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Journalists in Contempt

Michael Sexton reviews some recent developments which threaten the confidentiality of a journalist's sources of information

A number of recent decisions suggest that journalists have even less protection for their sources of information than has been generally accepted. One group of decisions deals with the so-called "newspaper rule" which provides that, in the case of defamation proceedings, a journalist would not normally be required to disclose his or her sources of information prior to giving evidence (if at all) in the trial of the action. In other words, the sources would not have to be revealed at the stage of discovery and interrogatories, unless the interests of justice required such disclosure.

But in three recent decisions the Queensland Supreme Court has required journalists to disclose their sources of information in answer to interrogatories. In each case the Court referred to the fact that the provisions of the Code shared by Queensland and Tasmania provide a defence to defamatory publications made in good faith, but place the onus of demonstrating lack of good faith on the plaintiff bringing the proceedings. In these circumstances the Court considered that the plaintiff was entitled to know in advance of the trial what would be an important element in the decision to publish — the identity and character of the sources of information. In *Hodder v Queensland Newspapers Pty Limited*, the plaintiff was a trade union official and the article in question specified other officials and members of the union as sources of the allegations against the plaintiff. The court considered that this style of reporting used the unnamed sources to give credence to the allegations and so effectively waived the protection that might normally be afforded by the newspaper rule.

Obviously, this is a common style of reporting for events within political parties, trade unions and many other

community bodies. If this approach is followed in other jurisdictions, there will be increased pressure on journalists to disclose their sources prior to the trial stage in defamation proceedings.

Legal problems for journalists

There is, however, an even more dangerous legal area for journalists and that is the action for preliminary discovery. This action seeks to identify the journalist's sources so that the plaintiff may bring proceedings against those persons in addition to or instead of the media organisation.

If an action for preliminary discovery is successful, the orders obtained would normally require the journalist in question to attend court to be examined. As he or she will inevitably be asked the source of the documents or other information obtained, a refusal to answer will almost inevitably involve a contempt of court for which penalties of a fine or imprisonment may be ordered.

The proceedings for preliminary discovery that are available under the rules of a number of the Australian jurisdictions are largely based upon the concept of the Bill of Discovery in equity. This action was used by the British Steel Corporation in the early 1980s to obtain orders for the examination of a journalist

after Granada Television broadcast a program concerning a strike in the steel industry, during which a number of confidential documents belonging to the Corporation were quoted.

Possible avenues of resistance

The High Court made it clear in *John Fairfax & Sons Limited v Cojuangco* that, where a plaintiff intends to bring defamation proceedings against the source, he or she will be entitled to know their identity unless the media organisation is prepared to abandon any defence that would place it in a better position to defend the action than the original sources would be. This position at least gives the employer of the journalist a choice. If it is prepared to accept full liability for the publication (whatever the extent of that liability might be) the sources of information are unlikely to be required by the Court.

But if the proceedings that the plaintiff desires to bring are not in defamation but in some other action, such as breach of confidence, even this option evaporates. In a situation where, for example, a journalist has been given confidential information about the tax avoidance activities of a multi-national corporation by a source within the Federal Government, the company may decline to sue the media organisation in defamation. Instead it may bring proceedings for preliminary discovery against the journalist to obtain the identity of the Government source in order to bring an action in breach of confidence against that person.

In the example given, there is little room for legal manoeuvre on the part of the journalist. One possible basis for

Rupert Murdoch
on the
Pacific Rim and
Australia's future.

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resisting an order for disclosure is the so-called "iniquity rule". A number of English decisions have suggested that if the material supplied by the source reveals criminal or fraudulent conduct on the part of the plaintiff, no action for breach of confidence will be available despite the way in which the material was obtained. It must be said, however, that the extent of this rule is uncertain. In any case, it is likely that an Australian court would consider there to be no criminality or fraud involved in tax avoidance, however harmful it may be in its effects on the general community.

"Blood Money"

In a recent decision of the New South Wales Supreme Court, Mr Justice Brownie made orders for preliminary discovery against the ABC and two of its journalists as a result of a *Four Corners* program. The program, entitled "Blood Money", dealt with some aspects of the financial operations of pathology companies. The directors of one pathology company alleged that documents originally seized under search warrant by the Federal Police had been used in the compiling of the program. They maintained that they wished to bring proceedings in breach of confidence against any persons who had given such material to the ABC. The NSW Court of Appeal granted leave to the ABC to appeal against the decision of Mr Justice Brownie. However, in late 1992 the entire proceedings were settled on terms not to be disclosed.

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COMMUNICATIONS NEWS NEW FORMAT

In this edition of the Bulletin Communications News has been provided as a looseleaf supplement. This format will enable us to ensure that Communications News is as up to date as possible. As Communications News represents an important record of regulatory developments, please remember to file it with your copy of the Bulletin.

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