HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

PAUL HOGAN APPELLANT

AND

AUSTRALIAN CRIME COMMISSION & ORS RESPONDENTS

Hogan v Australian Crime Commission [2010] HCA 21
16 June 2010
S289/2009

ORDER

1. Appeal dismissed.

2. Appellant to pay the costs of the third respondents.

On appeal from the Federal Court of Australia

Representation

J T Gleeson SC with F Kunc SC and P Kulevski for the appellant (instructed by Robinson Legal)

S J Gageler SC, Solicitor-General of the Commonwealth with D F C Thomas for the first and second respondents (instructed by Australian Government Solicitor)

D F Jackson QC with T D Blackburn SC and T Maltz for the third respondent (instructed by Blake Dawson Lawyers)

CATCHWORDS

Hogan v Australian Crime Commission

Federal Court of Australia – Powers – Restriction of publication of evidence – Section 50 of *Federal Court of Australia Act* 1976 (Cth) ("the Act") provided Federal Court may make such order forbidding or restricting publication of evidence as appears necessary to prevent prejudice to administration of justice or the security of the Commonwealth – Forensic decision to tender documents in evidence, under cover of s 50 order but pending further hearing – Order vacated at further hearing – Whether s 50 order no longer necessary to prevent prejudice to administration of justice – Whether inherent confidentiality sufficient to establish prejudice – Relevance of s 17(1) of the Act, requiring exercise of jurisdiction in open court, and relationship with s 50.

Federal Court of Australia – Practice and procedure – Inspection of documents by non-party – Interests of open justice – Principles applicable to exercise of power to grant leave under Federal Court Rules, O 46 r 6(3) – Relevance of existing order made under s 50 of the Act.

Words and phrases – "administration of justice", "confidential", "necessary".

Federal Court of Australia Act 1976 (Cth), ss 17(1), 50.
Federal Court Rules, O 46 r 6(3).

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON AND KIEFEL JJ. The present litigation arises out of a special investigation conducted by the first respondent, the Australian Crime Commission ("the ACC"), known as Operation Wickenby. In the course of its investigation, the ACC issued a notice under s 29 of the *Australian Crime Commission Act* 2002 (Cth) ("the ACC Act") requiring an accounting firm ("the Accountants") to produce documents concerning a number of individuals and entities, including the appellant ("Mr Hogan"). He has been a public figure for many years, in particular since the success of the film "Crocodile Dundee"[1].

2 Under the ACC Act, an examiner may by notice in writing served on a person require that person, on pain of committing an offence by non-compliance (s 29(3), (3A)), to produce documents relevant to a "special ACC operation/investigation" (as defined in s 4(1)) to the person specified in the notice (s 29(1)).

3 In his reasons for judgment delivered on 19 December 2007 in a related Federal Court proceeding, Emmett J recorded that the ACC accepted that the ACC Act does not abrogate the right or duty of a recipient of a s 29 notice to claim legal professional privilege on behalf of a person (whether the recipient of the notice or a third party) who holds the privilege[2]. The litigation which has reached this Court has been conducted on that footing. It also appears to have been accepted that the powers of the ACC would not extend to the use or dissemination of documents to the content of which the privilege attached, and that such use or dissemination might be restrained by injunction.

The institution of the Federal Court proceeding

4 The Federal Court proceeding which has given rise to this appeal was commenced on 23 February 2006 by application made by Mr Anthony Stewart and filed as NSD 373 of 2006[3]. Mr Stewart is an adviser to Mr Hogan who gave instructions to, and received advice from, the Accountants on behalf of

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1 See *Hogan v Koala Dundee Pty Ltd* (1988) 20 FCR 314; *Pacific Dunlop Ltd v Hogan* (1989) 23 FCR 553.

2 *MM v Australian Crime Commission* (2007) 244 ALR 452 at 459.

3 When the proceeding was commenced, Mr Stewart was referred to by the pseudonym "A3".

Mr Hogan. By his application Mr Stewart sought, inter alia, to restrain the ACC and the second respondent, the Chief Executive Officer of the ACC, from using or disseminating those documents produced by the Accountants to the ACC over which Mr Stewart claimed legal professional privilege on Mr Hogan's behalf. The jurisdiction of the Federal Court was conferred by both s 39B(1) and par (c) of s 39B(1A) of the *Judiciary Act* 1903 (Cth) as an injunction was sought against an officer or officers of the Commonwealth, in a matter arising under a federal law, the ACC Act. In response the ACC contended that the documents were not brought into existence for the dominant purpose of requesting or providing legal advice and that, in any event, the documents were made in furtherance of a crime or fraud such that no privilege existed[4].

5 On 11 May 2006 Mr Hogan was joined as the second applicant in the proceeding[5]. On 21 July 2006 Emmett J held that prima facie, and with minor exceptions, the documents in dispute were subject to legal professional privilege enjoyed by Mr Hogan[6]. On 17 November 2006 a further amended application was filed in which Mr Stewart was no longer named as an applicant in addition to Mr Hogan[7]. Mr Hogan continued his claim for relief to protect those documents in the ACC's possession in respect of which he asserted privilege. The ACC maintained its submission that the crime or fraud exception applied.

The section 50 orders

6 Emmett J made a number of orders in reliance upon s 50 of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"). As it then stood[8] s 50 stated:

> "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

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4 See *R v Cox and Railton* (1884) 14 QBD 153 at 165, 175; *Cross on Evidence*, 8th Aust ed (2010) at 910-913 [25290].

5 Mr Hogan was at this stage referred to by the pseudonym "P".

6 *A3 v Australian Crime Commission (No 2)* (2006) 63 ATR 348.

7 See *Hogan v Australian Crime Commission (No 4)* (2008) 72 ATR 107 at 116.

8 Section 50 has since been amended by the *Federal Court of Australia Amendment (Criminal Jurisdiction) Act* 2009 (Cth), but not in a manner presently material.

particular evidence, or the name of a party or witness, as appears to the Court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth."

7 Two points respecting s 50 should be made immediately. The first is that s 50 qualifies the general provision in s 17(1) of the Federal Court Act that the jurisdiction of the Federal Court is to be exercised in open court. The second concerns the phrase "the administration of justice". In reading what follows in these reasons it should be borne in mind that, to adapt remarks of Mason CJ in *R v Rogerson*[9], in no sense does the ACC administer justice; that duty was entrusted relevantly to the Federal Court.

8 The s 50 orders made by Emmett J variously prohibited publication of the name and address of both Mr Hogan and Mr Stewart, affidavits and exhibits thereto, and the reasons for judgment delivered by Emmett J on 21 July 2006. Some of those orders were sought by Mr Hogan, and others were sought by the ACC. In each case, the party not seeking the s 50 order either supported or, at the least, did not oppose the making of the order. Those orders were made because each of the parties, for his or its own reasons, desired that details of, and much of the evidence in, the proceeding not be made publicly available. The ACC desired to keep secret the result of the exercise of its powers of investigation under the ACC Act, and Mr Hogan his identity and financial affairs.

The discovery application

9 On 8 June 2007 Mr Hogan sought orders that the ACC provide discovery in relation to its case that the crime or fraud exception to privilege applied. On 9 August 2007, Mr Hogan filed an amended motion to that effect and Emmett J ordered the ACC to conduct enquiries and produce a list of documents concerning the inferences said to support the crime or fraud exception. The list was produced by the ACC and supplied to Mr Hogan, as later explained in these reasons.

10 In response, Mr Hogan filed a motion on 7 December 2007 seeking from the ACC further and better discovery with respect to its case that the crime or

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9 (1992) 174 CLR 268 at 276-277; [1992] HCA 25. See also at 283 per Brennan and Toohey JJ, 293-294 per Deane J, 303 per McHugh J.

fraud exception applied. This application was heard by Emmett J on 19 May 2008.

11 In support of Mr Hogan's discovery application his solicitor, Mr David Peter Rydon, affirmed an affidavit on 13 February 2008. The affidavit of Mr Rydon was read in court by Mr Hogan's counsel on 19 May 2008 at the hearing of the application and thereby became evidence in the proceeding. Emmett J had been provided with a copy of Mr Rydon's affidavit in advance, and allowed it to be filed in court at the hearing. The exhibit to Mr Rydon's affidavit, exhibit DPR-1, contained material divided into a number of parts. Of critical importance in this appeal are the documents behind tabs C and E ("the parts C and E documents"). It was upon these documents that the argument in this Court was focused.

12 Two points should be made immediately with respect to the parts C and E documents. First, they were not among the documents in respect of which the contested claim of legal professional privilege was made by Mr Hogan. Secondly, they were put in evidence by Mr Hogan as a step in support of his case that the privilege was not, as the ACC contended, defeated by the crime or fraud exception.

13 The part C document in exhibit DPR-1 was referred to in the proceeding as "the Inference Schedule". The Inference Schedule had been produced by the ACC pursuant to orders made by Emmett J on 19 December 2006. Order 1 made on that day required the respondents to "file and serve a schedule identifying the inferences the respondents will contend at the hearing of this matter can be drawn from the evidence on which they rely". The Inference Schedule sought to detail the inferences that could be drawn, as to the alleged involvement of Mr Hogan in tax evasion schemes, from documents in the ACC's possession. The Inference Schedule had been served on Mr Hogan on 8 February 2007, but was not then filed. However, it formed part of exhibit DPR-1 to Mr Rydon's affidavit, which was ultimately read in Mr Hogan's case and filed in court on 19 May 2008.

14 The part E documents in exhibit DPR-1 comprise file notes and accounting advices, created by the Accountants, together with certain other communications, all of which concern Mr Hogan's taxation and financial affairs ("the Accounting Advices"); Mr Rydon, in assembling these materials, believed they were among the documents produced by the Accountants to the ACC in response to the s 29 notice.

15 However, it is important to note that the case presented by Mr Hogan to this Court does not turn upon the protection of any legal professional privilege

which might have attached to these documents; rather, it was submitted that there had been a failure by the Federal Court to protect the "confidentiality interest" of Mr Hogan.

The section 50 order respecting the Inference Schedule and the Accounting Advices

16 After reading Mr Rydon's affidavit at the hearing on 19 May 2008, counsel for Mr Hogan sought an order under s 50 in respect of parts of exhibit DPR-1. Counsel informed the Court that immediately prior to the hearing, counsel for the ACC indicated that the ACC now opposed the making of any further s 50 orders and indeed foreshadowed an application to vacate the existing s 50 orders.

17 Counsel for Mr Hogan proposed the making of a s 50 order, limited until further order, so that the hearing of his client's discovery application could proceed without delay. He suggested that, should the ACC bring on its application for vacation of s 50 orders then existing, the Court could "revisit the question of confidentiality in globo".

18 Counsel for the ACC did not oppose the making of that s 50 order. On 19 May 2008 Emmett J made an order under s 50 restricting the publication of the whole of the parts C and E documents, the whole of the documents behind tab A of exhibit DPR-1 and eleven pages behind tab D to the parties and their legal advisers. The order was not expressed as made until further order, but from the transcript preceding the making of the order this appears to have been the intention of the parties[10]. His Honour further ordered Mr Hogan to file any motion for orders under s 50 on or before 9 June 2008.

19 At the hearing counsel for Mr Hogan relied upon the Inference Schedule to identify the ACC's allegations of crime or fraud in respect of which Mr Hogan sought further discovery, and the Accounting Advices to contradict the ACC's assertion that it had no documents or evidence which adversely affected those allegations. Mr Hogan's discovery application succeeded and Emmett J ordered the ACC to repeat the review process, in compliance with the orders made on 9 August 2007, by 1 July 2008.

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10 See also *P v Australian Crime Commission* (2008) 250 ALR 66 at 79.

Success on the privilege claim

20 Then on 1 July 2008 the course of the litigation took a significant change in direction. The ACC abandoned its reliance on the crime or fraud exception to privilege and requested the Court to relist the proceeding. On 4 July 2008 orders were made by consent that, inter alia, the ACC return the privileged documents to Mr Hogan and destroy any information which was derived from or reproduced the contents of those documents. The consent orders made on 4 July 2008 also vacated orders made on 19 May 2008, which had imposed the further discovery obligations on the ACC.

21 The orders made on 4 July 2008 vindicated Mr Hogan's claim with respect to the privileged documents and secured their return to him. The controversy as to whether Mr Hogan's claim to legal professional privilege could be properly maintained was resolved but the orders did not dismiss the proceeding. Mr Hogan's second further amended application was not dismissed until orders were made by consent on 19 January 2009. Those orders were the result of a judgment delivered by Emmett J in which he refused Mr Hogan's application for further relief that the ACC ensure that persons with knowledge of the privileged material no longer be involved in Operation Wickenby, or any similar investigation, and addressing the question of costs[11].

The next stages in the litigation

22 It is the next stages of the proceeding which have led to the present appeal. On 15 July 2008 Mr Hogan filed a motion in which he moved for orders that, "notwithstanding the disposal of these proceedings", the orders made under s 50 remain in force in relation to the material and documents identified in an exhibit to an affidavit affirmed by Mr Rydon on 14 July 2008. That material included, of relevance to this appeal, the Inference Schedule and the Accounting Advices. For its part, on 24 July 2008 the ACC filed a motion seeking orders under s 50 restricting publication of certain affidavits not including Mr Rydon's affidavit.

23 Then on 5 August 2008 the litigation took a further change in direction. The third respondents, Nationwide News Pty Limited ("News") and John Fairfax Publications Pty Limited ("Fairfax"), filed a motion seeking: (1) leave pursuant to O 46 r 6(3) of the Federal Court Rules to inspect the documents held by the

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11 *Hogan v Australian Crime Commission (No 4)* (2008) 72 ATR 107.

registry in relation to the proceeding; and (2) the vacation of all s 50 orders previously made. All three motions, those by Mr Hogan of 15 July 2008 and the ACC of 24 July 2008, and that of News and Fairfax, were heard by Emmett J on 20 August 2008.

24 Section 59 of the Federal Court Act authorises the making by the Judges of Rules of Court relating to the practice and procedure to be followed in Registries of the Court. Order 46 of the Federal Court Rules is headed "Registries". Order 46 r 6(3), so far as material, states:

> "Except with the leave of the Court or a Judge, a person who is not a party to a proceeding must not inspect any of the following documents in the proceeding:
>
> (a) an affidavit".

Rule 6(4) provides to the effect that a person not a party to a proceeding must not inspect any document in the proceeding where it is not otherwise specified in r 6.

25 The application by News and Fairfax was filed in the principal proceeding No NSD 373 of 2006, but appears to have instituted a new "matter" in the sense of Ch III of the Constitution, being the controversy arising under s 59 of the Federal Court Act and respecting the grant of leave under O 46 r 6(3)[12]. The one proceeding may comprise a number of Ch III "matters"[13]. The application was dealt with on the apparent basis that the continued operation of any s 50 order respecting material News and Fairfax sought to inspect would lead the Court to refuse leave under O 46 r 6(3). Hence the focus upon s 50 in the reasons given in the Federal Court.

26 On 21 August 2008, Emmett J made orders giving effect to his conclusions in relation to most of the material in dispute, but reserved his decision in relation to the Inference Schedule and the Accounting Advices. His Honour ordered that all s 50 orders previously made in the proceeding be vacated. His Honour also gave leave to News and Fairfax to inspect and copy specified documents, including Mr Rydon's affidavit of 13 February 2008 and exhibit DPR-1 thereto but not the Inference Schedule or the Accounting Advices.

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12 Cf *DJL v Central Authority* (2000) 201 CLR 226 at 237 [13]; [2000] HCA 17.

13 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 624 [87]; [2000] HCA 11.

The Inference Schedule and the Accounting Advices were made the subject of a s 50 order until further order.

27 His Honour published his reasons on 29 August 2008[14] and made further orders. Order 1 of those orders was amended by order of 12 February 2010 made by Emmett J after the hearing in this Court. The result has been to vacate all s 50 orders in the proceeding, and to extend leave, granted to News and Fairfax on 21 August 2008 under O 46 r 6(3) to inspect and copy documents, to the Inference Schedule and the Accounting Advices. It was from the vacation of the s 50 order made on 21 August 2008, restricting publication of the Inference Schedule and the Accounting Advices, that Mr Hogan sought leave to appeal to the Full Court of the Federal Court.

28 The Full Court granted leave to appeal, but by majority (Moore and Jessup JJ; Gilmour J dissenting) dismissed the appeal on 19 June 2009[15]. In this Court, Mr Hogan seeks relief which would have the effect of reinstating the s 50 order with respect to the Inference Schedule and the Accounting Advices and dismissing the O 46 r 6(3) application by News and Fairfax.

The construction of s 50

29 It has been assumed, no doubt correctly, that an order made under s 50 of the Federal Court Act may be made until further order and, in any event, may be vacated if the continuation of the order no longer appears to the Court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth. As a general proposition, a court remains in control of its interlocutory orders and a further order will be appropriate, for example, where new facts and circumstances appear or are discovered, which render unjust the enforcement of the existing order[16].

30 As it appears in s 50, "necessary" is a strong word. Hence the point made by Bowen CJ in *Australian Broadcasting Commission v Parish*[17], that the

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14 *P v Australian Crime Commission* (2008) 250 ALR 66.

15 *Hogan v Australian Crime Commission* (2009) 177 FCR 205.

16 See *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177-178; [1981] HCA 39.

17 (1980) 29 ALR 228 at 234.

collocation of necessity to prevent prejudice to the administration of justice and necessity to prevent prejudice to the security of the Commonwealth "suggests Parliament was not dealing with trivialities". Further, as indicated earlier in these reasons: (a) s 50 is an example of a provision authorising the Federal Court to make orders for the exercise of its jurisdiction other than in open court as mandated by s 17(1); and (b) "the administration of justice" spoken of in s 50 is that involved in the exercise by the Federal Court of the judicial power of the Commonwealth; this is a more specific discipline than broader notions of the public interest.

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 those characteristics[18].

32 If it appears to the Federal Court, on the one hand, 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 that 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.

33 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[19]. 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. It would, for example, be an odd construction of s 50 which supported the refusal of an order under s 50 notwithstanding that it

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18 A statement by Fullerton J to like effect, with respect to the powers of the Supreme Court of New South Wales, was approved by Hodgson JA (Hislop and Latham JJ concurring) in *Attorney-General (NSW) v Nationwide News Pty Ltd* (2007) 73 NSWLR 635 at 641.

19 *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 138-139 [40]; [2008] HCA 13.

appeared to the Court to be necessary to make an order to prevent prejudice to the security of the Commonwealth.

34 The character of an appeal (on the assumption that leave is necessary under s 24(1A) of the Federal Court Act and is granted) will depend upon the construction of s 24 of that Act. This provides for jurisdiction to hear and determine appeals from orders[20] and s 28 provides for the making of appropriate orders on appeal. The terse provisions in the Federal Court Act have given rise to difficulty[21]. It is sufficient for present purposes to say that on his appeal from the decision of Emmett J, Mr Hogan should have failed if the decision was correct. This is on the assumption, in favour of Mr Hogan as appellant, that the decision of Emmett J was more than an interlocutory decision on a matter of practice or procedure. Appellate intervention in matters of practice or procedure, where no questions of general principle are at stake, has been said to require the exercise of particular caution[22].

The reasons of Emmett J of 29 August 2008

35 Emmett J identified the critical question as whether, once the Inference Schedule and the Accounting Advices had been introduced by Mr Hogan into evidence, it remained necessary in order to prevent prejudice to the administration of justice that this material not be made available to the public. In that regard, it was significant that Mr Hogan had not adduced evidence of any specific prejudice that would or might flow from disclosure of that material.

36 His Honour said[23]:

> "I do not consider that the applicant has established that it was only because of the expectation that s 50 orders would continue in perpetuity that the other material in question was tendered. It would be fair to

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20 See the definition of "judgment" in s 4.

21 See, for example, *R v Hillier* (2007) 228 CLR 618 at 627-628 [15]-[16]; [2007] HCA 13.

22 *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 78 [53]; [2006] HCA 46.

23 (2008) 250 ALR 66 at 80.

> conclude that the applicant's decision to adduce evidence was driven by the object of succeeding in his application against the [ACC]. It is difficult to see how the proceeding could have been prosecuted otherwise than by tender of the material in question. In the absence of the material, it would have been well nigh impossible for the court to understand what the issue was. The court directed the [ACC] to particularise its assertion that there were reasonable grounds for believing that the privileged documents in dispute had been brought into existence in the furtherance of a fraud or commission of an offence. There is no evidence to suggest that the [ACC] was motivated by bad faith of some sort."

The Full Court

37 In his dissenting reasons in the Full Court, Gilmour J considered that while Emmett J had correctly identified the relevant principles, he had erred in rejecting matters relevant to the exercise of the power to vacate the s 50 order in question[24]. In particular, Gilmour J said[25]:

> "The legitimate interest of the public in the full disclosure of the evidence tendered by the appellant on that day is, in my opinion, in these circumstances, marginal and of little weight when set against the potentially highly damaging release of inferences said by the [ACC] to arise going to alleged criminal conduct on the part of the appellant but in the absence of any charges laid against him as well as the intrusion into the confidential financial affairs of the appellant by the release of detailed private financial and taxation advices prepared by the Accountants."

38 In the Full Court, and again in this Court, Mr Hogan submitted that Emmett J had failed to recognise what was said to be "the inherently confidential nature" of the Inference Schedule and the Accounting Advices. In rejecting this submission, Jessup J, with whom Moore J agreed generally, noted that Mr Hogan was not relying here on legal professional privilege and continued[26]:

> "How, then, does the applicant assert that the contentious documents were, and remain, inherently confidential? It is true that,

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24 (2009) 177 FCR 205 at 238.

25 (2009) 177 FCR 205 at 237.

26 (2009) 177 FCR 205 at 220-221.

> generally speaking, every person has a right to keep from the view of others, or of the world at large, documents and things which he or she regards as his or her private concern. But so to propose is no more, in my view, than to state a conclusion about the absence of a right in any other person to view such documents and things. There are, of course, all manner of situations in which a claim to keep a particular document confidential will be recognised by a court. For example, equity recognises that the information contained in certain documents is, of its nature and by reason of the circumstances of its communication, subject to a duty of confidence. So too will the law protect trade secrets in well-recognised situations. And it is commonly the case that the court will protect from the public eye personal or commercial information the value of which as an asset would be seriously compromised by disclosure. In this latter category, the source of the jurisdiction (in this court) to provide such protection is s 50 itself. That is to say, the question will always be: is an order necessary to prevent prejudice to the administration of justice? Absent an affirmative answer to this question it is, in my view, almost meaningless to propose that documents themselves are, or that the information in them is, inherently confidential to an extent justifying, or assisting in the justification of, the making of an order permanently protecting them from public view."

39 We agree with what his Honour said in that passage.

Conclusions

40 Leave of the Federal Court for News and Fairfax to inspect the Inference Schedule and the Accounting Advices should not be given if there remains in force an order made under s 50 which forbids or relevantly restricts their publication. In the absence of such an order, the question in such a case would be whether in circumstances where the evidence was tendered by a particular party that party might successfully oppose the making of an order under O 46 r 6(3) for inspection, upon the ground that the evidence contained material of a personal or private nature. Emmett J distinguished the situation respecting material on the file of the Court but not tendered and admitted into evidence, and said that the interests of open justice were not engaged there and that leave under O 46 r 6(3) should not be granted in such a case[27]. His Honour was correct in that conclusion.

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27 (2008) 250 ALR 66 at 70.

41 However, if the file material has been admitted into evidence the interests of open justice are engaged. Where, as here, the party in question adduces no evidence of apprehended particular or specific harm or damage, particularly by disclosure of the Accounting Advices as Emmett J noted[28], leave properly will be granted under O 46 r 6(3).

42 However, there should be a different outcome where a relevant s 50 order remains in force or should not have been vacated. The administration of justice by the Federal Court, which is the focus of s 50, certainly includes not only the generally recognised interest in open justice openly arrived at[29] which is reinforced by the terms of s 17(1), but also restraints upon disclosure where this would prejudice the proper exercise of its adjudicative function. Bowen CJ pointed this out in *Australian Broadcasting Commission v Parish*[30]. His Honour went on to describe the litigation in *Parish* as analogous to a case where confidential information "is the subject-matter of the proceedings"; he concluded that it was in the interests of justice that the processes for determination of those very proceedings not destroy or seriously depreciate the value of that subject matter[31].

43 That is not this case. Nor, contrary to the appellant's submissions, does it provide a fairly close analogy to this case. The placing of material in evidence, even on the faith of what for the time being would be a restriction imposed by a s 50 order, is a matter of forensic decision. The price of such a decision may be the subsequent disclosure, as is often the case in litigation, of embarrassing publicity[32]. It is no sufficient answer to brandish the term "inherently confidential", and rely upon the assumptions in favour of Mr Hogan made without an evidentiary basis.

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28 (2008) 250 ALR 66 at 79.

29 See *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 520-521 [49]; [2009] HCA 4.

30 (1980) 29 ALR 228 at 233.

31 (1980) 29 ALR 228 at 235.

32 See *Herald & Weekly Times Ltd v Williams* (2003) 130 FCR 435 at 444.

44 The decision of Emmett J was correct and the appeal to the Full Court properly failed.

Orders

45 The appeal should be dismissed. The appellant should pay the costs of the third respondents, News and Fairfax. The first and second respondents, the ACC and its Chief Executive Officer, were represented by the Commonwealth Solicitor-General, whose submissions were somewhat balanced between those of the other contestants. We would make no order for the costs of the first and second respondents.