SUPREME COURT OF QUEENSLAND

CITATION:	*F v Crime and Corruption Commission* [2020] QSC 245
PARTIES:	**[NAME NOT PUBLISHED]** (Applicant) v **CRIME AND CORRUPTION COMMISSION** (Respondent)
FILE NO/S:	[not published]
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	12 August 2020
DELIVERED AT:	Brisbane
HEARING DATE:	6 August 2020
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The application is dismissed.** **2. No order as to costs.**
CATCHWORDS:	CRIMINAL LAW – FEDERAL AND STATE INVESTIGATIVE AUTHORITIES – QUEENSLAND – where the applicant is employed at a television station – where the applicant received information in that capacity from an unnamed source which caused him to direct a television news reporter and camera man to a stated address – where the respondent is conducting a corruption investigation that police disclosed information without lawful authority, engaged in corrupt conduct and committed offences against the *Criminal Code* (Qld) and *Police Powers and Responsibilities Act* 2000 (Qld) – where the applicant refused to answer questions at a commission hearing on the ground of public interest immunity – where the applicant applied to a judge to decide whether the claims of privilege on the ground of public interest immunity are established and should be upheld – whether a journalist's claim of 'privilege' against disclosing confidential sources of information is within public interest immunity – where the court held that public interest immunity

does not extend to a journalist's obligation not to disclose confidential sources of information

CRIMINAL LAW – FEDERAL AND STATE INVESTIGATIVE AUTHORITIES – QUEENSLAND -where the application is alternatively for a restrictive injunction restraining the respondent from questioning the applicant further in relation to the corruption investigation – whether the investigation is being conducted unfairly by asking the applicant to disclose confidential sources of information – where the court held that the investigation is not being conducted unfairly

CRIMINAL LAW – FEDERAL AND STATE INVESTIGATIVE AUTHORITIES – QUEENSLAND -where the application is alternatively for a restrictive injunction restraining the respondent from questioning the applicant further in relation to the corruption investigation – whether the complaint or information for the investigation being conducted does not warrant an investigation – whether the unauthorised disclosure of information by a police officer is capable of constituting corrupt conduct - where the court held that it is not inapt to describe the disclosure of information as conduct that could result in the performance of functions or in a way that involves the misuse of information as corrupt conduct

CONSTITUTIONAL LAW – OPERATION AND EFFECT OF COMMONWEALTH CONSTITUTION – RESTRICTIONS ON COMMONWEALTH AND STATE LEGISLATION – RIGHTS AND FREEDOMS IMPLIED IN COMMONWEALTH CONSTITUTION – FREEDOM OF POLICITCAL COMMUNICATION – PARTICULAR CASES – where the applicant submitted that ss 192 and 196 of the *Crime and Corruption Act* 2001 (Qld) impermissibly burdens the freedom of communication about matters of government and politics to the extent they require the applicant to answer certain questions about the source of information and reveal the confidential source of information as a journalist – whether ss 192 and 196 of the Act are appropriate and adapted or proportionate to the achievement of their legitimate purpose consistent with the system of representative and responsible government – where the court held that the relevant constitutional question had already been answered by an intermediate appellate court – where the current case was not distinguishable – where the application for relief on this ground was not granted

Crime and Corruption Act 2001 (Qld), s 4, s 5, s 15, s 33, s 34, s 35, s 73, s 82, s 176(1), s 180, s 183, s 192, s 195B, s 196, s 198 s 202, s 332, s 334
Criminal Code (Qld), s 92A
Criminal Code and Jury and Another Act Amendment Act 2008 (Qld), s 11

Criminal Justice Act 1989 (Qld), s 77
Defamation Act 1974 (NSW)
Evidence Act 1995 (Cth), s 126H
Evidence Act 1995 (NSW), s 126K
Independent Commission Against Corruption Act 1988 (NSW), s 35, s 113, s 201
Police Powers and Responsibilities Act 2000 (Qld), s 352
Queensland Productivity Commission Act 2015 (Qld), s 46(4)(a).

A v Independent Commission Against Corruption (2014) 88 NSWLR 240, followed
Alister v R (1983) 154 CLR 404, discussed
Comcare v Banerji (2019) 372 ALR 42, applied
HT v The Queen (2019) 374 ALR 216, discussed
John Fairfax & Sons Ltd v Cojuangco (1988) 165 CLR 346, discussed
Lange v Australian Broadcasting Commission (1997) 189 CLR 520, cited
McGuinness v Attorney-General (Vic) (1940) 63 CLR 73, discussed
Rogers v Home Secretary [1973] AC 388, discussed
Sankey v Whitlam (1978) 142 CLR 1, discussed
The Age Company Ltd v Liu (2013) 82 NSWLR 268, discussed

COUNSEL: R Anderson QC and P Morreau for the applicant
G Diehm QC and J Brien for the respondent

SOLICITORS: Ashurst Australia for the applicant
Crime and Corruption Commission for the respondent

[1] **Jackson J**: This proceeding concerns the operation of provisions of the *Crime and Corruption Act* 2001 (Qld) ("the CC Act").

[2] The respondent is conducting a corruption investigation.[1] It is holding a commission hearing in relation to the investigation as a matter relevant to the performance of its functions.[2] The respondent issued an attendance notice requiring the applicant to attend at the hearing to give evidence.[3] The applicant attended the hearing. He took an oath when required[4]and gave evidence. He was obliged to answer a question put to him by the presiding officer.[5] He was not entitled to refuse to answer a question on the ground of

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1 *Crime and Corruption Act* 2001 (Qld), ss 35 and 73.

2 *Crime and Corruption Act* 2001 (Qld), s 176(1).

3 *Crime and Corruption Act* 2001 (Qld), s 82.

4 *Crime and Corruption Act* 2001 (Qld), s 183.

5 *Crime and Corruption Act* 2001 (Qld), s 192(1).

confidentiality.[6] But he was entitled to refuse to answer the question on the ground of "public interest immunity".[7]

[3] The applicant refused to answer questions asked of him on the ground of public interest immunity. He brings this application to a judge of the court to decide whether the claims of privilege on the ground of public interest immunity are established and, if so, whether they are to be upheld.[8]

[4] Alternatively, the application is for a restrictive injunction[9] restraining the respondent from proceeding further in questioning the applicant in relation to the corruption investigation.

[5] In the further alternative, this application is for relief on the ground that relevant provisions of the CC Act are invalid because they impermissibly burden the constitutional freedom of communication about matters of government and politics.

Facts

[6] The facts set out below, the name of the applicant and number of the proceeding have been "de-identified" because of requirements of the CC Act.[10]

[7] The applicant is employed at a television station.

[8] On a date in 2018, he received information in that capacity from an unnamed source that caused him to direct a television news reporter and camera man to a stated address ("the disclosure of information").

[9] On a stated date they attended the stated address and knocked on the door.

[10] A few days later, they filmed the arrest of a named person at the stated address.

[11] The respondent is conducting a corruption investigation that police disclosed information without lawful authority, including the disclosed information, engaged in corrupt conduct, and committed offences against s 92A *Criminal Code* (Qld) and s 352 *Police Powers and Responsibilities Act* 2000 (Qld).

[12] On a stated date, the chairperson of the respondent issued a notice of attendance to the applicant to give evidence in accordance with the schedule to the notice. The schedule stated that the subjects were:

- The applicant's knowledge of a criminal police investigation relating to the murder of a named person on a stated date at a particularised place;
- the applicant's knowledge of a joint counter terrorism team investigation into the alleged terrorist activities of another named person;

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6 *Crime and Corruption Act* 2001 (Qld), s 192(2)(b).

7 *Crime and Corruption Act* 2001 (Qld), s 192(2A)(b).

8 *Crime and Corruption Act* 2001 (Qld), s 196(2).

9 *Crime and Corruption Act* 2001 (Qld), s 332.

10 *Crime and Corruption Act* 2001 (Qld), ss 180(3), 202 and 332(8).

- the applicant's knowledge of the attendance of the named television news reporter at the stated address from one stated date to another stated date; and
- the applicant's notes in relation to any of those matters.

[13] On a stated date, the applicant attended a commission hearing in response to the notice of attendance, was sworn and gave evidence. In the course of the hearing he was asked the following questions ("sources of information questions"):

- What was the name of the police officer who asked "you"[11] to attend the address and knock on the door on the stated date?
- Who was the person who told you there were listening devices in the house at the time of the doorknock?
- Who told you that [the named television news reporter] had been heard on the listening devices in the residence where the doorknock took place?
- Who told you about the impending arrest at the stated address?
- Was it a named police officer who provided this information?

[14] The applicant refused to answer all of the sources of information questions on the ground of public interest immunity.

[15] A week or so later, this application was filed raising that and the other relevant questions to be decided on this hearing, except the alleged invalidity of ss 192 and 196 of the CC Act based on the freedom of communication about matters of government and politics, which was added by later amendment.

[16] Several months later, a named police officer was charged with two offences under s 92A *Criminal Code* (Qld) and one offence under s 352 *Police Powers and Responsibilities Act* 2000 (Qld). The offences alleged are:

> "Section 92A(1)(a) of the *Criminal Code*
>
> On [a stated date at a stated place a named police officer] being employed as a public officer with intent to dishonestly gain a benefit for [the applicant] dealt with information namely murder details gained because of the said [named police officer's] office.
>
> Section 352(1) and (2)(b)(i) of the *Police Powers and Responsibilities Act*
>
> On [a stated date at a stated place a named police officer] intentionally communicated protected information namely the existence of a surveillance device and the said [named police officer] knew the information was protected information and the said [named police officer] knew that the communication of the information was not permitted by Chapter 13 Part 5 Division 1 of the *Police Powers and Responsibilities Act*

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[11] The intention of the questioner was to refer to the named journalist and cameraman sent by the applicant to the address.

> 2000 and the said [named police officer] was reckless as to whether the disclosure of the said information would endanger the health and safety of any person.
>
> Section 92A(1)(a) of the *Criminal Code*
>
> On [a stated date at a stated place a named police officer] being employed as a public officer with intent to dishonestly gain a benefit for [the applicant] dealt with information namely a joint counter terrorism team raid gained because of the said [named police officer]' office."

[17] The applicant says that the disclosure of information to him was confidential information and he is obliged not to disclose or reveal the source of the information ("obligation of confidence"). The source of the alleged obligation of confidence was identified in oral submissions as equitable and it may be that the disclosure of information was made to him in circumstances in which an equitable obligation of confidence attached to the discloser. It is not necessary in the result to make more precise factual findings as to the circumstances of the disclosure of information or the alleged obligation of confidence.

Public interest immunity

[18] The applicant refused to answer the sources of information questions on the ground of public interest immunity in accordance with s 192(2A) (b) of the CC Act. The applicant applies to a judge of the court to decide whether his claims of privilege are established and, if so, whether they are to be upheld.[12]

[19] The relevant part of s 192 is as follows:

> "**192 Refusal to answer question**
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> (1) A witness at a commission hearing must answer a question put to the person at the hearing by the presiding officer.
>
> Maximum penalty—200 penalty units or 5 years imprisonment.
>
> (2) The person is not entitled—
>
> (a) to remain silent; or
> (b) to refuse to answer the question on the ground of the self-incrimination privilege or the ground of confidentiality.
>
> (2A) The person is entitled to refuse to answer the question on the following grounds of privilege—
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> (a) legal professional privilege;
> (b) public interest immunity;
> (c) parliamentary privilege."

[20] In deciding the statutory questions under s 192 in an application made under s 196, the burden of proof is on the applicant as the person who seeks to withhold the information

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12 *Crime and Corruption Act* 2001 (Qld), s 196(2).

or prevent the exercise of authority and the judge must consider submissions and decide whether the claim is established.[13]

[21] If the judge decides that the claim is established on the ground of public interest immunity, the judge may order the applicant to give the information if the judge decides that, on balance, the public interest is better served by giving the information.[14]

[22] The applicant submits that the privilege to refuse to answer a question on the ground of public interest immunity extends to his obligation of confidence not to disclose or reveal the source of the disclosure of information.

[23] The expression "public interest immunity" is deployed only in two sections of the CC Act.[15] Neither of those references textually informs the meaning of the expression in a definitive way. In s 192(2A) it is used in the context of identifying three "privileges"[16] that justify refusal to answer a question, in juxtaposition to s 192(2) that abrogates another privilege that might be engaged in relation to some questions. Each of those "privileges" is a recognised common law concept. In context, that suggests that public interest immunity is also a reference to that immunity at common law.

[24] Section 192(2) and (2A) in their present form were introduced in 2008.[17] Nothing in the explanatory note to the Bill introducing those subsections or the legislative process provides any further context useful to construing the meaning of "public interest immunity".

[25] Prior to that, from 2001, the earlier form of s 192 of the CC Act was in a materially similar form as follows:

> "**192 Refusal to answer question**
>
> (1) A witness at a commission hearing must answer a question put to the person at the hearing by the presiding officer.
>
> Maximum penalty—85 penalty units or 1 year's imprisonment.
>
> (2) The person is not entitled—
>
> (a) to remain silent; or
>
> (b) to refuse to answer the question on a ground of privilege, other than—
>
> (i) legal professional privilege; or
>
> (ii) public interest immunity; or
>
> (iii) parliamentary privilege."

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13 *Crime and Corruption Act* 2001 (Qld), s 196(3) and (4).

14 *Crime and Corruption Act* 2001 (Qld), s 196(5).

15 *Crime and Corruption Act* 2001 (Qld), s 192(2A)(b) and 195B(5).

16 See s 196(1) that refers to a "claim of privilege" under s 192 in a way that encompasses public interest immunity as a "privilege".

17 *Criminal Code and Jury and Another Act Amendment Act* 2008 (Qld), s 11.

[26] The explanatory note for the Bill for the CC Act in 2001 did not expand on the meaning of "public interest immunity".

[27] The expression "public interest immunity" is used in only one other Queensland statute.[18]

[28] Prior to 2001, there was a comparator provision to s 192 under the now repealed *Criminal Justice Act* 1989 (Qld). Section 77 of that Act provided:

> "**77 Claim of privilege**
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> If privilege in respect of any information, record or thing to which a notice under section 69 relates, or which is sought by a notice of summons under section 74, or in respect of which an authority conferred by section 70 or by a warrant under section 71 is about to be exercised, is claimed by a person entitled to claim the privilege on the ground—
>
> (a) of legal professional privilege; or
>
> (b) of Crown privilege or other public interest; or
>
> (c) of parliamentary privilege;
>
> the person has a lawful excuse for not complying with the notice or notice of summons or, as the case may be, the authority to inspect, seize, remove, copy or make an extract shall not be exercised, if it is found by a judge of the Supreme Court that the claim of privilege is valid and, where the claim is made on the ground of Crown privilege or other public interest, that on balance the public interest is better served by withholding the information, record or thing than by disclosure of it."

[29] An obvious question is whether there is an explanation for the change of expression, from "Crown privilege or other public interest" in s 77(b) to "public interest immunity" in s 192(2A) (b). The best possible explanation lies in the case law as to the change in usage of similar expressions at common law. Three cases are enough for this purpose.

[30] First, in *Sankey v Whitlam*,[19] Gibbs CJ said:

> "For convenience I have spoken of the claims that the documents should be withheld from production as claims to privilege, but in *R v Lewes Justices; Ex parte Secretary of State for the Home Department (Rogers v Home Secretary)*, the expression "Crown privilege" was criticized as wrong and possibly misleading." (footnote omitted)

[31] Second, in *Rogers v Home Secretary*,[20] Lord Simon of Glaisdale said:

> "… 'Crown privilege' is a misnomer and apt to be misleading. It refers to the rule that certain evidence is inadmissible on the grounds that its adduction would be contrary to the public interest… It is not a privilege

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18 *Queensland Productivity Commission Act* 2015 (Qld), s 46(4)(a).

19 (1978) 142 CLR 1, 38.

20 [1973] AC 388, 407.

> which may be waived by the Crown… or by anyone else. The Crown has prerogatives not privilege. The right to procure that admissible evidence be withheld from, or inadmissible evidence be adduced to the courts is not one of the prerogatives of the Crown."

[32] Third, in *Alister v R,*[21] Gibbs CJ said:

> "The law relating to what was commonly, but misleadingly, known as Crown privilege, but is now referred to as public interest immunity, was discussed at length in this Court in *Sankey v. Whitlam* and has since been considered in the House of Lords in *Burmah Oil Co. Ltd. v. Bank of England* and *Air Canada v*. *Secretary of State for Trade* and by the Court of Appeal of New Zealand in *Environmental Defence Society Inc. v. South Pacific Aluminium Ltd. (No.2)*." (footnotes omitted)

[33] These cases show that, at common law, the change in legal terminology from the expression "Crown privilege" to "public interest immunity" is one of change of name, not that "public interest immunity" is a new doctrine or principle freed from the operation of the principles concerning what was previously known as "Crown privilege".

[34] A critical point about those principles is that at common law public interest immunity is from production of a governmental document or disclosing a governmental communication. In *HT v The Queen*,[22] Gordon J said:

> "It is 'the duty of the court, and not the privilege of the executive government', to decide whether the public interest which requires that evidence should not be produced outweighs the competing public interest that a court should not be denied access to relevant and otherwise admissible evidence. **The objection to production of relevant evidence on the grounds of public interest immunity is an objection taken by an arm of the executive**." (footnotes omitted) (emphasis added)

[35] At common law, a journalist's claim of so-called "privilege" against revealing confidential sources of information is not within the concept of public interest immunity, as discussed so far, because it is not an immunity from production of a governmental document or communication and it is not an objection taken by an arm of the executive.

[36] Beyond that, at common law, putting to one side the role of public interest immunity as the modern terminology for Crown privilege, a journalist's claim of so-called "privilege" against revealing confidential sources of information is not protected by any general doctrine of "public interest immunity". The High Court in a joint judgment in 1988 in *John Fairfax & Sons Ltd v Cojuangco*[23] put it this way:

> "It is a fundamental principle of our law, repeatedly affirmed by Australian and English courts, that the media and journalists have no public interest immunity from being required to disclose their sources of information

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21 (1983) 154 CLR 404.

22 (2019) 374 ALR 216, 235 [70].

23 (1988) 165 CLR 346.

> when such disclosure is necessary in the interests of justice… The point is that there is a paramount interest in the administration of justice which requires that cases be tried by courts on the relevant and admissible evidence. This paramount public interest yields only to a superior public interest, such as the public interest in the national security. The role of the media in collecting and disseminating information to the public does not give rise to a public interest which can be allowed to prevail over the public interest of a litigant in securing a trial of his action on the basis of the relevant and admissible evidence."[24]

[37] The applicant submits, however, that *Cojuangco* supports the conclusion that there is a "public interest" in keeping a journalist's confidential sources confidential. Whilst some passages may go part of the way towards that conclusion, overall the case is tepid support for it, at best. First, *Cojuangco* is a defamation case concerned with the "newspaper rule" and the reasons must be understood in that context. Second, in rejecting a wider immunity than encompassed by the newspaper rule itself, the court said: "[t]he recognition of an immunity from disclosure of sources of information would enable irresponsible persons to shelter behind anonymous or even fictitious sources." [25] Third, the joint judgment referred to the earlier decision of the court in *McGuinness v Attorney-General (Vic)*[26] which held that the refusal of a newspaper editor to answer questions as to his sources of information before a royal commission was without lawful excuse.[27]

[38] However, it is not difficult to find support elsewhere for the conclusion that there is a public interest in the protection of a journalist's confidential sources of information. For the purposes of these reasons, it is not necessary to go beyond the provisions of Division 1A of the *Evidence Act* 1995 (Cth) and Division 1C of the *Evidence Act* 1995 (NSW) to illustrate that point. The relevant sections provide that if a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor the journalist's employer is compellable to give evidence or answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained.[28] But the immunity from compulsion is qualified by the court's power to order that the section not apply if, inter alia, the public interest in disclosure of the identity outweighs the public interest in the ability of the news media to access sources of facts.[29] It is a qualified statutory protection.

[39] Notwithstanding the existence of a relevant "public interest" in keeping a journalist's confidential sources confidential, in my view, 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.

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24 *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346, 354 [13].

25 *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346, 355.

26 (1940) 63 CLR 73.

27 *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346, 355.

28 *Evidence Act* 1995 (Cth), s 126H(1); *Evidence Act* (NSW), s 126K(1).

29 *Evidence Act* 1995 (Cth), s 126H(2); *Evidence Act* (NSW), s 126K(2).

[40] Distilled, the applicant's argument is that because of the important public interest attaching to the confidentiality of a journalist's sources, the expression "public interest immunity" in s 192(2A)(b) should be given a wider meaning than the recognised common law meaning of public interest immunity. I do not agree that any relevant principle of statutory interpretation carries the applicant's argument to the required point of acceptance.

[41] It follows that the applicant's claims of privilege against being required to answer the sources of information questions on the ground of public interest immunity are not established.

Restrictive injunction

[42] A person who claims that a commission investigation into corrupt conduct is being conducted unfairly may apply to a judge of the court for an order in the nature of a restrictive injunction addressed to the commission.[30]

[43] Also, a person who claims that the information on which a commission investigation into corrupt conduct is being conducted does not warrant an investigation may apply to a judge of the court for an order in the nature of a restrictive injunction addressed to the commission.[31]

[44] The application is to be heard in closed court.[32]

[45] The judge may, on the commission's application, hear submissions from the commission relating to the investigation in the absence of the person or the person's lawyer.[33] Although the commission indicated an intention to call such evidence at the hearing, ultimately it did not press that application.

[46] If the judge who hears the application is satisfied as to the matter claimed by the applicant, the judge may, by order require the senior executive officer (corruption) to conduct the investigation in accordance with guidelines specified in the order or direct him or her to stop or not proceed with an investigation on the information to which the application relates.[34]

Investigation conducted unfairly

[47] The relief sought in paragraph 2 of the application is for a restrictive injunction that the respondent be restrained from proceeding further in the questioning of the applicant in relation to the matters raised in the attendance notice.

[48] The relevant sections of the CC Act are ss 332(1) and 334(1), as follows:

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30 *Crime and Corruption Act* 2001 (Qld), s 332(1)(a).

31 *Crime and Corruption Act* 2001 (Qld), s 332(1)(b).

32 *Crime and Corruption Act* 2001 (Qld), s 332(8).

33 *Crime and Corruption Act* 2001 (Qld), s 332(2).

34 *Crime and Corruption Act* 2001 (Qld), s 334(1).

"**332 Judicial review of commission's activities in relation to corrupt conduct**

(1) A person who claims—

(a) that a commission investigation into corrupt conduct is being conducted unfairly; or

(b) that the complaint or information on which a commission investigation into corrupt conduct is being, or is about to be, conducted does not warrant an investigation;

may apply to a Supreme Court judge for an order in the nature of a mandatory or restrictive injunction addressed to the commission.

…

334 Application under s 332

(1) If the judge who hears an application under section 332 is satisfied as to the matter claimed by the applicant, the judge may, by order—

(a) require the senior executive officer (corruption) to conduct the investigation in question in accordance with guidelines specified in the order; or

(b) direct the senior executive officer (corruption) to stop or not proceed with an investigation on the complaint or information to which the application relates."

[49] The ground for the relief in paragraph 2 is that to the extent the applicant is to be required to answer questions in respect of matters for which he has claimed privilege the investigation is being conducted unfairly.

[50] The particulars of that ground include the following:

"…

16. A summary of the features of the unfairness … are (sic):

(a) The journalist's privilege is genuinely raised. Due consideration of it, and the weighing of the public interest means that it would be unfair in the circumstances to require him to answer the questions.

(b) The interest in maintaining the investigation in the manner in which it is being pursued does not outweigh the privilege. There appears to be sufficient evidence to cover the issue without requiring [the applicant] to disclose his confidential source.

(c) In investigating the allegation, the respondent has contravened s 35(3) of the Act, which requires the respondent to focus on more serious cases of corrupt conduct and cases of systemic corrupt conduct within the

> police. This is not, on the information known, a more serious case of corrupt conduct. Nor does it appear as a case of systemic corrupt conduct."

[51] The applicant submits that it is unfair to require him to answer all questions as to his confidential sources of information.

[52] For the purpose of analysis, it may be assumed that the answers to the sources of information questions may reveal or disclose the identity of a person or persons who may have contravened obligations in relation to the authorised use of information of police investigations into the alleged murder and the alleged terrorist activities.

[53] Given that the possible contraventions in part relate to the disclosure of information to the applicant, at first blush it is difficult to understand why or how it is unfair to ask the applicant the sources of information questions in a corruption investigation into those disclosures.

[54] The applicant relies on a number of provisions of the CC Act that relate to the respondent's corruption functions for the argument. The applicant begins with the purpose of the CC Act to continuously improve the integrity of and to reduce the incidence of corruption in the public sector[35] and the provision that the purpose is to be achieved by the use of powers to investigate cases of corrupt conduct, particularly more serious cases of corrupt conduct.[36]

[55] Next the applicant relies on the express functions of the respondent to raise standards of integrity and conduct in units of public administration and to ensure a complaint about, or information or matter involving corruption is dealt with in an appropriate way having regard to the principles set out in s 34.[37] Those principles include the "public interest" in the commission having an overriding responsibility to promote public confidence in the integrity of units of public administration and the way corruption is dealt with and dealing with particular cases of corruption having regard to, inter alia, the nature and seriousness of the corruption.[38]

[56] Last, the applicant relies on s 35(3) of the CC Act; in particular, that in performing its corruption function the commission must focus on more serious cases of corrupt conduct and cases of systemic corrupt conduct within a unit of public administration.

[57] The applicant submits that the investigation in the present case is being conducted unfairly because the sources of information questions require the applicant, under penalty of contempt,[39] to answer questions which would reveal the identity of a confidential source. He submits further that the meaning of "unfairly" in s 332(1)(a) is wide enough to encompass a proceeding which fails to uphold the public interest in keeping a journalist's confidential sources of information confidential.

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35 *Crime and Corruption Act* 2001 (Qld), s 4(b).

36 *Crime and Corruption Act* 2001 (Qld), s 5(3)(a).

37 *Crime and Corruption Act* 2001 (Qld), s 33.

38 *Crime and Corruption Act* 2001 (Qld), s 34.

39 *Crime and Corruption Act* 2001 (Qld), s 198(1)(c). The provision contravened would be s 192(1).

[58] In my view, this submission must be rejected. 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. There is no other aspect of the commission's conduct that is particularised as unfair.

[59] Accordingly, I am not "satisfied as to the matter claimed by the applicant"[40] for the relief in paragraph 2 of the application and that application must be dismissed.

Investigation not warranted

[60] The relief sought in paragraph 3 of the application is a restrictive injunction that the respondent be restrained from proceeding further with the investigation as it concerns the applicant.

[61] The relevant sections are ss 332(1) and 334(1) as set out above and s 334(2)-(5), as follows:

> "**Application under s 332**
>
> (1) …
>
> (2) In proceedings on an application under section 332, made on the ground that information or a complaint does not warrant an investigation, the applicant is not entitled to be given particulars of the information or complaint or of the source of the information or complaint.
>
> (3) A judge hearing an application under section 332, on the ground that information or a complaint does not warrant an investigation, may take or receive, in closed court, evidence from the commission on the basis for the investigation.
>
> (4) The applicant and any person representing the applicant must not be present while evidence is being taken or received under subsection (3).
>
> (5) Evidence taken or received by a court under subsection (3) must not be published or disclosed outside the court."

[62] The grounds for the relief in paragraph 3 stated in the application are that:

> "The complaint or information upon which the investigation is being conducted does not warrant further questioning of the applicant in relation to the matters raised in the Attendance notice by requiring the

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40 *Crime and Corruption Act* 2001 (Qld), s 334(1).

applicant to answer questions in respect of which he has claimed privilege, because it does not concern "corrupt conduct" within the meaning of s 15 of [the CC Act] or otherwise fall within the respondent's functions in s 33(2) of [the CC Act]; and/or

The conduct the subject of the investigation is not "corrupt conduct" within the meaning of s 15 of [the CC Act] or otherwise within the respondent's functions in s 33(2) of [the CC Act]."

[63] The particulars of those grounds are as follows:

"17. The allegation does not fall within the definition of "corrupt conduct" in s 15 because:

(a) The relevant conduct is that of the one or more police officers who have disclosed information, rather than the recipient of any such information;

(b) The disclosure of information in advance of a door-knock on [stated date] (the [stated date] disclosure) or alternatively in advance of a police raid on [further stated date] (the [further stated date disclosure] disclosure):

(i) did not, nor (sic) could not, adversely affect the performance of functions, or the exercise of powers of the police, or its officers; and

(ii) did not result in, nor (sic) could not result in the performance of powers by police in a way that:

(A) was not honest or impartial;

(B) involved a breach of trust; or

(C) involved a misuse of information or material acquired in or in connection with the performance of functions by police; and

(iii) was not a criminal offence or a disciplinary breach providing reasonable grounds for termination;

18. The allegation does not fall within the functions set out in s 33(2) of the Act.

19. In investigating the allegation, the respondent has contravened s 35(3) of the Act, which requires the respondent to focus on more serious cases of corrupt conduct and cases of systemic corrupt conduct within the police. This is not, on the information known, a more serious case of corrupt conduct. Nor does it appear as a case of systemic corrupt conduct."

[64] The applicant submits that the investigation in which he was required to give evidence is not into corrupt conduct as defined in the CC Act. Section 15 provides, in part:

"**15 Meaning of *corrupt conduct***

(1) ***Corrupt conduct*** means conduct of a person, regardless of whether the person holds or held an appointment, that—

(a) adversely affects, or could adversely affect, directly or indirectly, the performance of functions or the exercise of powers of—

(i) a unit of public administration; or

(ii) a person holding an appointment; and

(b) results, or could result, directly or indirectly, in the performance of functions or the exercise of powers mentioned in paragraph (a) in a way that—

(i) is not honest or is not impartial; or

(ii) involves a breach of the trust placed in a person holding an appointment, either knowingly or recklessly; or

(iii) involves 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; and

(c) would, if proved, be—

(i) a criminal offence; or

(ii) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or were the holder of an appointment."

[65] The applicant submits that the disclosure of information to the applicant did not result in and could not result in the performance of powers by police in a way that meets the requirements of s 15(1)(b). The point is whether it is inapt to describe the disclosure of information to the applicant as "conduct… that… could result in the performance of functions or the exercise of powers… in a way that involves a misuse of information." In my view, it is not inapt to do so.

[66] The applicant also submits that since a police officer has been charged already with offences arising from events the subject of the investigation there is no utility in requiring the applicant to answer the sources of information questions.

[67] The respondent submits that is not so for two reasons: first, the applicant's answers may provide information that the applicant, if called as a witness in a relevant proceeding including the one started already, will be able to give answers that directly prove that it was the defendant in the proceeding who made the disclosure of information to the

applicant;[41] second, the applicant's answers may refer to a police officer other than the presently charged officer or other facts that are relevant to the subjects of the investigation. In my view, these submissions should be accepted.

[68] Accordingly, I am not "satisfied as to the matter claimed by the applicant"[42] for the relief in paragraph 3 and that application must be dismissed.

Freedom of communication about matters of government and politics

[69] Alternatively, the applicant alleges (and presumably seeks declaratory relief) that ss 192 and 196 of the CC Act are invalid on the ground that they impermissibly burden the freedom of communication about matters of government and politics to the extent they require the applicant to answer the sources of information questions and reveal the identity of his confidential source of information as a journalist.

[70] The particulars of those grounds are as follows:

> "20. Alternatively, if ss 192 and/or 196 of the Act are to be interpreted to wholly abrogate a journalist's privilege, s 192 impermissibly burdens the implied freedom of political communication. The Act will be found to have the practical effect of inhibiting the journalist's capacity to investigate and publish to the public information on matters of government and politics. The Act is not reasonably adapted to the maintenance of the implied Constitutional right to freedom of communication in respect of such matters, in such a circumstance.
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> 21. The 'freedom' is circumscribed to what is necessarily implied by the representative system of government and is not a personal right; it merely being a restraint on the legislative and executive power. The importance of this is that it is a burden upon political communication in general which must be shown rather than upon specific types or methods of communication. These arguments are at least applicable in so far as s 192 applies to the applicant's conduct.
>
> 22. At least in that application, s 192 is neither directed to any legitimate object nor reasonably appropriate and adapted to such an object because s 192 creates an offence which is not at all affected by the exercise of discretion in s 196. It is therefore overbroad in its application."

[71] Sections 192 of the CC Act is previously set out. Section 196 of the CC Act, so far as relevant is as follows:

> "**196 Supreme court to decide claim of privilege**

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41 I have not overlooked that the applicant gave an answer to a general question earlier in the hearing that he did not remember who the police officer he called was.

42 *Crime and Corruption Act* 2001 (Qld), s 334(1).

> (1) This section applies if a person makes a claim of privilege … under section 192 in relation to a refusal to answer a question.
>
> (2) The chairperson or the person making the claim of privilege may apply to a Supreme Court judge to decide whether the claim is established and, if established, whether it is to be upheld.
>
> (3) The burden of proof on the application is on the person who seeks to withhold the information, document or thing or to prevent the exercise of authority.
>
> (4) The judge must consider submissions and decide whether the claim is established.
>
> (5) If the judge decides that the claim is established on a ground of public interest immunity, the judge may order the person to give the information or produce the document or thing to the commission if the judge decides that, on balance, the public interest is better served by giving the information or producing the document or thing.
>
> (6) If the judge decides that the claim is established on a ground of confidentiality, the judge must order the person to give the information or produce the document or thing to the commission unless the judge decides that to give the information or produce the document or thing would be against the public interest.
>
> …"

[72] Both parties' submissions commenced from an acceptance that the approach of the High Court in *Comcare v Banerji*[43] is to be applied to the constitutional question. On the one hand, the respondent did not contest that ss 192 and 196 could operate as an effective burden on the implied freedom of political communication. On the other hand, the applicant did not contest that ss 192 and 196 of the CC Act had a legitimate purpose.

[73] The disputed question is whether those sections are 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.[44]

[74] The applicant submits that ss 192 and 196 impact directly and diversely upon political communication as a whole because failing to uphold a journalist's "privilege" would have an effect upon the media's dissemination of relevant matters to the general population, to provide information informing their votes or consideration of governmental matters of the day and the impact of a decision in the applicant's case will have broader public policy considerations.

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43 (2019) 372 ALR 42.

44 (2019) 372 ALR 42, 913-914 [32]-[38].

[75] The applicant further submits the question is less concerned with the specifics of the applicant's individual circumstances than the "policy implications of failing to honour a time honoured practice, if not principle, of maintaining journalist's privilege".

[76] It is not necessary to consider as a matter of first principle either of these broad submissions or the more detailed submissions made by the applicant as to whether s 192 effectively burdens the implied freedom of communication and, if so, whether the purposes of ss 192 and 196 are compatible with the maintenance of the constitutionally prescribed system of representative government, or whether they are reasonably appropriate and adapted to advance a legitimate object in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

[77] That is because the relevant constitutional questions have been considered and answered by an intermediate court of appeal in a case concerned with similar legislation. In *A v Independent Commission Against Corruption*,[45] the applicant received a summons to produce documents under s 35 of the *Independent Commission Against Corruption Act* 1988 (NSW) ("ICAC Act"). That section and other sections of the ICAC Act imposed obligations to produce documents, made non-compliance an offence and abrogated the privilege against self-incrimination.

[78] The notice to produce sought documents in the possession of the applicant, as employer, that were from the email account and electronic diary of a person described as a political journalist. The applicant in that case raised with the commission whether production of the documents might infringe the journalist's privilege available in NSW under s 126K of the *Evidence Act* 1995 (NSW). The NSW commission responded that the obligations under the ICAC Act overrode any question of journalist's privilege.

[79] In support of its application to set aside the notice to produce as invalid, the applicant in that case contended that the relevant NSW provisions were invalid because they impermissibly burdened the freedom of communication about matters of government and politics.

[80] Basten JA, with whom Bathurst CJ agreed, accepted that s 35 of the ICAC Act may effectively burden political discourse and so considered the second limb of the constitutional test for invalidity. His Honour continued:

> "The applicant was faced with a higher, if not insuperable, obstacle in obtaining a favourable finding with respect to the second limb, for a number of reasons. First, neither the purpose nor the effect of the ICAC Act was to impose any direct burden on political discourse. Like the implied freedom itself, the Act's principal purpose was to protect, maintain and strengthen the institutions of representative government. Secondly, the powers conferred on the commission for the purposes of investigation might well be described as commonplace statutory powers conferred upon investigative agencies. Thirdly, although dealing with a power of disclosure incidental to the exercise of judicial power, the reasoning in *The Age Company Ltd v Liu* [2013] NSWCA 26; 82 NSWLR 268 at [96]–[99] (Bathurst CJ) would support the conclusion that s 35 was

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45 (2014) 88 NSWLR 240.

> appropriate and adapted to serve a legitimate end, being an end not merely compatible with, but directed to, the maintenance of representative government.
>
> Fourthly, there are significant limitations on the use of such confidential information. It is those parts of s 111 challenged by the applicant which are designed to prevent any officer of the commission divulging or communicating information obtained in the course of his or her functions under the ICAC Act which will protect from disclosure precisely that material with respect to which the applicant is anxious to maintain confidentiality. Particularly is that so when a summons under s 35 is deployed in support of a compulsory examination, which is to be conducted in private: s 30(5). That is not to say that there is any statutory guarantee that confidential information will not be used by the commission for the purposes of its investigation in ways which the source may not have anticipated or intended. Rather, it demonstrates that there are protections against misuse and inappropriate disclosure which provide substantial support for the conclusion that the powers are appropriate and adapted to the legitimate purpose for which they are conferred."

[81] Recognising the similarities between the present case and *A v ICAC*, the applicant sought to distinguish that case by reference to Basten JA's four reasons in the passage set out above.

[82] As to Basten JA's first reason, the applicant accepted that neither the purpose nor the effect of the CC Act was to impose any direct burden on political discourse. Like the implied freedom itself, the CC Act's principal purpose was to protect, maintain and strengthen the institutions of representative government.

[83] As to Basten JA's second reason, the applicant submits that the powers conferred on the respondent for the purposes of investigation under the CC Act, in ss 192 and 196 are not commonplace statutory powers conferred upon investigative agencies. However, in my view, that submission does not engage with what Basten JA was describing as "commonplace", to the extent that might be relevant to a question of requiring a journalist to answer the sources of information questions or like questions. The "commonplace" powers Basten JA was referring to are powers to compel a person to give evidence or produce documents, which are powers conferred on many statutory investigative bodies.

[84] As to s 192, the only provisions in that section that appear to enlarge the "commonplace" powers are the abrogation of the right to refuse to answer a question on the ground of self-incrimination privilege[46] and the power to require disclosure of the name and address of the holder of legal professional privilege against answering the question.[47] But neither of those provisions is relevant to disclosure of a journalist's confidential sources of information or the freedom of communication about matters of government and politics. The same conclusion is true of s 196. Accordingly, this case is not distinguishable from *A v ICAC* based on Basten JA's second reason.

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46 *Crime and Corruption Act* 2001 (Qld), s 192(2)(b).

47 *Crime and Corruption Act* 2001 (Qld), s 192(3)(b).

[85] As to Basten JA's third reason, the applicant submits that the reasoning in *The Age Company Ltd v Liu*[48] does not support the conclusion that s 192 is appropriate and adapted to serve a legitimate end, being an end not merely compatible with, but directed to, the maintenance of representative government. The applicant referred to the relevant passage in *Liu*[49] 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*,[50] 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 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.

[86] As to Basten JA's fourth reason, the applicant submitted that the right of a defendant charged with an offence to be given evidence held by the respondent relevant for the defence of the charge under s 201 of the CC Act distinguishes the present case from the limitations on the use of the confidential information contained in the ICAC Act referred to by Basten JA. Even if there were no comparator to s 201 in the ICAC Act, that difference would not, in my view, disapply the conclusion that would be otherwise reached in the present case having regard to Basten JA's reasons in *A v ICAC*. In any event, there was a comparator provision in s 113 of the ICAC Act at the time when *A v ICAC* was decided.

[87] It is unnecessary to set out in more detail the extent to which the matters referred to in that passage from Basten JA's reasons are reflected in the provisions of the CC Act that were engaged in relation to the notice of attendance and the sources of information questions in the present case. 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.

[88] It follows that no relief should be granted to the applicant upon paragraph 4 of the application.

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48 (2013) 82 NSWLR 268.

49 (2013) 82 NSWLR 268, 289-290 [96]-[99].

50 (1997) 189 CLR 520, 568-569.