

## Legal professional privilege over accounting documents

*Hogan v Australian Crime Commission* [2010] HCA 21



Paul Hogan in the office of his solicitor. Photo: Rene Nowytarger / Newspix

The High Court rejected an argument that the Federal Court should have made orders restricting publication of evidence on the basis that it was of an ‘inherently confidential nature’, holding that any such order must be necessary to prevent prejudice to the administration of justice.

As a part of its investigation of promoters and participants in tax haven arrangements, ‘Operation Wickenby’, the Australian Crime Commission (ACC) issued a notice requiring an accounting firm to produce documents relating to the financial affairs of Paul Hogan.

In a Federal Court proceeding Mr Hogan maintained a claim of legal professional privilege over the accounting documents. The ACC submitted that the documents were made in furtherance of a crime or fraud and, as a consequence, no privilege existed.

During the course of the Federal Court proceeding, Emmett J made a number of orders pursuant to section 50 of the *Federal Court of Australia Act 1976* restricting the publication of the identity of Mr Hogan and the contents of affidavits and exhibits in the proceeding. Section 50<sup>1</sup> 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 particular evidence, or the

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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.

A motion filed by Mr Hogan seeking further and better discovery from the ACC was supported by an affidavit of Mr Hogan’s solicitor exhibiting documents which included a schedule of the inferences the ACC sought to draw as to Mr Hogan’s involvement in tax haven arrangements and file notes and advices created by Mr Hogan’s accountants (relevant documents). It was the relevant documents, which were the subject of the appeal to the High Court.

Upon the application of Mr Hogan, Emmett J made an order under section 50 with respect to the relevant

documents.<sup>2</sup> Mr Hogan was subsequently successful in his application for further and better discovery and in his assertion of privilege.

Media organisations applied to the court for access to the court's files and the vacation of all section 50 orders made by the court. Emmett J vacated section 50 orders previously made, including with respect to the relevant documents. His Honour held that section 50 only allowed the court to prohibit publication of material otherwise accessible on a court file if its disclosure would prejudice the administration of justice. Mr Hogan had failed to identify any specific prejudice other than the broad assertion that the relevant documents were his 'private and confidential information'.<sup>3</sup> By majority, the full court dismissed Mr Hogan's appeal.<sup>4</sup>

Both in the full court and the High Court, Mr Hogan argued that the relevant documents were of an 'inherently confidential nature' and that the Federal Court had failed to recognise that fact. Relevantly, Mr Hogan did not rely on any claim of legal professional privilege in relation to the relevant documents.

In dismissing the appeal, the High Court recited and explicitly approved a passage<sup>5</sup> from the judgment of Jessup J in the full court (with whom Moore J agreed). His Honour recognised that the court will protect certain personal and public information and that the source of the Federal Court's jurisdiction to protect such information is section 50, in respect of which:

... 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.<sup>6</sup>

In construing section 50, the High Court noted that 'necessary' in section 50 'is a strong word' and in order

for a section 50 order to be made it will need to be more than 'convenient, reasonable or sensible, or to serve some notion of the public interest'.<sup>7</sup>

The court concluded by noting that placing material into evidence 'is a matter of forensic decision' and although the price of that decision may include 'embarrassing publicity', 'it is no sufficient answer to brandish the term 'inherently confidential'.' Once evidence is admitted in a proceeding 'the interests of open justice' will be considered alongside the interests of the parties.<sup>8</sup>

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The judgment is a salutary reminder to litigants and their lawyers that particular care must be taken in the exercise of forensic decisions as to the evidence to be adduced in proceedings. The jurisdiction of the Federal Court to restrict publication of evidence is limited to section 50 and outside of the terms of that section, broad notions of confidentiality will not assist.

**By Ben Koch**

#### Endnotes

1. Now s 50(1) following the amendments introduced by the *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009*.
2. *P v Australian Crime Commission* [2008] FCA 1336; 250 ALR 66.
3. [2008] FCA 1336 at [61]–[62].
4. *Hogan v Australian Crime Commission* (2009) 177 FCR 205.
5. [2010] HCA 21 at [38]–[39].
6. (2009) 177 FCR 205 at 221.
7. [2010] HCA 21 at [30]–[31].
8. [2010] HCA 21 at [41]–[43].