CAMLA COMMUNICATIONS LAW
BULLETIN
Communications & Media Law Association Incorporated
Volume 39, No 3. June 2020 (Bonus Edition)
Bonus Edition

War Crimes, Defamation and the Scope of Journalistic Privilege under the Evidence Act 1995 (Cth):

Roberts-Smith v Fairfax Media Publications Pty Ltd (No 3) [2020] FCA 2

Adaena Sinclair-Blakemore, Associate, Baker McKenzie, explains the significance of the recent Roberts-Smith v Fairfax judgment on journalists' sources.

1. Introduction

In *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 3)* [2020] FCA 2, Justice Besanko considered whether a journalist's privilege under section 126K(1) of the *Evidence Act 1995* (Cth) (**Act**) is displaced if the identity of the journalist's informant is disclosed in the Outlines of Evidence filed by or on behalf of the journalist in the proceedings.

The proceeding concerns Ben Roberts-Smith, who is a former Commander in the Special Air Service Regiment (**SASR**) of the Australian Army and was awarded the Victoria Cross in 2011. However, since June 2018, Roberts-Smith has been the subject of an investigation by the Australian Federal Police (**AFP**) into allegations of war crimes committed by Roberts-Smith and other members of the SASR while deployed to Afghanistan.[1]

2. The Scope of Section 126K

Section 126K of the Act provides that:

1) If a journalist has promised an informant not to disclose the informant's identity, **neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained**.

2) The court may, on the application of a party, order that subsection (1) is not to apply if it is satisfied that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs:

   a) any likely adverse effect of the disclosure on the informant or any other person; and

1 See Nick McKenzie and Chris Masters, 'Police Investigate Ben Roberts-Smith over Alleged War Crimes' (online), *The Sydney Morning Herald*, 29 November 2018 <https://www.smh.com.au/national/police-investigate-ben-roberts-smith-over-alleged-war-crimes-20181126-p50ihb.html>; Nick McKenzie and Chris Masters, 'Ben Roberts-Smith under Police Investigation for "Kicking Handcuffed Afghan Off Small Cliff"' (online), *The Age*, 22 September 2019 <https://www.theage.com.au/national/ben-roberts-smith-under-police-investigation-for-kicking-handcuffed-afghan-off-small-cliff-20190910-p52pys.html>.

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Editors' Note

Dear readers,

We are thrilled to present you with this, CAMLA's **bonus edition** of the Communications Law Bulletin. Conscious as we are that you have been unable for months to meet face-to-face for CAMLA seminars and networking events, we thought we would do our bit to increase the connection between our members by publishing an extra edition of the CLB this year. This is among the raft of other initiatives on which the CAMLA Board and Young Lawyers Committee are continuing to work hard to help the membership #stayconnected through all this. If the Pulitzers had a prize for thoughtfulness, it still probably wouldn't go to us. But it's nice of you to say.

Speaking of CAMLA's other corona-initiatives, our friends at **Baker McKenzie** hosted a brilliantly informative CAMLA webinar, **'Contracts, Cancellations and Coronavirus in the Tech-Media Industry'**. The wonderful team at **McCullough Robertson** hosted a **workplace relations** webinar dealing with the legalities and practicalities around standing down employees, the requirements under the *Broadcasting and Recorded Entertainment Award 2010*, alternatives to standing employees down, and various other employment law issues related to the unfolding coronavirus shutdown. On 25 June 2020, CAMLA and Ashurst hosted the excellent **Prepublication 101** webinar featuring **Larina Alick,** Executive Counsel at Nine, **Marlia Saunders,** Senior Litigation Counsel at News Corp Australia, **Prash Naik,** General Counsel Doc Society, and **Leah Jessup,** Business & Legal Affairs Executive at Endemol Shine Australia. Organised by CAMLA Young Lawyers as a valuable introduction into prepub by some of the best in the business, this webinar was widely attended and gratefully received. These webinars are being made available to members to be enjoyed via the CAMLA website, placing CAMLA comfortably among the most game-changing content streaming platforms to launch in Australia in the last decade.

Speaking of webinars and game-changing content streaming platforms, another webinar is on its way. This one will address the future of Australian screen content following the release of the **Supporting Australian Stories on our Screens Options Paper**. The webinar, hosted by Baker McKenzie at 1:30-2:30pm on Thursday 2 July 2020, will feature some of the leading voices from within that discussion, including the ACMA's **Fiona Cameron** (co-author of the Options Paper), **Bridget Fair** (CEO, Free TV) and **Emile Sherman** (the Academy Award winning and nominated producer for The King's Speech and Lion).

Still focusing on the streaming platforms (not an altogether unfamiliar activity for me over the last few months), nbn's **Jessica Norgard** profiles **Netflix**'s Director of Production Policy (APAC), **Deb Richards**. On top of that, Minters' **Kosta Hountalas** comments on the **USYD v ObjectiVision** case and the implications it can have for commercialising IP. Baker McKenzie's **Liz Grimwood-Taylor** talks us through the ongoing consultation around changes to the *Online Safety Act*. Ashurst's **Nina Fitzgerald, Eoin Martyn, Caroline Christian** and **Jasmine Collins** help us to understand copyright ownership where material is created by artificial intelligence. McCullough Robertson's **Beck Lindhout** and **Robert Lee** provide a useful chart to clarify defamation law in a social media context. HWL Ebsworth's **Teresa Torcasio, Laura Young** and **Chantelle Radwan** summarise the **ACCC v Trivago** ruling. Corrs' **Michael Do Rozario**, **Simon Johnson** and **Bianca Collazos** tell us why it's time to stop force-feeding cookies to users, following a recent GDPR ruling by the CJEU. And Bakers' **Adaena Sinclair-Blakemore** explains the significance of the recent **Roberts-Smith v Fairfax** judgment on journalists' sources.

With great thanks to all our contributors, we hope you enjoy this edition as much as we have!

Ashleigh and Eli

b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

3) An order under subsection (2) may be made subject to such terms and conditions (if any) as the court thinks fit.

Section 126K(1) shields a journalist and their employer from having to disclose their sources where a journalist made a promise to an informant not to disclose the informant's identity. However, subsection (2) introduces a public interest test which enables a court to order that the privilege does not apply where the public interest in disclosure outweighs any likely adverse effect of the disclosure. This rule replaces the old common law rule, called the "newspaper rule", and creates a rebuttable presumption that a journalist does not need to disclose their sources' identities.[2]

3. Facts of the case

Roberts-Smith commenced defamation proceedings against Fairfax and three individual journalists (Nick McKenzie, Chris Masters and David Wroe) after articles published in August 2018 revealed the allegations of war crimes and an allegation of domestic violence against him. These allegations, which Roberts-Smith has vehemently denied, were borne out of an internal Australian Defence Force investigation which

2 See Joseph Fernandez and Mark Pearson, 'Shield Laws in Australia: Legal and Ethical Implications for Journalists and their Confidential Sources' (2015) 21 *Pacific Journalism Review* 61.

was reported on by Fairfax Media outlets and journalists. Broadly, the allegations made by the journalists in the articles in issue are that:

- while in Afghanistan, Roberts-Smith murdered an unarmed Afghan civilian;
- while in Afghanistan, Roberts-Smith pressured junior SAS soldiers to murder unarmed Afghan civilians; and
- while in a hotel room in Canberra, Australia, Roberts-Smith committed an act of domestic violence against a woman.[3]

During the discovery phase of these proceedings, the respondents withheld producing 49 relevant documents on the basis that these documents are protected by s 126K(1). These documents include the journalists' notes of their meetings with informants, transcripts of interviews with informants and documents that the informants gave to the journalists during or after their meetings. The respondents argued that the documents included information like personal details, professional details, details of the informants' relationships to Roberts-Smith, unique vocabulary choices and phrases that the informants used. Further, the documents handed over to the journalists by the informants are documents that could only have been in the possession of very few individuals. On this basis, the respondents have argued that any disclosure would compromise the identity of the informants.[4]

However, Roberts-Smith argued that the identity of various sources had been revealed when the respondents filed and served their Outlines of Evidence. This is because the Outlines of Evidence were given by named current and former SAS soldiers. Having regard to the contents of those Outlines combined with the name of the person whose Outline of Evidence it was, the respondent argued that the journalists' informants identities are apparent and therefore no privilege can exist over those identities. Roberts-Smith put forward numerous examples of this. One example is that in an article published in June 2018, it was said that SAS soldiers were the sources of an allegation against Roberts-Smith that he murdered an Afghan civilian on Easter Sunday in 2009. Only one of the Outlines of Evidence filed by the respondents refers to this incident and the applicant therefore argues that this witness must be the informant and his identity has been revealed. Therefore, the respondent argued that there is no privilege in the documents that relate to this informant.[5]

4. Decision

However, Justice Besanko disagreed with this argument that the identity of a source can be inferred by simply comparing the contents of the publications with the Outlines of Evidence, and that such identification displaces the privilege in section 126K(1).[6] His Honour found that this overlooks the possibility of some other way the journalist may have been provided with that information. Further, it conflates the identity of a witness with the identity of an informant. Furthermore, the respondents submit that it is important to distinguish between eyewitnesses, informants and trial witnesses. So the judge concluded that while it may be reasonable speculation that persons who are the subject of Outlines of Evidence are the journalists' informants, this is not a reasonable inference to be drawn over other inferences. Consequently, the privilege in section 126K(1) was not displaced and the respondents could keep the identities of their sources confidential.

5. Implications and conclusion

The decision is significant because it reinforces the high bar that must be met before a court may find that the privilege in section 126K(1) has been displaced. Justice Besanko emphasised that any displacement of privilege must be evidenced by clear and unambiguous information which discloses the informant's identity and it cannot be displaced merely by inference. The judge analogised a waiver of privilege under section 126K(1) with a waiver of legal professional privilege to emphasise that any displacement or waiver of privilege must be made clear and unambiguous.[7]

Notably, Roberts-Smith did not make an application for production of the documents under section 126K(2). However, Justice Besanko commented in obiter that any such application would likely have been unsuccessful because the adverse effects of disclosure would likely have outweighed any public interest in disclosure.

Overall, this decision provides useful insight into the approach a court may take to the scope of protection afforded to a journalist and their sources under section 126K(1), which is a particularly timely issue in light of recent AFP raids on media outlets and growing concern over media freedom in Australia.[8]

3 *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 3)* [2020] FCA 2 at [8]-[10].

4 *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 3)* [2020] FCA 2 at [26].

5 See *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 3)* [2020] FCA 2 at [52]-[80].

6 *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 3)* [2020] FCA 2 at [81].

7 *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 3)* [2020] FCA 2 at [81].

8 See, eg, Keiran Hardy, 'Press Freedom in Australia Needs Much More than Piecemeal Protection' (online), The Interpreter, 16 August 2019 <https://www.lowyinstitute.org/the-interpreter/press-freedom-australia-needs-much-more-than-piecemeal-protection>.