

IN PRACTICE

The fourth estate & the incapacitated estate

What's new in succession law
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Blackened pages on the broadsheet were a feature of our print news late last year.

The press protest was sparked after the Australian Federal Police raid on the ABC's Sydney office and the home of a Canberra journalist.¹ Much debate ensued and continues around laws prohibiting publication of certain material.

The Right to Know coalition called for “the decriminalisation of public interest journalism, and greater protection for the media and whistle-blowers”.² The focus of its callout was our national

security laws, with some asserting that in the last 20 years the Australian Parliament had passed a national security law every three months, with no less than 82 national security laws aimed at suppressing the release and/or publication of information.³

The press argued that these laws were used primarily by governments to shield them from embarrassing leaks or whistle-blower claims.⁴ However, some might be surprised to find that non-publication laws also exist in other realms, such as the substituted decision-making regime. It seems now that individuals and the media may be falling foul of those laws as well, resulting in exposure to criminal prosecution.

In Queensland broadly, section 74A of the *Powers of Attorney Act 1978* and sections, 108, 109, 114(2), 210B, and 249A, *Guardianship and Administration Act 2000* (GAAA) make it an offence to disclose confidential information about, or the identity of, an incapacitated person in certain circumstances.⁵ The provisions are significant because the degree of risk to any individual or organisation for falling foul of them is high, by virtue of the sheer number of Queenslanders and volume of their finances managed by the Public Trustee of Queensland (PTQ).

Some 9957 Queenslanders have their financial affairs managed by the PTQ, with \$2.9 billion of private citizen assets under management by the PTQ.⁶ In the last financial year, 12,805 applications were filed in the Guardianship Tribunal.⁷ These staggering figures, and the nature of the issues involved, inevitably result in people being disgruntled by the processes and the organisations involved, with some viewing the media as the optimum means of ventilating their issues or influencing the tribunal. But this preference for resorting to the fourth estate⁸ can easily result in a breach of the law.

LER [2019] QCAT 406⁹ is one such matter. It follows a long-running series of applications before QCAT¹⁰ about the affairs of *LER*. The decision by Senior Member Guthrie is well considered and by necessity of the issues canvassed and the number of submissions, lengthy.¹¹ While the decision addresses matters of standing, the authority of the tribunal to make orders, and its power to determine the application, the focus of this article is on the discussion around s114A of GAAA.

“Section 114A(1) provides that generally information about a guardianship proceeding may be published. Section 114A(2) provides, that a person must not, without reasonable excuse, publish information about a guardianship proceeding to the public or a section of the public if the publication is likely to lead to the identification of the relevant adult by a member of the public or a section of the public to whom information is published.”¹²

The issue in dispute related to the publication in a newspaper of an article about the affairs of *LER* and the prospect of a television station publishing similar material.¹³ Accordingly, a non-publication order and a confidentiality order were sought.¹⁴

The newspaper “article included a photograph of *LER* and *LER*’s partner, *LSS*, mentioned the suburb of the city in which *LER* lives, as well as specific details about *LER*’s financial assets. The article also included the statement that *LER* is ‘under financial administration of the Public Trustee of Queensland’.”¹⁵

The tribunal had to determine whether s114A of the GAAA was breached by the publication of the newspaper article, if so by whom, whether it was necessary to make the orders sought and determine if the breach ought to be referred to the Commissioner of Police to prosecute.¹⁶

There were a number of adjournments to deal with procedural matters before the final hearing was resumed. In that intervening period notice was given to a range of involved parties that a finding of a breach of the law may be made and that a referral to the Commissioner of Police may also be made. Two parties, in particular, were given that notice – the publisher of the newspaper article and the journalist who authored the article.¹⁷ However, they were not in attendance at the resumed hearing,¹⁸ no submissions were made by them and at the date the decision was made, the newspaper article remained online.¹⁹

LSS (LER's partner) appeared at the final hearing.

In coming to conclusions about whether s114A was breached, firstly, Senior Member Guthrie found the newspaper did publish information likely to lead to the identification of LER by a member of the public or a section of the public.²⁰ Then the tribunal moved to determine whether publication contained "information about a guardianship proceeding".²¹

Guardianship proceeding is defined in Schedule 4 of the GAAA, however the qualifier 'information' is not defined.

LSS argued that there was no mention in the newspaper article of words such as 'guardianship', 'hearing' or 'QCAT', ergo "the article does not contain information about a guardianship proceeding so there has been no breach of s114A".²²

The PTQ, Public Guardian and Public Advocate variously argued that the article clearly contained information about LER being involved in a guardianship proceeding and contained material identifying LER's affairs, in particular his financial circumstances.²³

While finding the article itself was "not a description or retelling of what occurred during the course of a...proceeding",²⁴ the tribunal did find it contained a substantial amount of information about matters canvassed in the hearing in which the tribunal determined to appoint the PTQ, and also at a hearing on a review of that appointment.²⁵ Therefore it did contain "information about a guardianship proceeding".²⁶

The focus then moved to the meaning of the term 'publish' and how that term ought to be interpreted in the context of the GAAA.²⁷ The tribunal adopted the "ordinary meaning of the word"²⁸ as being "any person who caused the article to be placed on the website".²⁹ The tribunal found those included the journalist, Fairfax Media and LSS.³⁰

The next element for the tribunal to determine was whether there was a reasonable excuse. The analysis of that element was the lengthiest part of the judgment, canvassed over 26 paragraphs from [62]-[88]. In those paragraphs, the tribunal reviewed previous decisions around LER, the degree to which LER lacked capacity, whether he was able to consent to participating in the interview for the article and who was responsible for providing to the journalist the minutiae of LER's financial details.

The tribunal affirmed³¹ the decision of *Bergmann v DAW* [2010] QCA 143 "that an adult cannot make decisions for which a substitute decision-maker has been appointed",³² Ergo, LER could not consent to the publication of the material. In finding that there was no reasonable excuse for the publication,³³ the tribunal rejected "LSS's argument that the publication of the article in terms of its criticism of the PTQ was in the public interest".³⁴

The tribunal then went on to decline to make the orders as it found that s114A was clear and to make orders directing the very action s114A contemplates would do nothing more than undermine S114A. The tribunal found that “[s]ection 114A...ought to have operated to protect LER’s identity and privacy. It has not done so.”³⁵

However, that was not the end of the matter. The tribunal referred the matter to the Commissioner of Police to consider “prosecution of those who have published prohibited information, namely all of those who provided the information reported in the article to the journalist as well as all who have caused the article to be written and published online.”³⁶

We have all encountered the client dissatisfied with the legal system who seeks to expose its flaws through the press. While caution ought to be counselled at that suggestion generally, in matters involving incapacitated adults, your client ought to be made specifically aware of the above provisions.

Further, practitioners ought to be aware of S7(1) (c) and (d) of Schedule 1 the *Criminal Code Act 1899* (Qld) (Criminal Code), which makes it an offence to aid another in committing an offence, and s8, which makes it an offence to prosecute a breach of the law with a common purpose. Advisers of all kind need to be alive to risk they themselves are at should they facilitate a breach of the above provisions.

From a broader public policy perspective, for some, this decision may raise questions around whether the balance is right. With limited recourse through the court process to air grievances, is the balance right when the complaint process about a particular institution is directed internally for it to self-assess?³⁷

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Notes

¹ abc.net.au/news/2019-10-21/media-unites-to-rally-for-press-freedom/11621806.

² *Ibid.*

³ pressfreedom.org.au/the-war-on-journalism-3fa11cdd944f#_edn2.

⁴ *Ibid.*

⁵ Each provision proscribes a maximum fine of 200 penalty units = \$26,690. See *Penalties and Sentences Act 1992 Penalty Units* – From 1 July 2020 increased to \$133.45.

⁶ pt.qld.gov.au/media/1758/pt-annual-report-2018-19.pdf.

⁷ qcat.qld.gov.au/__data/assets/pdf_file/0019/636130/qcat-2018-19-annual-report.pdf.

⁸ *The public press*, see merriam-webster.com/dictionary/fourth%20estate.

⁹ Judgment delivered on 15 October, 2019, published on 30 April 2020.

¹⁰ At[1]-[3] dating back to 2013.

¹¹ 23 pages, submissions from the Applicant, Public Guardian, Public Trustee, Public Advocate, Interested Person and Channel 9. There were a number of technical aspects around standing of the Applicant and the authority of QCAT to make the order which

are too lengthy to canvass here.

¹² At [18].

¹³ At [5].

¹⁴ At [4].

¹⁵ At [5].

¹⁶ At[13].

¹⁷ At [13].

¹⁸ At [15].

¹⁹ At [26].

²⁰ At [26]-[38].

²¹ At [39].

²² As above.

²³ At [40]-[43].

²⁴ At [48].

²⁵ As above.

²⁶ At [50].

²⁷ At [52]-[61].

²⁸ *Vis the technical meaning as referred to in defamation law, see [55].*

²⁹ At [60].

³⁰ At [60]-[61].

³¹ At [85].

³² As above.

³³ At [88].

³⁴ At [87].

³⁵ At [98].

³⁶ At [103].

³⁷ [pt.qld.gov.au/contact/contact-us/compliments-and-complaints](https://www.qld.gov.au/contact/contact-us/compliments-and-complaints).