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High Court clarifies the test for non-publication orders in the Federal Court

In *Hogan v Australian Crime Commission and Ors* [2010] HCA 21, the High Court has considered, for the first time, the power to make non-publication orders under section 50 of the *Federal Court of Australia Act 1976* (Cth).

Without expressly rejecting the test formulated by Bowen CJ in the previous leading case on section 50 (*Australian Broadcasting Commission v Parish* (1980) 29 ALR 228), the High Court has concluded that once the Federal Court is satisfied that the prerequisite thresholds under section 50 are met (that the making of a non-publication order is 'necessary' to prevent prejudice to either the administration of justice or the security of the Commonwealth), the Federal Court has no discretion to refuse to make a non-publication order. Importantly, there must be evidence to demonstrate that the prerequisite thresholds have been met.

The High Court also addressed the question of when inspection of documents on the Federal Court file will be permitted pursuant to Order 46 r 6(3) of the *Federal Court Rules*.

Background

The appeal to the High Court arose from a Federal Court proceeding involving, amongst other things, privilege claims relating to documents obtained under notices issued pursuant to section 29 of the *Australian Crime Commission Act 2002* (Cth).

In the context of a discovery dispute, Mr Hogan's solicitor affirmed an affidavit exhibiting various documents. Those documents included an Inference Schedule prepared by the Australian Crime Commission (ACC) (but put into evidence by Mr Hogan) and a bundle of documents obtained by the solicitor from Mr Hogan's accountants.

Emmett J made an interim section 50 order restricting publication of the documents. After hearing notices of motion on the question of which section 50 orders ought to remain in place in the proceeding (a large number of orders had previously been made throughout the course of the matter), his Honour vacated all previous section 50 orders: *P v Australian Crime Commission* (2008) 250 ALR 66.

The Full Court of the Federal Court, comprising Moore, Jessup and Gilmour JJ, by majority granted Mr Hogan leave to appeal from Emmett J's orders in relation to the vacation of the section 50 orders relating to the Inference Schedule and the accounting advices: *Hogan v Australian Crime Commission* (2009) 177 FCR 205. By a differently constituted majority, the Full Court dismissed the appeal.

Construction of section 50

Section 50(1) provides:

> 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.

The High Court emphasised that the Federal Court must be satisfied of the *necessity* of making an order under section 50, stating (at [31]):

> 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.

The High Court concluded that the Federal Court is required to make (or vacate) a section 50 order once satisfied of the necessity (or the cessation of the circumstances leading to the necessity) of the order. At [33], the Court said:

> 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.

Need to adduce evidence of harm

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 (at [41] and [43]). 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' (at [43]).

Inspection of material pursuant to Order 46 r 6(3)

Order 46 r 6(3) of the *Federal Court Rules* provides that a third party cannot inspect certain documents (such as most affidavits, documents produced in response to a subpoena or discovery lists) on the file without leave. The Court confirmed that where material on the file has not been tendered and admitted into evidence, the interests of open justice were not engaged and leave to inspect such material should not be granted (at [40]).

However, where material on the file has been admitted into evidence, in the absence of an order made under section 50, it will be proper to grant leave to inspect that material, particularly if the party objecting to inspection has not adduced any evidence of particular or specific harm or damage that would flow from disclosure (at [41]).

Legal Services Directions

The High Court's emphasis on section 50 orders being made only where the necessity for the order has been made out is consistent with the requirements in paragraph 4.9 of the Attorney-General's *Legal Services Directions 2005*.

That paragraph, which took effect on 30 January 2010, limits the circumstances in which an agency regulated by the *Financial Management and Accountability Act 1997* (FMA Act agency) can seek orders prohibiting or restricting disclosure or publication of evidence. An

FMA Act agency can only seek such an order if it considers suppression of the evidence or information to be reasonably necessary to protect the interests of the Commonwealth. Importantly, it cannot seek a suppression order merely to avoid disclosure of information that is embarrassing to the Commonwealth or its agencies, unless there are also legitimate Commonwealth interests to protect.

Implications

Section 50 orders are frequently sought, and made, in a wide range of litigation involving Commonwealth agencies, including commercial disputes, enforcement proceedings in trade practices matters, proceedings involving law enforcement or national security issues and native title disputes. Frequently, Commonwealth agencies seek, or consent to, section 50 orders to protect information provided by third parties, who may have assisted (voluntarily or under compulsion) the relevant agency by providing commercial-in-confidence information that will be tendered in evidence.

The practical implications of the High Court's decision include:

- an increased emphasis on providing evidence of the precise harm that will flow from disclosure of the information that is sought to be protected (consistent with approaches a number of Federal Court judges have taken in recent years in declining to make section 50 orders by consent);
- particularly in protracted litigation, the Federal Court may now require parties seeking the continuation of confidentiality orders to provide evidence showing that the orders are still necessary;
- where a third party seeks leave to inspect documents on the Federal Court's file pursuant to Order 46 r 6(3), a party objecting to inspection may now have to adduce evidence of the harm that would flow from disclosure (rather than merely asserting their objection, which has frequently been sufficient in the past);
- the arguments in favour or against making a section 50 order will now hinge entirely upon the cogency of any evidence as to the necessity of making an order (rather than weighing up the competing interests in disclosing or protecting the information);
- although the question of whether to make an order under section 50 is not discretionary, the terms of the order will still be within the Federal Court's discretion (although within the narrow compass of what is considered necessary to prevent the particular prejudice in each case);
- arguably, the evidence required to justify the making of a section 50 order may have to be more persuasive than has previously been the case, particularly if the section 50 order is envisaged to have a lengthy or indeterminate duration;
- there will be an even greater need for agencies seeking section 50 orders to protect third party information to obtain evidence, or at the very least, assistance from the third party in putting evidence before the Court to demonstrate the necessity of the orders; and
- there is a possibility that third party organisations (such as the media) opposing section 50 orders or seeking access to documents on the Court file will more vigorously agitate such applications, by putting parties to proof on the necessity of the orders and by seeking to test the evidence.

AGS acted for the Australian Crime Commission.

Text of the decision is available at:
Hogan v Australian Crime Commission [2010] HCA 21 (16 June 2010)

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