Chapter 3 - Journalist v the Court

The Cases

3.1 A line of recent cases has brought attention to, and public debate upon, the issue of shield laws for journalists. It starts with the one involving Tony Barrass in Perth in 1989. In this chapter is an account of the issues raised in each case. In its submission to the Committee, the Communications Law Centre states that these cases "disclose a trend of hostility on the part of the judiciary towards journalists' claims to confidentiality".[1]

3.2 Until these cases there had been little occasion for the court to deal with journalists who refused to reveal the identity of confidential sources. It is not possible to explain the reason why the issue has now come to the fore after a lengthy period of relative obscurity but one witness made the following comment on how things were before these cases:

> Before these six cases came up a lot of journalists were already suffering a penalty because of the fact that they could not go to court and claim confidentiality, but it was sort of a hidden process because cases were settled. In some cases, perhaps, stories were even not run on legal advice to do a defamation, but I think more likely because when you went to see the lawyers after the defamation suit was there, at a certain stage it would become clear that there could be a difficulty in the evidence.[2]

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1 *Submission 113, p.1191*

2 *Evidence (Ms Bacon) p. 138*

The Barrass Case

3.3 An employee of the Australian Taxation Office in Perth was charged with official corruption under subsection 70(1) of the *Crimes Act 1914* (Commonwealth) for unauthorised publication of Commonwealth documents. [*DPP v Luders*, unreported] During the committal Tony Barrass, a journalist with *The Sunday Times*, was asked to reveal the source of the leaked Tax Office information which was the basis of his series of stories. The answer to this question would appear to have been directly relevant to the defendant's guilt. Tony Barrass refused to answer, claiming an ethical obligation to maintain confidentiality. The magistrate treated this as a very serious matter because of its connection to the issue of guilt of the defendant. The question requiring Mr Barrass to identify his source could neither be rephrased nor ignored to avoid the ethical dilemma.

3.4 The magistrate committed Barrass to gaol for 7 days under section 77 of the *Justices Act 1902* or until the answer was given. Barrass stayed in prison for 5 days without providing the information.

3.5 When Mr Luders was tried before the District Court, Barrass was called again and again refused to answer, referring to his profession's ethical obligation to protect the confidentiality of sources. However, Judge Kennedy rejected his argument, placing greater weight upon the administration of justice and the rule of law. She convicted him of contempt and fined him $10,000.

3.6 Notable aspects of this case were that Luders was convicted of official corruption anyway, without the requested evidence from Barrass and Luders was fined $6,000. This reasonably leads to the conclusion that whilst

the information was central to the issue before the court, it was ascertainable from another source. (Of course, at the point in the trial that Mr Barrass was being pressed to give his evidence, the fact that that evidence would not ultimately be central to the issue was not known to the court.) The media later argued the absurdity of this situation. The person who did nothing more than abide by his ethical code was punished more severely than the person convicted of a relatively serious corruption offence.[3] They also argued it was a serious blow to the freedom of the press. Barrass' fine was in fact paid by his newspaper.[4]

The Budd Case

3.7 Gerard Budd was employed by the Brisbane *Courier-Mail.* He was a witness in a defamation action before the Supreme Court of Queensland and sentenced to imprisonment for 14 days (released after 6) when he refused to answer questions about the identity of a source of information referred to in an article in the *Courier-Mail* written by him, even when invited to do so only to the Bar Table. He was also given an opportunity to contact the source to seek a release from the undertaking. The judge considered the questions to be particularly relevant to the issue of testing the credibility of Mr. Budd as a witness. The following extract from Dowsett J's judgment is particularly pertinent to the issues in this inquiry:

> 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

3 *The West Australian, 9 August 1990, p.10*

4 *This case led to the reference to the Law Reform Commission of Western Australia cited previously.*

> asserts is made in the article that there has been a cover-up, involving the plaintiff in that cover-up ... 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.[5]

3.8 Argument in the case revolved around issues of relevance and the appropriate penalty for contempt, without reference to whether or not the court should recognise a privilege for journalists in general. The judge did express a very strong view against it when convicting Mr. Budd. He rejected any comparison with the clergy in relation to confession. In particular he said:

> ... 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 source, contrary to law, asserting some high-handed view that this is in the public interest and that he, or his profession, is entitled to decide what is in the public interest.[6]

The Hellaby Case

3.9 David Hellaby was a journalist with the Adelaide *Advertiser.* [Mr Hellaby gave evidence before the Committee at its public hearing in Brisbane.] During proceedings taken against Mr Hellaby by the State Bank

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5 *Copley v Queensland Newspapers Pty Ltd (unreported), Queensland Supreme Court, 20 March 1992, Transcript p.267.*

6 *Transcript p.271*

of South Australia for pre-trial discovery, the Supreme Court of South Australia ordered him to hand over documents he used in preparing two reports in *The Advertiser* on the South Australian Auditor-General's inquiry into the State Bank of South Australia. The Bank alleged it needed access to the journalist's documents in order to decide whether it would sue Mr. Hellaby for injurious falsehood. His appeal to the Full Court was rejected, as was his application for leave to appeal to the High Court.

3.10 The court had given Mr Hellaby 14 days to reveal his source on pain of imprisonment for contempt should he fail to comply. Some of the documents called for were subsequently filed but none which revealed the identity of the source. He was found guilty of contempt but the court allowed him a week to contact his source to seek a release from the undertaking. Eventually the case was settled confidentially and not proceeded with, but the judge fined Hellaby $5,000 for the period he had been in contempt.

3.11 Unlike Mr. Barrass and Mr. Budd, Mr Hellaby was not giving evidence in court as a witness but rather as the respondent to an application for pre-trial discovery. During evidence before the Committee Mr Hellaby stated that this was a "misuse of the judicial process to gag the media"[7]. He said:

> To me the entire case was totally vexatious. It was also purely a form of legal bullying to force me into a situation where they knew that I would be forced into an ethical conundrum. It, to me, appeared to be totally unjust. I had no opportunity whatsoever to present any evidence that actually pointed to the crux of the matter. And had I been able to I am convinced, and

7 *Evidence (Mr Hellaby), p.377.*

> my lawyers were convinced, that we would have been able to show that the stories I had written that were being complained of were true, fair and accurate, and we could have done it without having to reveal the source.[8]

The Nicholls Case

3.12 In this collection of cases that of Mr Nicholls is unique. He was a journalist and the defendant in a criminal action for impersonation, false pretences and forgery resulting from his investigation into allegations that a Cabinet minister in South Australia had assisted her partner to obtain commercially valuable information. The prosecution alleged that Mr Nicholls had made telephone calls to the bank of the minister's partner, pretending to be him and seeking confidential information. In his defence Mr. Nicholls alleged that the calls were not made by him but by a confidential source. He refused to reveal the identity of that source during the course of his evidence. He was acquitted of the criminal charge but subsequently convicted of contempt of court and sent to prison for 4 months. On appeal, the Full Court reduced the sentence to 12 weeks' imprisonment.

The Cornwall Case

3.13 Deborah Cornwall's case also differs from the others in that the contempt with which the court was dealing arose not out of her evidence before a court, but before the New South Wales Independent Commission Against Corruption. This is an investigatory body with very wide terms of reference, making the question of relevance of the information to the

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8 Evidence (Mr Hellaby), p. 389

inquiry extremely difficult to dispute.

3.14 At the relevant time Ms Cornwall was a journalist with the *Sydney Morning Herald.* She wrote a story about a murder case in which she said unnamed police officers had told her that Neddy Smith had been a police informer. When she was summoned before the ICAC she refused to reveal the name of the officers. Commissioner Temby told Ms Cornwall that she had been misled by her informants and that she should therefore be no longer obligated to keep their identity confidential. She did not agree and maintained the secrecy. She was directed not to approach her source. Section 37 of the *Independent Commission Against Corruption Act 1988* obliges witnesses before the Commission to answer questions or produce documents when required, so Commissioner Temby cited Ms Cornwall for contempt. This was dealt with by Abadee J of the New South Wales Supreme Court.

3.15 Abadee J examined clause 3 of the Code of Ethics, noting that whilst it was apparently absolute in its terms, the defendant Ms Cornwall seemed willing to disclose the required information if the source consented (she had been directed not to approach the source) or if she was satisfied that she had been deliberately misled. The Judge concluded that clause 3 was intended to operate beyond the law. This conclusion has been disputed by some commentators.[9] The court held that Ms. Cornwall's refusal was not based upon the Code in any event, but on a 'subjective personal ethical consideration unrecognised by the Code itself.'[10]

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9 *Flint, Prof D, 'Protection of Journalists Confidential Sources', p.8*

10 *Independent Commission Against Corruption v Cornwall (1993) 116 ALR 97*

3.16 It was argued before the Supreme Court in this case that a law which limits the ability of journalists to maintain the confidentiality of their sources is a restriction on the implied constitutional guarantee of freedom of political communication found to operate in Australia by the High Court in *Nationwide News Pty Ltd v Wills*[11] and *Australian Capital Television Pty Ltd (No.2) v The Commonwealth*[12]. Abadee J rejected these arguments. He said that although in *Cojuangco* the High Court confirmed that the media had a role in collecting and disseminating information and that the free flow of information is vital to investigative journalism, it had held that there was no public interest immunity, let alone constitutional protection, which exempted a journalist from disclosing his or her sources of information when it was in the interests of justice to do so.[13] He said that the newspaper rule had nothing to do with Commissions of Inquiry.

3.17 In the result Ms Cornwall was found guilty of contempt and a two month suspended sentence was imposed with 90 hours of community service.

The Legal Principles

3.18 All these cases have highlighted the dilemma for journalists created by the present state of the law in Australia on the issue, as articulated by the High Court in *Cojuangco* and quoted in chapter 2.

3.19 The law on the matter of disclosure of sources in Australia was

11 *[1992] 66 ALJR 658*

12 *[1992] 66 ALJR 695*

13 *Independent Commission Against Corruption v Cornwall, Supreme Court of New South Wales, unreported, 6 July 1992, p.90.*

established in *McGuinness v Attorney-General of Victoria* (1940) 63 CLR 73. Mr. McGuinness was the editor of *Truth*. He wrote and published articles which suggested that certain persons were collecting funds to bribe members of the Victorian Parliament to vote against two Bills before the House. A Royal Commission to inquire into the allegations ensued. When called to give evidence, Mr. McGuinness refused to reveal the source of his information. He was convicted of an offence against the Evidence Act and fined fifteen pounds.

3.20 When the case went to the High Court on appeal, it was held that newspaper proprietors, editors and writers do not have a privilege which entitles them to refuse to disclose their sources at a subsequent trial. The following extract from the judgment of Rich J firmly states the High Court's position at the time[14]:

> The appellant was called upon to choose between his duty under the law to answer questions relevant to the enquiry, unless he had some lawful excuse for refusal, and what he conceived to be his duty as a pressman to his informant to maintain silence. He chose to observe the latter supposed duty and to refuse to divulge the source of his information. ... [the cause] seems to be founded on a paradox. It is said that newspapers will not be able to discover the truth and publish it unless when the courts of justice in their turn want the truth pressmen in whom it has been confided are privileged to withhold it.
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> The paramount principle of public policy is that the truth should always be accessible to the established courts of the country.

3.21 There is some debate about whether there is any residual discretion in the courts to excuse a person from disclosing a confidential

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14 ibid.

source even when the information is both relevant and admissible. The Supreme Court of New South Wales denied it in *Re Buchanan* (1964) 65 SR NSW 9 at page 11. In the United Kingdom some courts have conceded the existence of such a discretion at trial (as well as at the interlocutory stage) if a breach of an ethical or social value or risk of serious injustice is involved and that this should override the public interest in ensuring that all relevant and admissible information is before the court.[15]

3.22 In Australia the position is uncertain but it could be argued that the qualification of the High Court in *Cojuangco* that the disclosure might not be ordered if it was not '*necessary in the interests of justice*' allows for the exercise of such a discretion.

The Newspaper Rule

3.23 In defamation actions, the newspaper rule allows a newspaper publisher, proprietor or editor to withhold information about the name of the writer of the article which is the subject of the action and about the sources of information supporting the article, but only in interlocutory proceedings and subject to special circumstances. The rule does not apply at trial. The High Court said, in *Cojuangco*, that it is a rule of practice, not evidence, and it 'guides or informs the exercise of the judicial discretion'.[16]

3.24 According to Dixon J in *McGuinness v Attorney-General of Victoria*[17] the rule is founded on:

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15 *Attorney-General v Mulholland [1963] 2 QB 477, British Steel Corporation v Granada Television [1981] AC 1096 and D v National Society for the Prevention of Cruelty to Children [1978] AC 171*

16 *(1988) CLR 346 at 356*

17 *(1940) 63 CLR 73 at 104*

> the special position of those publishing and conducting newspapers, who accept responsibility for and are liable in respect of the matter contained in their journals, and the desirability of protecting those who contribute to their columns from the consequences of unnecessary disclosure of their identity.

3.25 Because the newspaper is liable for what it publishes, it is not necessary for the plaintiff to search for other possible defendants at the interlocutory stage. At trial, however, disclosure may be necessary to show malice and so the rule does not apply.

3.26 The rule was applied by the Queensland Court of Appeal in *Hodder v Queensland Newspapers Pty Ltd*[18] which held that the interests of justice did not require the appellant to answer interrogatories about the identity of a confidential source. Fitzgerald J said the rule helped the courts balance the effective administration of justice with other public interests like freedom of speech and the public's right to be informed. The balance enabled a person alleging defamation to ascertain the necessary details when it was important, at trial, rather than at a stage when they might abandon the case after the identity of the source has been revealed.

3.27 In *Cojuangco* the High Court recognised that, at an interlocutory level, it is much less likely to be 'necessary in the interests of justice' to require disclosure of a confidential source. It also recognised that even at trial the court will not compel disclosure unless it is necessary to do justice.[19]

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18 [1993] ATR 81-207

19 (1988) 165 CLR 346 at 345-355

Pre-trial Discovery

3.28 All Australian jurisdictions have in place in their rules of procedure, in some form or other, provision for a discovery process before the commencement of an action[20]. It is usually called pre-trial discovery. This assists the parties to identify any wrongdoing. This was the procedure in issue in *Cojuangco* and in the Hellaby case.

3.29 At common law there was a recognised equitable procedure for discovery to allow for the identification of a wrongdoer[21]. The English case of *British Steel Corporation v Granada Television Ltd*[22] involved an action for disclosure of the name of the person who supplied documents to Granada which formed the basis of a television program. The majority of the House of Lords held that disclosure should not be compelled unless it was necessary in the interests of justice. Because British Steel had abandoned all claims against Granada, disclosure was needed to obtain an effective remedy. It was therefore in the interests of justice.

3.30 In *Cojuangco* the question was whether there should be preliminary discovery against a media organisation for the names of the sources of information upon which certain publications were based. Where there was an effective remedy against the media organisation an order for preliminary discovery would not be made to reveal the source. It must, however, be an *effective* remedy.

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20 eg. New South Wales Part 3, Rules of the Supreme Court 1970; Rules of Procedure in Civil Proceedings, 1986 (Vic), Rule 32.03

21 Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133

22 [1981] AC 1096

3.31 An effective remedy has been defined as a remedy against the media organisation which is coextensive with the one that would be available against the sources if they were known, namely the same opportunity to recover adequate monetary compensation. The media organisation would not be able to rely on a defence unavailable to the source.[23]

Investigatory bodies

3.32 As discussed in Chapter 2, conflict between journalists and the legal system has arisen in the context of investigations conducted by statutory bodies set up in a number of jurisdictions to investigate matters related to corruption and organised crime. These bodies include the National Crime Authority (NCA), the Australian Securities Commission (ASC) (both Commonwealth), the New South Wales Independent Commission Against Corruption (ICAC), the New South Wales Crime Commission and the Queensland Criminal Justice Commission (CJC). In September 1993 the Parliamentary Criminal Justice Committee of the Legislative Assembly of Queensland published a report on confrontation between a media determined to maintain confidentiality of a source and the ICAC (*ICAC v Cornwall*) and the CJC.

3.33 Each of these bodies has broad, but not coincidental, powers to require answers to questions and production of documents. The relevant provisions are listed in the following table:

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23 *The Herald and Weekly Times Ltd and Others v The Guide Dog Owners' and Friends' Association and Another [1990] VR 451 at 458 and Cojuangco v John Fairfax and Sons Ltd (No 2) (1991) ATR 81-068 at 68,541*

Act	Power to require documents	Power to require statement
Australian Securities Commission Act 1989	sections 28-34	sections 19 and 37(9)
National Crime Authority Act	section 29	-
Independent Commission Against Corruption Act 1988	section 22(1)	section 21(1)
Crime Commission Act 1985 (NSW)	section 19(2)	section 10(1)
Criminal Justice Act 1989 (Qld)	section 3.1	section 3.1

3.34 The Chairman of the Australian Press Council has made the following criticism of the powers of the ICAC:

> Given the power of ICAC to determine its own investigations and its own terms of reference, and the consequent ease with which a disclosure may thus be found to be relevant, its potential to impact on freedom of political communication vastly exceeds that of a court. Although not a court, it may compel disclosure and treat as a contempt any refusal. It may do so selectively, as indicated in *ICAC v Cornwall*, where Mr Smith himself had declined to answer questions and ICAC had been unwilling to institute proceedings for contempt. ... Reporting on corruption and crime are legitimate matters for political and public communication. Freedom of that communication requires the use of confidential sources, including "off the record" briefings by officials even by inquisitorial bodies. If statutory protection from contempt is required for inquisitorial bodies, should it not be reasonably proportionate to the need for protection and the freedom of political communication?[24]

24 *Paper delivered to Hobart Legal Convention 1993, p. 11-12*

3.35 The issue is that these statutory provisions may displace, either impliedly or expressly, the common law test of the evidence being necessary to the interests of justice when a court is considering whether to order disclosure, see for example subsection 37(1) of the ICAC Act. Some of them also are sufficiently broadly expressed to remove the ability to determine whether the information demanded is relevant.

3.36 On another occasion Professor Flint has asked:

> Did we ever intend to give powers to bodies like the ICAC, greater than those of our courts, to use against journalists and the media - the very institution that has done more in the initial exposure of defects in public life than any other?[25]

3.37 Examination of the provisions listed above shows that not all these bodies have been given the same breadth of authority. The NCA Act, for instance, restricts the power to demand documents and the like to those which have relevance to the specific investigation it is conducting. The Act does not allow for 'proposed investigations', as does the CJC legislation. The Queensland Parliamentary Criminal Justice Committee's report on the use of the power under section 3.1 of the Criminal Justice Act recommended the CJC's coercive powers not be confined by its two investigative responsibilities. The Parliamentary Criminal Justice Committee thought it might be necessary in future to effectively discharge its other functions and responsibilities.[26]

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25 *'Protecting Sources', Australian Press Council News, August 1993, p.3*

26 *Parliamentary Criminal Justice Committee, Report of a Review of the CJC's use of its power under section 3.1 of the Criminal Justice Act 1989, September 1993, p.30*

3.38 The Committee's view is that Professor Flint's question must be closely examined. The issue of confidential sources has drawn attention to the growth of power of these statutory bodies and the danger they pose of intrusion on personal and press freedom. If there is to be any privilege for journalists against disclosure, it should clearly apply to all legal and quasi-legal proceedings, including proceedings before these investigatory bodies.

Recommendation 1

The Committee recommends that, if there is to be any privilege for journalists against disclosure, it should apply in all legal and quasi-legal proceedings, including proceedings before investigative bodies.