Not Just the Crocodiles: Why Queensland Journalists Work in Australia's Riskiest Jurisdiction

Gina McWilliams, Senior Legal Counsel, News Corp Australia, considers journalists being required to reveal confidential sources under Queensland's Crime and Corruption Act 2001, following *F v Crime and Corruption Commission*.

The decision of His Honour Justice David Jackson in *F v Crime and Corruption Commission* [2020] QSC 245 (published 12 August 2020) has reinforced the need for a Queensland shield law to protect journalists from being forced to identify confidential sources. While Queensland remains the last Australian jurisdiction to legislate to protect this bastion of free speech, this might change in the near future.

Underlying Facts

F is an employee of an unnamed television station. At some time during 2018, F received a confidential tip from a source that caused him to send a crew to doorknock a particular premises and, a few days later, to return to film the occupant being arrested for murder. The Crime and Corruption Commission (**CCC**) subsequently commenced an investigation into whether a police officer had disclosed information without lawful authority and issued F with an attendance notice pursuant to s. 82 of the *Crime and Corruption Act 2001* (QLD) (**the CC Act**) requiring him to give evidence under oath. The attendance notice indicated that the CCC intended to ask F what he knew about the police investigation into the murder, a joint counter terrorism team investigation into the alleged terrorist activities of a second person and how the crew came to attend the arrest, including the name of F's confidential source.[1]

Unless a person has a reasonable excuse, it is an offence under the CC Act to fail to attend a hearing if given an attendance notice (ss. 82(5)), take an oath when required (s. 183) or answer a question when asked (s. 192), all of which are punishable by a 200 penalty unit fine[2] or 5 years' imprisonment. F did attend the CCC as required and was duly asked to identify the person who tipped him off about the murder arrest and who told him there were listening devices in the house at the time his crew doorknocked the premises. Section 192(2)(b) of the CC Act provides that a person cannot rely on confidentiality as a basis upon which to refuse to answer a question. That being the case, and because Queensland does not have a shield law overriding s. 192, the confidentiality F had promised to his source was not a reasonable excuse for F to stay silent. Legal professional privilege, public interest immunity or parliamentary privilege are all lawful grounds upon which to decline to answer a CCC question but since neither legal professional nor parliamentary privilege applied in the circumstances, F had to rely on public interest immunity when he declined to identify his source.[3]

A week after the CCC hearing, F applied to the Supreme Court to determine whether public interest immunity applied and could be relied on in his case and, as an alternative, whether he was entitled to a restraining injunction pursuant to s. 332 of the CC Act to stop the CCC from asking him any further questions. F subsequently amended his application to ask the Court to determine whether ss. 192 and 196[4] of the CC Act were invalid because they impermissibly burdened the constitutional freedom of communication about matters of government and politics. Several months after F filed his application – and without F having answered the questions to which he objected – a police officer was charged with two offences under s. 92A(1)(a) of the *Criminal Code* (QLD) (for dealing with information about the murder and the joint counter terrorism team raid) and a third offence under s. 352 of the *Police Powers and Responsibilities Act 2000* (QLD) for disclosing the existence of a surveillance device in circumstances where the officer was reckless as to whether the disclosure would endanger the health and safety of any person.

Public Interest Immunity?

Public interest immunity is not a term defined in the CC Act and there were no secondary materials Jackson J found useful in interpreting the term. Rather, His Honour noted that the context in which the words were used in the CC Act suggested that the common law meaning applied.[5] At common law, "crown privilege" was rebadged "public interest immunity" in *Alister v R* (1983) 154 CLR 404 by His Honour Chief Justice Gibbs following earlier comments he had made in *Sankey v Whitlam* (1978) 142 CLR 1 that the former term was "potentially wrong and possibly misleading". While the name changed, the privilege remained

1 The attendance notice also required F to produce his notes about the matters the CCC wanted to question him about but there was no argument about access to documents raised in the Supreme Court.

2 Which currently equates to $26,112.

3 s. 192(2A)(b) of the CC Act.

4 s. 196 provides that the Supreme Court is to decide claims of privilege under the CC Act.

5 F v CCC at [23].

the same as did the "critical point" that it pertained to immunity "from production of a governmental document or disclosing a governmental communication".[6] The starting point was, therefore, that any claim of confidentiality by a journalist falls outside the scope of public interest immunity.

F, nonetheless, argued that there is a public interest in maintaining an obligation of confidence given by a journalist and that that public interest is so important that, for the purposes of considering s. 192(2A)(b) of the CC Act, public interest immunity should be afforded a wider meaning than that recognised at common law. F submitted *John Fairfax & Sons Ltd v Cojuangco*[7] was authority for the existence of the relevant public interest in making that submission.[8] Unfortunately, Jackson J regarded the argument as "tepid" at best.[9] *Cojunagco* itself notes that "it is a fundamental principle of our law… that the media and journalists have no public interest immunity from being required to disclose their sources of information when such disclosure is necessary in the interests of justice".[10] Moreover, in that case – which notoriously concerned a defamation claim – the court declined to accept that journalists had a wider immunity from disclosure for discovery purposes than the "newspaper rule" since to find otherwise "would enable irresponsible persons to shelter behind anonymous or even fictitious sources".[11] The court was also following the earlier authority of *McGuinness v Attorney-General (Vic)*[12] which held that a newspaper editor who refused to answer questions about his sources before a royal commission had no lawful excuse for doing so.

Jackson J found that the better source of public interest in a journalist maintaining confidentiality was statutory, citing as examples the shield laws in the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW).[13] His Honour noted that protection offered by those provisions is not absolute. In both cases, journalists are granted a qualified immunity as the court is empowered to rule that the public interest in disclosure outweighs the public interest in protecting the confidentiality of the source. Ultimately, notwithstanding His Honour's recognition that there is at least some "public interest" in maintaining an obligation of confidentiality extended by a journalist, "it is clear that the former "privilege" now known as public interest immunity at common law does not extend to a journalist's obligation of confidence not to disclose or reveal the sources of his or her information" and the argument failed.[14]

Restrictive Injunction?

Section 332(1) of the CC Act allows a person to apply to the Supreme Court for a restrictive injunction if a CCC investigation into corrupt conduct is being conducted unfairly or the complaint or information on which such an investigation is being conducted does not warrant an investigation. F made both arguments but both failed. In relation to unfairness, F submitted that being required to breach his obligation of confidence was unfair and pointed to various parts of the CC Act relating to the CCC's corruption functions in support of his argument. However, His Honour held:

> *Once it is accepted that the subjects of this investigation are within the power of the commission to investigate and that it is within its power to conduct a hearing as to the facts as previously set out, it is not unfair to ask the sources of information questions because to do so will breach a journalist's obligation of confidence, absent other factors. To conclude that to ask the sources of information questions is in itself to conduct the investigation unfairly would be to create an additional de facto category of journalist's privilege, under the rubric of unfairness, when it is not otherwise a recognisable category of privilege against answering the questions.*[15]

F also asserted that the CCC investigation was unwarranted because the source's disclosure did not meet the definition of "corrupt conduct" set out in s. 15(1) of the CC Act or otherwise fall within the CCC's functions set out in s. 33(2) of the CC Act. To meet the s. 15(1) definition, the disclosure by F's source to F had to constitute the performance or exercise of the source's functions or powers in a way that could involve "a misuse of information or material acquired in or in connection with the performance of functions or the exercise of powers of a person holding an appointment".[16] F said it didn't; His Honour held it was "not inapt" to describe the disclosure that way.[17] In relation to the CCC's s. 33 functions, F submitted that since an officer had already been charged

6 F v CCC at [34].
7 (1988) 165 CLR 346.
8 F v CCC at [37].
9 Ibid.
10 F v CCC at [36].
11 F v CCC at [37].
12 (1940) 63 CLR 73.
13 F v CCC at [38].
14 F v CCC at [39].
15 F v CCC at [58].
16 S. 15(1)(b)(iii) of the CC Act.
17 F v CCC at [65].

there was no utility in the investigation continuing and requiring him to answer questions about his source. The CCC disagreed submitting that F's answers may provide information or evidence useful to its case against the officer charged or, alternatively, may indicate that some additional police officer was relevant to the CCC investigation. His Honour accepted that submission.[18]

Constitutionally Invalid?

Lastly, F submitted that if ss. 192 and/or 196 of the CC Act are to be interpreted as requiring a journalist to make a disclosure contrary to an obligation of confidentiality they impermissibly burden the implied freedom of political communication, having the practical effect of inhibiting the journalist's capacity to investigate and publish to the public information on matters of government and politics.[19] In relation to this issue, the parties agreed on a number of points. Both accepted that the approach of the High Court in *Comcare v Banerji*[20] was to be applied; the CCC did not contest that ss. 192 and 196 could burden the implied freedom; and, F did not contest that ss. 192 and 196 had a legitimate purpose.[21] That left Jackson J to determine whether or not the sections were "appropriate and adapted or proportionate to the achievement of their legitimate purpose consistent with the system of representative and responsible government having regard to the requirements of suitability, necessity and adequacy in balance".[22]

Sadly, F almost immediately ran into a brick wall: *A v Independent Commission Against Corruption* (***A v ICAC***).[23] In *A v ICAC,* the NSW Full Court had already been asked to decide the very question Jackson J was considering in relation to a summons to produce documents under s. 35 of the *Independent Commission Against Corruption Act 1988* (NSW) (**ICAC Act**) which, together with other parts of the ICAC Act, also imposed obligations to produce and made noncompliance an offence.[24] Basten JA, with whom Bathurst CJ agreed, accepted that while s. 35 of the ICAC Act may indirectly burden political discourse, neither the purpose nor the effect of the ICAC Act imposed any direct burden. To the contrary, "like the implied freedom itself, the Act's principal purpose was to protect, maintain and strengthen the institutions of representative government".[25] Moreover, the powers set out in s. 35 were commonplace – routinely conferred upon investigative agencies – and although dealing with a power of disclosure incidental to the exercise of judicial power, the reasoning in *The Age Company Ltd v Liu*[26] supported the conclusion that s. 35 was appropriate and adapted to serve a legitimate end, being an end not merely compatible with, but directed to, the maintenance of representative government. His Honour also noted that the disclosure would be attended by a high degree of confidentiality because a hearing in relation to which a summons is issued under s. 35 must be conducted in private and the ICAC Act imposed significant limitations on how confidential information could be used.[27]

F accepted that, like the ICAC Act, neither the purpose nor the effect of the CC Act imposed any direct burden on political discourse and that the CC Act's principal purpose was also to safeguard the institutions of representative governments. F, otherwise, sought to distinguish his case from that of A's.

First, F submitted that the powers granted by ss. 192 and 196 were not commonplace. However, Jackson J held that submission did not engage with Basten JA's reasoning. Basten JA's commonplace powers were the powers to compel a person to give evidence or produce documents. Neither ss. 192 nor 196 were significantly dissimilar or at least not to an extent relevant to disclosure of a journalist's confidential sources of information or the freedom of communication about matters of government and politics.[28]

Secondly, F submitted that the reasoning in Liu does not support the conclusion that s. 192 is appropriate and adapted to serve the required legitimate end. Jackson J was critical of this submission:

> *[F] referred to the relevant passage in Liu as though the comparison to be made was between s 192 and the provision of the Defamation Act 1974 (NSW) considered in Lange v Australian Broadcasting Commission, or the rule of court considered in Liu, but that was not the point of the reference to Lange made by Bathurst CJ in Liu or the point of Basten JA's third reason, as I understand it. The point being made by Basten JA was that a provision that reduces the ability*

18 F v CCC at [66] – [68].

19 F v CCC at [69] – [70].

20 (2019) 372 ALR 42.

21 F v CCC [72]

22 F v CCC [73].

23 (2014) 88 NSWLR 240.

24 The NSW shield law – and whether it was overridden by s. 37(2) of the ICAC Act which provides that an obligation of confidence is not a lawful reason to decline to answer a question or produce a document once summonsed by the ICAC – were not raised at trial or on appeal in this case (see A v ICAC at [82).

25 F v CCC at [80].

26 [2013] NSWCA 26; 82 NSWLR 268 at [96]–[99] (Bathurst CJ).

27 With ICAC officers prohibited from divulging or communicating information obtained in the course of exercising his or her functions under the ICAC Act.

28 F v CCC at [83] – [84].

of a journalist to keep his or her sources of information confidential may be appropriate and adapted, as the provision in Liu's case was found to be, for the reasons given by Bathurst CJ.

Thirdly, F submitted that the fact the CCC is obliged to provide a defendant charged with an offence with anything stated at, or any document or thing produced at, a CCC hearing which is relevant to the defence of the charge[29] distinguishes the present case from the confidentiality regimes of the ICAC Act referred to by Basten JA. But Jackson J found that even if there had been no equivalent section in the ICAC Act at the time A v ICAC was decided (which there was) that difference alone would not cause him to part ways with *A v ICAC:*

As a judge sitting at first instance, it is enough to dispose of the constitutional argument in the present case to conclude that A v ICAC is persuasive authority of an intermediate appellate court on a similar question that I should follow, unless persuaded that it was wrongly decided or that the reasoning in substance is distinguishable from the present case. I was not persuaded of either proposition.[30]

F's application was, consequently, dismissed with no order as to costs.

Light at the end of the tunnel?

Despite the applaudable effort of F's legal team, it is clear from the judgment that F fought this battle with both hands tied behind his back. Now, more than ever, Queensland needs a shield law that is at least as effective as s. 126K of the *Evidence Act 1995* (Cth), protecting journalists from being compelled to answer questions or documents which would disclose the identity of a confidential source unless a court determines that the public interest requires otherwise.

Before mid-August, the Queensland government had made no attempt to engage with this issue. However, the day after the decision was handed down, the Labor government tabled a Bill which would have added two new offences to the CC Act, prohibiting a person from publishing allegations of corrupt conduct by a candidate in either a State or local government election during the election period. Due to the way "publish" was defined[31], the new offences would have prohibited both the general public and media entities from publishing such allegations, so clearly about government and political matters, at a time when they were most relevant to assisting voters in making their decision about who to support. Unsurprisingly, both the media and social commenters united in unanimously condemning the amendment and the Bill was withdrawn the next day. However, the furore served to focus attention on other shortcomings of the CC Act and on August 17, the LNP committed to enacting a shield law as an electoral promise. That move prompted the first sign that the Labor Party might do the same. Following the election in November, watch this space for updates.

29 s. 201 of the CC Act.

30 F v CCC at [86].

31 Disclosing the allegation, or causing the allegation to be publicly disclosed, by newspaper, radio, television, other electronic or printed media for communicating to the public or other media for social networking with the public.