treat certain information as protected. This is the case, for example, in the United Kingdom, where section 10 of the *Contempt of Court Act 1981* provides that courts may not require a person to disclose sources of information contained in a publication unless it is established to the court's satisfaction that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

4.14 A number of jurisdictions in which such provisions have been introduced or proposed are discussed in Appendix IV.

4. ABSENCE OF PRIVILEGE AND ITS IMPACT ON JOURNALISTS

4.15 Until recently, few Australian cases have had to deal with refusals by journalists to disclose the identity of their sources of information. There are a number of possible explanations:

> "[J]ournalists' sources may not often be relevant to litigation or investigations; the parties may not press the matter; if a government is involved it may not wish to appear to attack the media. Furthermore, to ensure public confidence in the authenticity of information, journalists generally identify its source; the issue of compulsory disclosure usually arises only in the comparatively rare case where, not only does the informant not want to be identified, but also the information is published notwithstanding that the source is not identified."[19]

4.16 However, in recent years, some Australian journalists have been fined or imprisoned for contempt of court for failing to disclose the identity of sources of information. Other

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19 S Walker "Compelling Journalists to Identify Their Sources: `The Newspaper Rule' and `Necessity'" (1991) 14 *UNSWLJ* 302, 305.

journalists and media personnel have faced the prospect of punishment for contempt. In response, the press and media organisations have referred to the need for the creation of a legal privilege relating to the confidential identity of journalists' sources of information and to inappropriate penalties for contempt of court imposed on journalists. The following incidents which have recently prompted public debate are detailed below:

(a) The Barrass case.
(b) The Budd case.
(c) The Hellaby case.
(d) The Cornwall case.
(e) The Nicholls case.

(a) The Barrass case

4.17 In *DPP v Luders*[20] the defendant, an employee of the Australian Taxation Office, was charged with official corruption under section 70(1) of the *Crimes Act 1914* (Cth) for publishing Commonwealth documents without authorisation. Proceedings were commenced by the Commonwealth Director of Public Prosecutions.

4.18 Committal proceedings in the Perth Court of Petty Sessions were followed by a trial in the District Court. Both courts were exercising federal jurisdiction and the law applied was federal law.[21]

4.19 During the committal proceedings a *Sunday Times* journalist, Mr Tony Barrass, was requested by the prosecution[22] to reveal the identity of the source of the Australian Taxation Office information which had been leaked from that Office and formed the basis of a number of media stories. It was apparent that the answer would have been highly relevant to the prosecution for the purpose of establishing the defendant's guilt or to pursue others, whether independent of the defendant or accomplices.[23]

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20 *DPP v Luders* (unreported) Court of Petty Sessions (WA), 27 November 1989, No 27602 of 1989 (committal proceedings); *DPP v Luders* (unreported) District Court of WA, 7-8 August 1990, No 177 of 1990 (trial).

21 See Ch 1 n 2.

22 Committal proceedings transcript 27 November 1989, 10. The defendant's counsel did not object to the question and in fact considered it relevant and necessary in the interests of justice: id 13-14.

23 Id 18 per Thobaven SM.

4.20 Mr Barrass refused to reveal the source of his information on the basis of his profession's ethical duty to maintain the confidentiality of such sources.[24] The witness acknowledged the fact that the law does not recognise a privilege for journalists. Nevertheless, he continued to refuse to disclose the source of his information.

4.21 The magistrate acknowledged that the impact of refusing to answer questions in court was more serious in relation to some matters than to others.[25] However, this matter was considered relatively serious because at that stage the answer to the question appeared to go directly to the prosecution's establishment of guilt or otherwise and to the defendant's ability to present a proper case if it went to the District Court.

4.22 It was not apparent to the magistrate that the question could be reworded so as to avoid the dilemma in which Mr Barrass found himself that is, either to breach his ethical obligations as a journalist or to face punishment for contempt of court.[26] Nor could the question be ignored on the basis that it was irrelevant to the case before the court. Because the proceedings were part way through, the magistrate considered it imperative that the answers be given and that the court should use its full powers to ensure that they were given. A fine against Mr Barrass was considered inappropriate given the seriousness of the matter. The magistrate committed Mr Barrass to imprisonment for seven days pursuant to section 77 of the *Justices Act 1902*.[27] During that period it would have been possible for the witness to answer the question and so be released. Mr Barrass remained in prison for five days and did not answer the questions.

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24 The prosecutor asked Mr Barrass: "How did [print-outs from the Taxation Department computer] come to be in your possession, Mr Barrass?" Mr Barrass answered: "I'm not going to answer that question sir, I'm sorry, because as a journalist I'm bound by certain ethics, one of those pertaining to the fact that if I reveal certain information that points to a source I am, in fact, breaking the code of ethics. Therefore, I'm not going to answer that question": Committal proceedings transcript 27 November 1990, 10.
Defence counsel also considered the question relevant and necessary in the interest of justice (id 13-14) and indicated that he also wished to question the witness on the same matters: transcript 11 November 1989, 4.
The magistrate also put to Mr Barrass: "I am going to give you an opportunity now to indicate whether or not you are prepared to answer the questions [which would reveal the identity of the source], or not?" Mr Barrass replied: "With all due respect, sir, no": id 3.

25 Committal proceedings transcript 27 November 1989, 21-22.

26 Committal proceedings transcript 11 December 1989, 3.

27 The media's attention focused on the magistrate's decision: eg *The Australian* 13 December 1989, 3: "A-Gs may review journalist's jailing"; *Sunday Times* Editorial December 17 1989 38: "The information Barrass received was authentic and accurate and was clearly a matter of public concern. How supremely ironic then that he should be the first journalist to be jailed by a court for ethical commitment. At the absolute minimum, the law that sent Barrass to jail should be amended to protected journalists from judicial coercion when the criteria of authenticity, accuracy and public interest can be demonstrated as they have been in the Barrass case."

4.23 The trial of Mr Luders was heard before the District Court of Western Australia in August 1990. Mr Barrass was called as a witness for the prosecution and again refused to answer questions in court which would have revealed the source of his information.[28] Judge Kennedy warned Barrass:

> "You are obliged to answer the question. You are a competent and compellable witness and you are obliged to answer any question that is put to you and the penalty for refusing to do so is a maximum penalty of 5 years' gaol and $50,000 fine."[29]

4.24 Mr Barrass maintained his refusal,[30] referring to his profession's ethical obligation to protect the confidentiality of sources of information. Judge Kennedy gave very little weight to this argument:

> "The administration of justice is of far greater importance [than the journalist's point of view]. We have an adversary system which depends on those who are competent and compellable coming to court and truthfully telling what they know. If they decline to do that the administration of justice could break down. If any person has any problem with that concept they might like to consider their position if they were wrongfully charged with an offence and the one person who could give evidence for an acquittal declined to answer relevant questions. The rule of law is an important way in which this community is distinguished from various totalitarian regimes. No matter how important you think your objective when you are considering overturning the law to get to the devil you should consider what protection you will then have if the devil turns on you."[31]

4.25 The judge went on to observe:

> "It is for you and your conscience what you have, in fact, done to Mr Luders. You have caused him in the end great damage. I do not refer so much to the conviction and the penalty but the fact that he lost a job; a young man with no skills and probably the only chance he had to have a decent job in his whole life, and he has lost that. It seems to me that that is also a consideration for journalists: whether the damage they are likely to do to individuals outweighs any supposed benefits to the entire community."[32]

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28 The prosecutor asked: "When did you first meet this person who gave you the documents?" Mr Barrass replied: "I think, sir, I will have to refuse to answer that question. Your Honour, I'm sorry, but I understand my duty as a witness, but I also am bound by a code of ethics as a member of the Australian Journalists' Association . . . and I think if I give any information that may point to a source, well then I'm breaking that Code": trial transcript 6 August 1990, 70.

29 Id 70.

30 Eg id 77.

31 Id 64. Judge Kennedy referred to the "gravamen" of his offence in the terms that "it strikes the heart of the administration of justice": trial transcript 8 August 1990, 31.

32 Id 64-65.

4.26 Judge Kennedy convicted Mr Barrass of contempt. The Judge regarded contempt as a very serious matter, and in her deliberations on the appropriate sentence was mindful of the fact that if a substantial fine could not be paid by Barrass then he would have to be imprisoned. Mr Barrass was fined $10,000.[33]

(b) The Budd case

4.27 A former Brisbane Courier-Mail reporter, Mr Gerard Budd, was jailed for 14 days by the Queensland Supreme Court for contempt in the face of the court when, as a witness in a defamation action,[34] he refused to answer questions[35] put to him by the plaintiff's counsel and

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33 The $10,000 fine was paid by the Sunday Times: *Sunday Times* 9 August 1990, 3. Editorials in both Western Australia's major newspapers criticised Judge Kennedy's decision and the laws that allowed Barrass to be fined:
The West Australian 9 August 1990, 10:
"Whatever the law may say, there was no justice in the punishment meted out to former Perth journalist Tony Barrass in the District Court yesterday. A $10,000 fine was harsh treatment for bringing to public notice a scandal in the Australian Taxation Office over the leaking of confidential tax records . . . Something is drastically wrong with contempt laws when Luders [the defendant] is fined $6,000 for official corruption, but Barrass a witness in the case who simply obeyed the code of ethics binding his profession is fined $4,000 more than that for contempt of court. . . . [T]he prosecution in the lower court and the District Court established its case against Luders without the evidence sought from Barrass. It has dangerous implications for all journalists investigating important matters of public interest that could end up in court."
Sunday Times 12 August 1990, 40:
"The real victim here . . . is the public and its right to know. If people are to be deterred from giving information to the press in the public interest, and if newspapers were inhibited from publishing such material, that right must be severely threatened. . . . [T]here are plenty of senior politicians, public servants and police officers in this State who would be horrified if they thought they could be identified, under judicial coercion, as the source of information they provide in the public interest.
The *Sunday Times* recognises the conflict between a journalist's legal obligations and adherence to the profession's code of ethics. It does not seek a blanket exemption that would provide a refuge for unscrupulous journalists who make up their sources. Journalists who do so will be sacked. But we again call for amendments to the law. If a published report can be demonstrated to be accurate, authentic and in the realm of the public's right to know, the law should direct courts to take those factors into account and apply a wide discretion and not punish a journalist who refuses to disclose a source.
And on the question of penalties, who offends more against society a journalist who abided by ethical principles and was fined $10,000 . . . a man who killed two Vietnamese brothers in a head-on smash but was fined a total of $3,000 on two counts of dangerous driving causing death . . . a heroin addict who was involved in two bank hold-ups and planned a third but was given three years' probation . . . a youth who killed his best friend in a traffic accident but was ordered to do 240 hours of community service for dangerous driving causing death . . .?"
Mr Luders was convicted. Mr Barrass did not reveal the identity of his source.

34 *Copley v Queensland Newspapers* Pty Ltd (unreported) Queensland Supreme Court, 20 March 1992, No 3107 of 1989. Mr Budd is no longer with the Courier-Mail.

35 Eg transcript 254-255:
Plaintiff's counsel: "Who is this mysterious person to whom you gave the assurance but wouldn't disclose his name?"
Mr Budd: "The person was one of my contacts."
Counsel: "Who is he?"
Mr Budd: "I can't identify."
Dowsett J: "You will have to answer the question."

Dowsett J concerning the identity of an unnamed source of information referred to in an article written by Mr Budd in the *Courier-Mail*.[36]

4.28 Dowsett J considered the questions put to Mr Budd to be relevant to the issues being dealt with in the case and, in particular, to testing the credibility of Mr Budd as a witness:

> "It is very easy for a witness to say that he made inquiry of an unknown source, a source whom he cannot now remember or whose name he is not willing to disclose. It compels an additional level of honesty upon him if he has to disclose a name even if the plaintiff is not now in a position to call evidence to rebut that allegation. A witness who identifies the name of the person from whom he derived information is put at risk of that person coming forward and denying the fact with whatever consequences that may have.
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> Thus it seems to me to be more than a reasonable way of testing credibility to insist upon identification of source. I think too that the identity of the source of that information goes to the question of good faith in the allegation which the plaintiff asserts is made in the article that there has been a coverup, involving the plaintiff in that coverup. . . . The identity and office of the person who made such an allegation to Mr Budd may well be very relevant in assessing his good faith in the way in which he dealt with that information as compared with the way he dealt with the allegations made against Mr Copley. I think therefore that in both respects the question of the identity of the source of information is a relevant matter and a matter of sufficient importance in the conduct of the case to justify me in directing the witness to answer the questions designed so to identify the source."[37]

4.29 Neither defence counsel nor counsel representing the witness in the Budd case attempted to argue in favour of the recognition of a professional privilege for journalists.[38] Instead, arguments were directed to the relevance of the evidence and the appropriate penalty for contempt.

Mr Budd: "With due respect, your Honour, this person spoke to me on the condition that they not be identified."
Dowsett J: "I don't know where people get this idea from. Journalists can't make this rule. The law of the country says you have to answer the question. That is the law and it applies to all of us."
Mr Budd: "I realise it was my duty as a journalist at the time to protect that source. . . . It is part of the journalistic code of ethics."

36 "Code of Silence", 1 September 1989, in which it was alleged that an insinuation could be perceived of a police coverup of police involvement in misconduct in Toowoomba. The article also dealt with the conduct of the prosecution case against one of the police officers by the plaintiff. The implication alleged was that the plaintiff (a lawyer) was also involved in the coverup.

37 Transcript 267.

38 Nor were such arguments put forward in *DPP v Luders*: see para 4.20 above.

4.30 The judge took some steps to facilitate the maintenance of the alleged confidence.[39] He invited the journalist to identify the source in writing for communication only to the Bar Table. Counsel for the plaintiff indicated that, for the purposes of the trial, he would be willing to accept that method of identification, but the journalist declined the offer. The journalist was also given an opportunity to contact his source to seek a release from the confidentiality, but reported to the court that he was unable to make contact.

4.31 The judge was reluctant to fine Mr Budd because:

> "The trouble with fines in cases like this is that it leaves it open to the inference that you can buy your way out of this if you want to."[40]

4.32 In convicting Mr Budd of contempt and sentencing him to a term of 14 days' imprisonment,[41] Dowsett J indicated his strong objection to the journalism profession's claim to privilege:

> "I cannot begin to understand a situation in which responsible members of the community seek to put themselves above the law. I particularly have difficulty in understanding how journalists as a class, who perhaps more than all other professions apart from the law itself, should be able to see the need for the application of the law uniformly to all, should claim an entitlement to exempt themselves from its obligations. In recent times, there has been an attempt by the press, it seems, to in some way identify this sort of privilege with that claimed by the clergy as to confession. I cannot see that there is any comparison. The clergy, after all, claim such privilege as originating at a time immemorial, whereas the claim made by journalists is very new indeed.
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> Further, particularly in a case such as this, I find it impossible to understand why any journalist should think that he is entitled to make statements about another person which may, on their face, be correct or otherwise, and when proceedings are brought to establish that they are not true and that they are defamatory, seek to conceal the

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39 For other methods available to courts to maintain confidences or reduce the adverse consequences of a forced breach of confidence see Ch 2.

40 Transcript 270. In *DPP v Luders* Mr Barrass was fined $10,000 by the District Court. As noted at n 33 above, the fine was paid by the *Sunday Times*.

41 Mr Budd was released after 6 days: *The West Australian* 27 March 1992. Following Mr Budd's conviction the Queensland Premier, Mr Wayne Goss, was reported as backing Mr Budd's stand: "Change law, urges writer" *The West Australian*, 27 March 1992. It was also reported that contempt of court laws would be reviewed by the Standing Committee of Attorneys General in October 1992: "Plea to change contempt laws" *The West Australian* 23 March 1992. For discussion of the case see A Field "A Gypsy's Curse" *Courier-Mail* 26 March 1992, 9. One mistake in that article is in the assertion by the author that the judge stated that clerics had a privilege in Queensland. In fact he merely referred to the claim by clerics to a privilege, in the same way as he referred to the claim by journalists to a privilege: transcript 271. No changes to the law of privilege have been made in Queensland since the *Copley case*.

source, contrary to law, asserting some highhanded view that this is in the public interest and that he, or his profession, is entitled to decide what is the public interest.

Having said all that, though, I accept completely that however misguided I may think your views to be, you hold them conscientiously. I accept that subject to any questions as to your credibility, which I will have to decide in the course of the trial, you are taking this point because of your views as to the way in which you are professionally bound. How you justify to yourself the very serious interference with the administration of law which this causes, I don't know.

I take into account, also, the fact that you have sought a release from whoever is the source of your information, but have not been able to obtain it. That seems to me to have been the least you could have done. In any event, of course, as far as the law is concerned, neither you nor he has any proper interest in seeking to restrain the provision of the information in answer to the questions which have been put to you.

I take into account, too that you appear not to be likely to gain anything from coming here to give evidence. I take into account the fact that there is a great risk of prejudice to you in your present employment as a result of any sentence of imprisonment."[42]

(c) The Hellaby case

4.33 On 4 September 1992 Cox J of the Supreme Court of South Australia ordered a reporter from the *Adelaide Advertiser*, Mr David Hellaby, to hand over to the court documents used in preparing two reports relating to the South Australian Auditor General's inquiry into the State Bank of South Australia.[43] The judge also ordered the journalist to hand over papers relevant to the authorship of the articles, the journalist's belief in their accuracy, his sources, attempts to verify the articles and any directions given to him regarding the writing of the articles. The Bank told the court that it was considering suing the journalist for injurious falsehood[44] but to decide whether to proceed it first needed access to the journalist's

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42 Transcript 271.

43 *State Bank of South Australia v Hellaby* (unreported) Supreme Court of South Australia, 4 September 1992, No 1627 of 1992. The reports appeared in the *Adelaide Advertiser* on 7 and 8 July 1992. They referred to claims from alleged sources within the State Bank inquiry that suspected criminal activity in the State Bank had been uncovered on an incredible scale.

44 The tort of injurious falsehood has been defined by Bowen LJ in *Ratcliffe v Evans* [1892] 2 QB 524, 527-528 as consisting of:

"written or oral falsehoods . . . where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage. . . . To support it, actual damage must be shewn, for it is an action which will only lie in respect of such damage as has actually occurred."

R P Balkin & J L R Davis *Law of Torts* (1991) 723 summarise the four elements of the action as:

(1) a false statement of or concerning the plaintiff's goods or business;

(2) publication of that statement by the defendant to a third person;

(3) malice on the part of the defendant - that is, that the statement was made mala fide or with a lack of good faith; and

documents. The journalist was given leave to appeal to the Full Court against the order for discovery but the Full Court dismissed the appeal, and an application for special leave to appeal to the High Court was refused.

4.34 Under the order for discovery Mr Hellaby had 14 days to reveal his source, with the possibility that he would be imprisoned for contempt of court if he refused.[45] On the 14th day his lawyers filed some of the documents required by the order, but none of the documents filed disclosed the identity of his source. Mr Hellaby was found guilty of contempt of court, but Duggan J adjourned the hearing for a week to give Mr Hellaby more time to ask his source to release him from his undertaking of confidentiality.[46] Eventually, under a confidential settlement between the Bank and Mr Hellaby's lawyers, the Bank agreed not to proceed with moves to identify the source. However, Duggan J fined Mr Hellaby $5,000 for the period he had been in contempt.[47] It is noteworthy that this case, unlike the Barrass and Budd cases, involved a pre-trial discovery order rather than the giving of evidence in court.

(d) The Nicholls case

4.35 On 19 April 1993 Mr Chris Nicholls, formerly a radio journalist with the ABC, was sentenced to four months' jail after pleading guilty to a contempt of court charge for refusing to reveal a source. Mr Nicholls had been charged with impersonation, false pretences and forgery as a result of his investigations into allegations that a South Australian Cabinet minister had assisted her partner, Mr Jim Stitt, to obtain commercially valuable information. The prosecution alleged that Mr Nicholls had made telephone calls to Mr Stitt's bank and had pretended to be Mr Stitt in order to obtain confidential information. Mr Nicholls' defence was that the telephone calls were made not by himself but by a source to whom he had given an undertaking of confidentiality. When Mr Nicholls gave evidence he refused to reveal his source's identity.[48] The jury acquitted Mr Nicholls of the criminal charge,[49] but he was then

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(4) proof by the plaintiff that he has suffered a particular and identifiable loss as a result of the statement.

45 "Reporter faces jail for hiding sources": *The West Australian* 13 March 1993, 35. See also "Source of discontent" *The Australian* 6 May 1993.

46 "Journalist in contempt over State Bank source" The Australian 7 May 1993, 5; "Reporter guilty, awaits sentence" *The West Australian* 7 May 1993, 28.

47 "Journalist fined after legal deal" *The West Australian* 15 May 1993, 15.

48 "Journalist refuses to name source" *The Australian* 6 April 1993.

49 "Journalist not guilty of impersonation" *The Australian* 17-18 April 1993; "Journalist cleared of impersonation charges" *The West Australian* 17 April 1993.

imprisoned for four months for contempt of court in refusing to disclose the source of his information.[50] On appeal, the Full Court reduced the sentence to 12 weeks' imprisonment.[51]

4.36 Commenting on the Hellaby and Nicholls cases, Mr Stephen Halliday, President of the Australian Journalists' Association section of the South Australian Media, Entertainment and Arts Alliance, said that the union would continue its push for national shield laws for journalists to protect their sources.[52] He advocated the New Zealand system under which courts had discretionary powers to excuse a witness from giving evidence that would disclose confidential communications.[53] South Australian Democrat leader Ian Gilfillan promised to introduce a private member's bill into the South Australian Parliament to protect journalists who refused to reveal their sources,[54] and the South Australian Attorney General, Mr Chris Sumner, said that he was willing to consider legislation under which reporters would not have to name sources in court in certain circumstances.[55]

(e) The Cornwall case

4.37 On 25 March 1993 contempt of court proceedings were commenced against Deborah Cornwall, a reporter with the *Sydney Morning Herald*, who had refused to reveal the source of her information for a story on a murder case to the New South Wales Independent Commission against Corruption.[56] Ms Cornwall wrote a story which said that unnamed police officers had told her that one Neddy Smith had informed on a man subsequently convicted of murder. Ms Cornwall had been summoned before the ICAC to give evidence but had refused to name the police officers concerned. ICAC Commissioner Ian Temby said that it had been established that Mr Smith was not the informant, and suggested that the unnamed source's information was designed to discredit Smith and warn off other potential ICAC informants. Mr Temby said that the fact that the information had been established to be false removed any obligation on Ms Cornwall to protect her source, but Ms Cornwall disputed

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50 "Reporter jailed for four months" *The Australian* 20 April 1993, 1-2; "Jail for contempt" *The West Australian* 20 April 1993.

51 "ABC journalist's jail sentence cut" *The West Australian* 22 May 1993, 32.

52 See "Reporter jailed for four months" *The Australian* 20 April 1993, 1-2; "Source of discontent" *The Australian* 6 May 1993.

53 The Commission's recommendation that courts should be given a general discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach of confidence is based on the New Zealand legislation: see paras 8.15-8.23, 8.38-8.56 below.

54 "Move to shield journalists" *The West Australian* 23 April 1993, 34.

55 "Talks look at law on media silence" *The West Australian* 10 May 1993.

56 "Reporter faces contempt charge" *The Australian* 26 March 1993, 2.

that the information was false and maintained that she was bound by the AJA *Code of Ethics* to maintain her source's confidentiality.[57]

4.38 In the hearing before Abadee J in the New South Wales Supreme Court, which commenced on 27 April 1993, Ms Cornwall maintained her refusal to identify her sources, and said that Mr Temby's claim that her sources had lied to her was not enough to ignore important moral and social consequences of maintaining confidentiality.[58] On 3 May 1993 Abadee J reserved his decision.[59] That decision was expected to be given shortly after the date of this Report. Section 37 of the *Independent Commission Against Corruption Act 1988* provides that witnesses summoned to attend or appearing before the Commission are not entitled to refuse to answer questions or to produce documents, and it seemed likely that this might be a major factor in the eventual decision.

(f) Other recent cases

4.39 Other recent incidents have also highlighted the problem of journalists being required to reveal their sources.

(i) The Parry case

4.40 On 9 April 1992, during the hearings of the Royal Commission into Commercial Activities of Government and Other Matters on the Western Australian Teachers Credit Society, a Western Australian journalist, Mr Geoff Parry, declined to answer questions put to him relating to the identity of a confidential auditor's report.[60] Mr Parry had used information from the report for a Channel Seven television news story on a former deputy Opposition leader.[61] Mr Parry claimed he was bound by the AJA *Code of Ethics* not to reveal his sources.

4.41 Royal Commissioner Geoffrey Kennedy adjourned Mr Parry's evidence and stated that the Commission would review the situation and decide if it was necessary to press the

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57 "Ethics source of landmark legal battle" *The West Australian* 12 April 1993.
58 "Journalist refuses to name police sources" *The West Australian* 28 April 1993 33.
59 "Judge delays sources ruling" *The West Australian* 4 May 1993 12.
60 "Silent journalist faces fine" *The West Australian* 10 April 1992.
61 Claiming that that person had borrowed $42,000 from the Society without any proper documentation.

question.[62] The Commission did not return to the matter before the completion of its inquiry.[63]

(ii) The Four Corners case

4.42 On 1 September 1992 a judge of the Equity Division of the Supreme Court of New South Wales ordered reporter Neil Mercer and executive producer Marian Wilkinson to reveal the name of the person who supplied the reporter with documents relating to "Blood Money", a "Four Corners" television programme on overservicing by pathologists.[64] The order was sought by directors and shareholders of a company which provided pathology services. They claimed to be entitled to sue some person or persons whom they had not been able to identify to protect the confidentiality of certain information. The reporter and executive producer were to be asked at a future hearing who supplied the documents for the programme. However, the matter was settled without the need to disclose the identity of the source.[65]

(iii) The 7.30 Report case

4.43 On 3 September 1992 it was reported[66] that Melbourne businessman Mr John Elliott would be applying to the Supreme Court of Victoria in a bid to make the Australian Broadcasting Corporation disclose the identity of informants used in two episodes of the "7:30 Report". Counsel for Mr Elliott was reported as telling a court on 2 September 1992 that an existing defamation action against the ABC arising from a 1990 broadcast had been "overtaken by recent events". The two programmes examined various aspects of Mr Elliott's business activities.[67] Up to the date of this report there had been no further developments.[68]

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62 Under s 14(1) of the *Royal Commissions Act 1968* a witness who refuses to answer a question put to him by a Commissioner which is relevant to the inquiry may be dealt with on the motion of the Attorney General as if he were in contempt of the Supreme Court.

63 The Royal Commission became functus officio in relation to its investigations when it delivered its second and final report on 12 November 1992. The former Royal Commissioners continue to have limited responsibilities under the *Royal Commission (Custody of Records) Act 1992*.

64 "Reporter ordered to reveal source" *The West Australian* 2 September 1992, 41.

65 Information provided by ABC Legal and Copyright Department, 20 November 1992.

66 "Elliott seeks informants' names" *Financial Review* 3 September 1992.

67 Telephone interview with Mr Jeffrey Sher QC, counsel for Mr Elliott, on 5 October 1992. Mr Sher confirmed that the matter was still "under consideration" and that no action had yet been taken to force the disclosure of the identity of the informants. This was still the situation as of 20 November 1992 (information provided by ABC Legal and Copyright Department).

68 Information from ABC Legal and Copyright Department 23 April 1993.

(iv) The Synnott case

4.44 On 6 January 1993 it was reported that Mr Duncan Gay MP, the chairman of a New South Wales Parliamentary committee investigating the dispute between New South Wales Police Commissioner Tony Lauer and the former Police Minister Ted Pickering, had suggested that a journalist who reported evidence given in camera to the committee by Mr Pickering could be called on to reveal his source.[69] Mr John Synnott, a reporter with the Sun-Herald, reported that Mr Pickering had told the committee that he had personally investigated a heroin dealer out of frustration at police inaction, and had made allegations of police corruption. A spokesman for the New South Wales Free Speech Committee praised Mt Synnott for drawing the public's attention to these allegations, and said that informing the public about corruption was a major function of the media. Mr Gay however said that the report was in contempt of Parliament and would be referred to the parliamentary privileges committee, which could ask the reporter to reveal his source.

5. POSSIBLE RATIONALES FOR A PRIVILEGE

4.45 Possible rationales for recognising a journalists' privilege to refuse to disclose the sources of their information are journalists' ethics and interests such as freedom of the press and the public's right or need to know.

4.46 In the Commission's view, the public interest in the protection of confidential information in the hands of journalists, including the confidential identity of sources of information, does not outweigh the public interest in courts having all relevant evidence available to them so as to justify the creation of a privilege.

4.47 However, the Commission has concluded that courts should be given a general discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach by the witness of a confidence.[70] In appropriate circumstances, confidential information held by journalists, including the identity of sources, could be withheld as a result of the exercise of that discretion.

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69 "Call to protect reporter's source" *The WestAustralian* 6 January 1993, 25.

70 See paras 8.38-8.56 below.

(a) Journalists' ethics

4.48 Where Australian journalists have declined to provide relevant information to judicial proceedings, thus placing themselves in the position of being in contempt of court, they have sought to justify their actions on the basis of obligations pursuant to the AJA *Code of Ethics*. The Code forbids its members from revealing the confidential identity of sources of journalists' information, providing that "In all circumstances they [members] shall respect all confidences received in the course of their calling."[71]

4.49 A professional code of ethics usually regulates the conduct of the members of that profession. The public interests served by such regulation might be many and varied. For example, such a code will usually require members to provide a high standard of professional service to clients, and will establish a mechanism for the professional to be disciplined should he fail to adhere to the requisite standards. Codes might also prohibit members from conducting themselves in a manner unbecoming to the profession.

4.50 To date the common law has failed to recognise a public interest in protecting the ethical beliefs of an individual professional, or of his profession generally, which would, by itself, justify the creation of a professional or other privilege. The creation of a privilege cannot be justified unless the public interests to be promoted or maintained thereby override the public interest in the ability of courts to require as much relevant information as possible for the determination of issues.

4.51 On its face the provision in the AJA Code amounts to an absolute prohibition on a journalist revealing a confidential source. However, practice suggests that a considerable degree of discretion is involved. According to Padraic McGuinness:

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[71] Rule 7(a) 3. Mr R Millhouse referred the Commission to a view that the Code does permit a breach of confidence in certain circumstances. The preamble states:

> "Respect for the truth and the public's right to information are overriding principles for all journalists. In pursuance of these principles journalists commit themselves to ethical and professional standards."

It might then be argued that, when faced with a court order to reveal a source, a journalist's "overriding principles" are "respect for truth and the public's right to information". Before the adoption by the AJA of the current preamble and *Code of Ethics*, a legal opinion on the operation of the preamble was sought by Mr Millhouse from Feez Ruthning & Co. The opinion was that:

> "[W]e incline to the view that a court would interpret the ten (10) specific ethical rules enumerated in section 49 independently from the general introductory words of the section, and would therefore not entertain as a defence to any allegation of a breach of any of the ten (10) specified rules that the journalist in question was simply acting in `respect for truth and the public's right to information.'"