
Case note

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NON-PUBLICATION ORDERS IN THE FEDERAL COURT: HOGAN v AUSTRALIAN CRIME COMMISSION

The principle of open justice is well recognised in Australian jurisprudence. In the Federal Court, its importance is enshrined in s 17(1) of the *Federal Court of Australia Act 1976* (Cth) (Act), which makes it clear that the court will, in most circumstances, exercise its jurisdiction in open court.

Section 17(4) of the Act, however, recognises that there will be occasions when the court may exclude the general public or specified persons “where the Court is satisfied that the presence of the public or of those persons, as the case may be, would be contrary to the interests of justice”.

Similarly, s 50(1) of the Act confers a specific power on the court to make non-publication orders:

The Court may, at any time during or after the hearing of a proceeding in the Court, make such order forbidding or restricting the publication of particular evidence, or the name of a party or witness, as appears to the Court to be necessary to prevent prejudice to the administration of justice or the security of the Commonwealth.

There is a wide range of circumstances under which the powers under ss 17(4) and 50(1) may be exercised, including litigation involving the disclosure of commercially sensitive information.

Trade practices litigation, including enforcement litigation brought by the Australian Competition and Consumer Commission (ACCC), frequently involves the disclosure of commercially sensitive or otherwise confidential documents between parties, whether voluntarily or under compulsion. It is a common practice for parties (and third party confidentiality claimants) to agree upon confidentiality regimes to govern how such material will be treated between themselves. At the time of production, disputes can, and do, arise where the parties cannot agree on the terms of the confidentiality regime or when they object to confidentiality claims over particular documents. However, even after such disputes are resolved, the mere fact that the parties agree a particular document ought to be kept confidential will not necessarily be sufficient to protect the contents of the document from wider disclosure when one of the parties subsequently seeks to tender it in the course of a hearing. Since an agreed confidentiality regime only operates between the parties (and the confidentiality claimant, if not a party to the litigation) and cannot bind the court; only a non-publication order will protect the document from wider disclosure.

In *Hogan v Australian Crime Commission*,¹ the High Court considered, for the first time, the Federal Court’s power to make non-publication orders under s 50 of the Act. Until *Hogan*, the leading case on s 50 was the Full Federal Court’s decision in *Australian Broadcasting Commission v Parish*.² In that case, Bowen CJ characterised the process for determining whether to make an order under s 50 as involving two elements: first, that s 50 confers a discretion upon a Federal Court judge; and secondly, that the exercise of that discretion involves “weighing in the scales” the countervailing public interests, being the principle of open justice and the prejudice that would be suffered by disclosure of the material in question.

Although *Hogan* arose in a somewhat different context to trade practices matters, it has implications for all Federal Court proceedings in which non-publication orders may be sought under s 50. It has particular significance for the approach that the court might take in long-running litigation where the circumstances of the confidentiality claimant (whether a party or a third party to the litigation) or the confidentiality of the material may have changed since the s 50 orders were made.

FACTUAL BACKGROUND

Hogan arose from a Federal Court proceeding brought by Mr Hogan’s business adviser in February 2006, and to which Mr Hogan was subsequently joined. The proceeding related to, among other

¹ *Hogan v ACC* (2010) 240 CLR 651.

² *Australian Broadcasting Commission v Parish* (1980) 43 FLR 129.

things, claims for legal professional privilege over documents obtained by the Australian Crime Commission (ACC) from Mr Hogan's accountants under compulsory notices issued pursuant to s 29 of the *Australian Crime Commission Act 2002* (Cth) (ACC Act).

At first instance, a very large number of orders were made pursuant to s 50. Those orders were largely made by consent.³

In the course of a discovery dispute, Mr Hogan's solicitor affirmed an affidavit exhibiting various documents. The exhibit included an "inference schedule" prepared and served by the ACC pursuant to an earlier order of the court (but not previously filed or tendered) and a bundle of documents obtained by the solicitor from Mr Hogan's accountants (the accountants' correspondence). The affidavit was read in court by Mr Hogan's counsel during a hearing on 19 May 2008. At that time, Emmett J made an interim order, pursuant to s 50, restricting publication of parts of the exhibit.

After hearing notices of motion on the question of which s 50 orders ought to remain in place in the proceeding, and an application by the media for access to the court file pursuant to O 46, r 6 of the *Federal Court Rules*, Emmett J vacated all previous s 50 orders and granted the media access to documents that had been admitted into evidence.⁴

In his judgment, Emmett J noted that Mr Hogan had not adduced evidence of any specific damage or prejudice that might or would be occasioned by disclosure, but had argued that the material included "private and confidential information and that he would not have tendered it or have permitted it to be admitted into evidence had he known that it might become public".⁵ In response to an argument that it would be unfair to vacate the confidentiality regime, his Honour said:

It is not a matter for agreement between parties as to whether an order under s 50 will be made or, assuming an order is made, whether a subsequent order might be made varying or discharging the order. A fortiori, the fact that the applicant's solicitor proceeded on an assumption that a restriction on the publication of evidence may be permanent is of no consequence unless, perhaps, the evidence was tendered in circumstances where the Court was informed that, unless a permanent order were made, the evidence would not be tendered ... questions of fairness may then possibly arise ... In either event, ultimately it is a matter for the Court, in the light of the criteria specified in s 50, to determine whether an order should be made and whether an order, having been made, should be discharged or varied.⁶

Mr Hogan subsequently sought leave to appeal from Emmett J's orders vacating the s 50 orders over the inference schedule and the accountants' correspondence. By majority, the Full Court of the Federal Court, comprising Moore, Jessup and Gilmour JJ, granted him leave to appeal but dismissed the appeal.⁷

Mr Hogan subsequently sought and was granted special leave to appeal to the High Court.⁸

THE TEST IN PARISH: WEIGHING THE COUNTERVAILING PUBLIC INTERESTS

At first instance, Emmett J referred to the judgment of Bowen CJ in *Parish*, as did Jessup and Gilmour JJ in the Full Federal Court. In *Parish*, Bowen CJ stated that the reference to "prejudice to the administration of justice" in s 50 was to the "public interest that the Court should endeavour to achieve effectively the object for which it was appointed: to do justice between the parties".⁹ His Honour went on to say that the court's determination of whether to make an order under s 50 would involve "weighing in the scales the countervailing public interests involved", being justice between

³ *P v ACC* (2008) 71 ATR 555 at [8].

⁴ *P v ACC* (2008) 71 ATR 555.

⁵ *P v ACC* (2008) 71 ATR 555 at [62].

⁶ *P v ACC* (2008) 71 ATR 555 at [65].

⁷ *Hogan v ACC* (2009) 177 FCR 205.

⁸ *Hogan v ACC* [2009] HCA Trans 252.

⁹ *Australian Broadcasting Commission v Parish* (1980) 43 FLR 129 at 133.

the parties and the principle of open justice. Further, his Honour noted that the degree of derogation from the principle involved in the proposed order was an important matter to be considered.¹⁰

THE HIGH COURT'S CONSTRUCTION OF S 50

In a unanimous decision, the High Court emphasised that s 50 required the Federal Court to be satisfied of the *necessity* of making an order, stating:

It is insufficient that the making or continuation of an order under s 50 appears to the Federal Court to be convenient, reasonable or sensible, or to serve some notion of the public interest, still less that, as the result of some “balancing exercise”, the order appears to have one or more of these characteristics.¹¹

Without explicitly rejecting the test in *Parish*, the High Court concluded that the Federal Court is required to make (or vacate) a s 50 order once satisfied that the order is necessary (or that it is no longer necessary, as the case may be):

If it appears to the Federal Court ... to be necessary to make a particular order forbidding or restricting the publication of particular evidence or the name of a party or witness, in order to prevent either species of prejudice identified in s 50, or on the other hand, that the necessity no longer supports the continuation of such an order, then the power of the Federal Court under s 50 is enlivened. The appearance of the requisite necessity (or supervening cessation of it) having been demonstrated, the Court is to implement its conclusion by making or vacating the order. The expression in s 50 “may ... make such order” is to be understood in this sense.

It may tend to distract attention from the particular terms of s 50 to describe the Federal Court as embarking upon the exercise of a “discretion” when entertaining an application under s 50 ... Once the Court has reached the requisite stage of satisfaction, it would be a misreading of s 50 to treat it as empowering the Court nevertheless to refuse to make the order, or to leave in operation the now impugned order.¹²

Whereas *Parish* treated s 50 as conferring a discretion on a Federal Court judge, the High Court's approach seems to suggest that the discretion lies not in whether or not to make an order, but in crafting an order that meets the requisite prejudice.

NEED TO ADDUCE EVIDENCE

In dismissing the appeal, the High Court took into account that Mr Hogan had adduced no evidence as to the specific prejudice that would flow from disclosure of the information said to be confidential. In particular, the High Court considered that, having made a forensic decision to deploy that material for the purposes of the discovery dispute, the “price of such a decision may be the subsequent disclosure, as is often the case in litigation, of embarrassing publicity”.¹³

In this regard, the High Court's reasons emphasised the long-standing recognition in the jurisprudence of suppression orders that the party seeking to depart from the court's usual adherence to open justice must persuade the court that it should do so. In *Scott v Scott*, Viscount Haldane LC said:

While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions ... it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one

¹⁰ *Australian Broadcasting Commission v Parish* (1980) 43 FLR 129 at 136.

¹¹ *Hogan v ACC* (2010) 240 CLR 651 at [31].

¹² *Hogan v ACC* (2010) 240 CLR 651 at [32]-[33].

¹³ *Hogan v ACC* (2010) 240 CLR 651 at [43]. See also at [41].

which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity.¹⁴

THE NECESSITY FOR CONTINUATION OF S 50 ORDERS

Notwithstanding this long-standing emphasis on the need for parties to persuade the court that a departure from open justice is required, there has sometimes been a tendency, particularly in protracted litigation, for s 50 orders to be sought on the same basis throughout the proceeding and without specific evidence in support, although the circumstances of the confidentiality claim may have changed. In *Hogan* at first instance, Emmett J had made s 50 orders originally with the consent of all parties, persuaded at least partly by an earlier decision of Allsop J in *C v Australian Crime Commission*.¹⁵ In that matter, Allsop J was satisfied on the evidence before him that s 50 orders were necessary to prevent prejudice to the ACC's investigations. Moore J, in his reasons given on the *Hogan* appeal to the Full Federal Court, noted that:

It was not suggested in these proceedings that any subsequent consideration was given to the foundation of the later orders made under s 50 on the application of both the applicant and the respondents. It would appear both sought such orders on the footing that the rationale for them had been established in November 2005 by Allsop J. That continued to be so at the time the s 50 order was made on 19 May 2008.¹⁶

Similarly, in *Arnotts v Trade Practices Commission*, the Full Federal Court took issue with "unnecessarily wide" confidentiality orders that rendered the first instance judgment devoid of an "intelligible explanation" for the outcome:

When we asked counsel why particular documents had been thought to be confidential, the claims of confidentiality melted away. In the end it was conceded, not only by the parties to the appeal but also by counsel for George Weston Foods Ltd ... whose client had produced numerous documents for which it made a blanket confidentiality claim, some of which were quoted by the trial Judge in his unexpurgated reasons – that none of the material quoted in the reasons should properly be regarded as confidential.¹⁷

The question of continuing non-publication orders from a first instance proceeding also arose in *Dye v Commonwealth Securities Ltd*.¹⁸ In that case, Rares J, with whom both Marshall and Flick JJ agreed, emphasised the need for a non-publication order over a person's name to be justified by evidence. In particular, having regard to the High Court's reasoning in *Hogan*, his Honour considered that it was insufficient to refer to orders made in previous proceedings (albeit the proceeding in respect of which leave to appeal was being sought) without providing the Full Court with evidence, other material or submissions to warrant the making of a further non-publication order under s 50.

CONCLUSIONS

There have so far been few cases applying the High Court's decision in *Hogan*. At the time of writing, only two had drawn attention to the High Court's reasoning in *Hogan*, suggesting that s 50 does not involve the exercise of a discretion: see *ACCC v Cement Australia Pty Ltd*¹⁹ and *Yara Australia Pty Ltd v Burrup Holdings Ltd (No 2)*.²⁰ However, in the authors' view, the conclusions drawn on the confidentiality issues in those proceedings (that litigation ought not become the forum or a vehicle for trade sensitive disclosures that would damage a confidentiality claimant, and also in the *Cement Australia* proceeding, that the court has an interest in enabling co-operation from third parties in complying with orders for production of documents) could equally have been drawn under the *Parish* test.

¹⁴ *Scott v Scott* [1913] AC 417 at 437-438.

¹⁵ *C v ACC* [2005] FCA 1736.

¹⁶ *Hogan v ACC* (2009) 177 FCR 205 at [4].

¹⁷ *Arnotts v Trade Practices Commission* (1990) 24 FCR 313 at 317 (Lockhart, Wilcox and Gummow JJ).

¹⁸ *Dye v Commonwealth Securities Ltd* [2010] FCAFC 115.

¹⁹ *ACCC v Cement Australia Pty Ltd (No 2)* [2010] FCA 1082 at [11]-[12].

²⁰ *Yara Australia Pty Ltd v Burrup Holdings Ltd (No 2)* [2010] FCA 1304 at [19].

As at the time of preparing this case note, Perram J had reserved his decision in *ACCC v SingTel Optus Pty Ltd*, relating to an application by SingTel Optus Pty Ltd (Optus) for s 50 orders over its financial documents. Those documents had been tendered by the ACCC in support of an application for a pecuniary penalty under the former s 76E of the *Trade Practices Act 1974* (Cth) (TPA),²¹ arising from Optus' contravention of the former s 55A of the TPA in an advertising campaign. It is anticipated that his Honour may consider the implications of the *Hogan* decision in giving his reasons.

In any event, it may be that the practical implications of the High Court's clarification of the test under s 50 will manifest themselves less in judgments, and more in the process by which confidentiality claims are managed. It remains to be seen whether the Federal Court will start to insist upon more detailed and cogent evidence in support of s 50 orders, perhaps even giving guidance as to what is required to persuade the court of the necessity for the orders in a similar manner to the case law on affidavits in support of legal professional privilege or public interest immunity claims.

The High Court's emphasis on the need for evidence to demonstrate the precise harm that will flow from disclosure may well inject more rigour into applications for s 50 orders at an early stage. It could reduce the scope for disputes and interlocutory skirmishes that distract from the substance of the litigation if confidentiality claimants (whether parties to the litigation or not) consider – at the time of any claim – whether or not they will be able to articulate, with precision, what prejudice to the administration of justice would flow from disclosure of their information. Similarly, in protracted litigation, parties may well find themselves being asked to justify the continuation of s 50 orders, particularly where the material that is the subject of the orders has become very dated.

It remains to be seen whether the Federal Court will, in a practical sense, exercise its power under s 50 differently under the *Hogan* test, compared to the *Parish* test. Even if the outcomes are largely the same, *Hogan* serves as a timely reminder of two things. First, that in the absence of cogent evidence justifying the making of the order, parties to litigation in the Federal Court cannot assume that a non-publication order will be made (even if a confidentiality regime has been agreed between the parties). Secondly, parties cannot assume that a s 50 order will have permanent effect. Particularly in high profile cases, even if the parties do not propose to disturb the regime of s 50 orders, an application by the media may well prompt the question of whether the orders are still required.

In summary, parties need to consider at an early stage whether there is a need for any confidentiality claim and whether that need can be borne out on the evidence; in addition, parties need to reconsider during the course of the proceeding whether there is still a need for a s 50 order.

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²¹ Now the *Competition and Consumer Act 2010* (Cth).