Before the High Court

The Paradox of Public Disclosure: *Hogan v Australian Crime Commission*

Judith Bannister*

Abstract

Actor Paul Hogan is before the High Court attempting to keep his personal financial and taxation information out of the newspapers. The documents being fought over were put into evidence by Paul Hogan's lawyers to support an application for further and better discovery in proceedings claiming legal professional privilege over documents seized by the Australian Crime Commission. The principle of open justice requires full public disclosure of court proceedings unless publication of the information would prejudice the administration of justice. It is argued in this article that the protection of information flows to the courts is fundamental to the administration of justice and that the search for truth may sometimes justify restrictions on publication. Having said that, it is by no means clear that the public interest in full disclosure should necessarily save Paul Hogan's personal information from public disclosure in this case.

Introduction

It is a fundamental principle of the common law that court proceedings are conducted 'publicly and in open view'.[1] This exposure to public scrutiny is intended to maintain public confidence in the integrity and independence of the courts 'without which abuses may flourish undetected'.[2] However, the principle is not absolute and the proper administration of justice may at times require the courts to be closed and publication of information to be suppressed. The exceptions that displace the fundamental principle of open justice are 'few and strictly defined'[3] by the courts. That publicity would be embarrassing to a party in the proceedings will not in itself be sufficient reason to grant a non-publication order. This is the problem faced by Paul Hogan who is currently before the High Court seeking to protect from publication information about his personal, financial and taxation affairs. The Federal Court made non-publication orders in the early stages of the *Hogan* case, but later revoked

* Senior Lecturer, Law School, University of Adelaide.

1 *Scott v Scott* [1913] AC 417, 441.

2 *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

3 *John Fairfax Publication Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344, 353 (Spiegelman CJ).

them and Nationwide News Pty Ltd and John Fairfax Pty Ltd then sought access to the documents. Paul Hogan appealed the decision to remove the non-publication orders to the Full Court of the Federal Court and then the High Court. Oral argument was heard by the High Court on 4 February 2010. Throughout the appeals Paul Hogan has argued that publication of his financial information would prejudice the administration of justice. In this article I will consider that argument and the related question: can compelled disclosure to the public domain lead to suppression of information? I argue that sometimes it is necessary to divulge information in a controlled environment to ensure that full disclosure is made. Paradoxically, the threat of compelled disclosure to the public domain may sometimes diminish the range of information sources publicly available.

Open Justice

Open justice has long been considered a central tenet of our legal system;[4] the Australian High Court has said that publicity is one of the normal attributes of a court.[5] The Supreme Court of Canada has listed various rationales for the principle including: the pursuit of the truth; fostering the integrity and legitimacy of judicial proceedings; the promotion of democracy; public education; and fostering participation in debates by the wider community.[6]

Open justice requires that the courts be accessible to members of the public and that they be free to speak about what they have seen there. In modern times the media has played a central role in this process and if the courts are to be truly open, journalists must also be free to make fair and accurate reports of proceedings including the publication of evidence. In recognition of this role, the courts will grant the media standing to challenge suppression orders.[7] Open justice includes allowing the media to report evidence heard in open court that a member of the public might have heard had they attended and also granting access to court documents.[8]

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4 For a discussion of the history of open justice see Kirby P in: *Raybos Australia v Jones* (1985) 2 NSWLR 47, 50–3. See also: James Spigelman, 'Seen to be Done: The Principle of Open Justice — Parts 1 and 2' (2000) 74 *Australian Law Journal* 290, 378; James Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (2006) 29 *University of New South Wales Law Journal* 147; Andrew Kenyon, 'Not Seeing Justice Done: Suppression orders in Australian Law and Practice' (2006) 27 *Adelaide Law Review* 279; Sharon Rodrick, 'Open Justice, the Media and Avenues of Access to Documents on the Court Record' (2006) 29 *University of New South Wales Law Journal* 90.

5 *Dickason v Dickason* (1913) 17 CLR 50, 51.

6 *Named Person v Vancouver Sun* [2007] 3 SCR 253, 272–3, 295–8.

7 *Herald & Weekly Times Ltd v Williams* (2003) 130 FCR 435, 440.

8 *Tuqiri v Australian Rugby Union Ltd* [2009] NSWSC 781; Sharon Rodrick, 'Open Justice, the Media and Avenues of Access to Documents on the Court Record' (2006) 29 *University of New South Wales Law Journal* 90.

Open justice and the proper administration of justice are both important public interests. The concept of the public interest is recognised as being notoriously difficult to define, and that is certainly true when it comes to cases involving claims to information access. When claims are made for a right to publish in the public interest the courts emphasise that 'there is a world of difference between what is in the public interest and what is of interest to the public'.[9] No weight will be given to public interest claims when the disclosure merely provides amusement or gratifies curiosity.[10] The public interest must also be understood in terms of the interest of the public generally as distinct from the interest of an individual or group of individuals.[11] As mentioned above, the possibility that public disclosure would be embarrassing to a party in the proceedings will not be sufficient reason to grant a non-publication order.

> It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms … A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported.[12]

It is true that when cases involving ordinary people come before the courts they are heard in public, but the public domain is a curious place. Ordinary people can maintain a good deal of privacy while ostensibly being exposed to the public domain if they are known to only a small group of acquaintances.[13] There is relative privacy in obscurity. For public figures and celebrities such as the actor Paul Hogan, the public domain is truly public and modern communications technologies have made what once would have been local disclosure in a community now available to the entire world. This may generate little sympathy from readers — it is the price of fame and may be the product of years of valuable publicity that has enhanced a career. Regardless of one's views on the nature of celebrity, as

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9 *Lion Laboratories Ltd. v Evans* [1985] QB 526, 553.

10 *Director of Public Prosecutions v Smith* [1991] 1 VR 63, 73–5; *Osland v R* (2008) 234 CLR 275, 318 (Kirby J).

11 *Director of Public Prosecutions v Smith* [1991] 1 VR 63, 75; *Osland v R* (2008) 234 CLR 275, 318 (Kirby J).

12 *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131, 142–3 (Kirby P). In New Zealand where a tort of privacy has been recognised by the courts (*Hosking v Runting* [2005] 1 NZLR 1) the public interest in open justice may still prevail when weighed against the privacy interests of the plaintiff. See: *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277. For a discussion of a possible tort of privacy in Australia see: *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; *Giller v Procopets* (2008) 79 IPR 489.

13 Although depending upon the nature of matter, modern media practices can sometimes turn mere involvement in court proceedings into a form of celebrity.

explained by Kirby J in the quote above,[14] a personal desire for privacy is not sufficient grounds for denying the media access to the courts. The arguments in the *Hogan* case must focus upon the public interests in the open administration of justice and the effective administration of justice. Generally the two complement each other, but sometimes there may be conflict.

Departure from Open Justice

Open justice is deeply entrenched in Australian law,[15] but it is not an absolute principle.[16] The proper administration of justice may at times require the courts to be closed and publication of information suppressed.[17] The common law recognises the need to protect vulnerable parties, notably 'lunatics' and children.[18] In some cases legal proceedings would be rendered futile if they were conducted in open court, for instance if the very subject matter of the dispute would be destroyed by publicity as would occur if there was full disclosure in cases involving trade secrets.[19] The common law has also recognised the need to protect victims of blackmail, police informers and national security.[20] In some of these examples it is the administration of justice in the proceedings currently before the court that is considered, in others, such as the protection of police informers, it is protection of the future supply of information that suggests a broader conception of the administration of justice.[21]

A range of statutory provisions also provide exceptions to the principle of open justice granting courts the power to make non-publication orders, also known as 'suppression orders'. So, for instance, children and the victims of certain sexual offences can be protected.[22] Courts defend the principle of open justice by construing the statutory derogations strictly and narrowly.[23] The restriction on open justice that is imposed by statute must also be compatible with the implied freedom of political communication that protects the system of representative and responsible government established by the *Commonwealth*

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14 *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131, 142–3 (Kirby P).

15 *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501, 520; *Dickason v Dickason* (1913) 17 CLR 50; *Russell v Russell* (1976) 134 CLR 495, 520.

16 *Re Application by the Chief Commissioner of Police (Vic)* (2005) 214 ALR 422, 448; *Russell v Russell* (1976) 134 CLR 495, 520.

17 See discussion in: Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (2002).

18 *Scott v Scott* [1913] AC 417.

19 *Scott v Scott* [1913] AC 417, 437.

20 *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131, 141.

21 *Fairfax* (1991) 26 NSWLR 131, 141 (Kirby P). See discussion in: Andrew Kenyon, 'Not Seeing Justice Done: Suppression orders in Australian Law and Practice' (2006) 27 *Adelaide Law Review* 279, 284–6.

22 See examples listed in: David Rolph, Matt Vitins and Judith Bannister, *Media Law: Cases, materials and commentary* (2010) 411.

23 *Raybos Australia v Jones* (1985) 2 NSWLR 47, 55 (Kirby P).

Constitution.[24] The implied freedom concerns discussion of the legislature and executive rather than the courts,[25] but a communication that concerns the courts may fall within the scope of the freedom if it also has a bearing on the conduct of the legislature or executive.[26] Any burden on that freedom must be reasonably and appropriately adapted to serve a legitimate end that is compatible with our system of government. In *John Fairfax Pty Ltd v A-G (NSW)*[27] the New South Wales Court of Appeal held that it went too far to require all appeals by the Attorney-General on questions of law in contempt proceedings to be held *in camera* and prohibit all publication.[28] The section concerning non-publication orders that is at issue in the *Hogan* case[29] does not go so far.

Section 50 of the *Federal Court of Australia Act 1976* (Cth)

Section 17(1) of the *Federal Court of Australia Act 1976* (Cth) provides that the jurisdiction of the Federal Court shall be exercised in open court, subject to statutory exceptions. Section 50(1) concerns prohibition on the publication of evidence:

> 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 in order to prevent prejudice to the administration of justice or the security of the Commonwealth.

Chief Justice Bowen stated in *Australian Broadcasting Commission v Parish* that open justice is the underlying assumption of s 50 and should be taken into account, but must be weighed against the public interest in the court doing justice between the parties.[30] *Australian Broadcasting Commission v Parish* concerned confidential agreements for 'World Series' cricket matches that was challenged by the Australian Broadcasting Commission (ABC).[31] The confidential material in that case was analogous to that found in trade secrets cases.[32] Public disclosure would have weakened the negotiating strength of the Australian Cricket Board and publicity alone could have achieved the ABC's object without the need for it to succeed in its legal argument.[33] The Full Court of the Federal Court reversed the primary judge's decision not to make a non-publication order and held that it

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24 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

25 *John Fairfax Pty Ltd v Attorney-General (NSW)* (2000) 158 FLR 81, 96.

26 See discussion in: Sharon Rodrick, 'Open Justice, the Media and Avenues of Access to Documents on the Court Record' (2006) 29 *University of New South Wales Law Journal* 90, 116.

27 (2000) 158 FLR 81.

28 *John Fairfax Pty Ltd v A-G (NSW)* (2000) 158 FLR 81, 104. See the brief discussion in relation to *Federal Court of Australia Act 1976* (Cth) s 50 in *Siam Polyethylene Co Ltd v Minister of State for Home Affairs (No 3)* [2009] FCA 839.

29 *Federal Court of Australia Act 1976* (Cth) s 50.

30 (1980) 43 FLR 129, 133–4 ('*Parish*').

31 Under *Trade Practices Act 1974* (Cth).

32 *Parish* (1980) 43 FLR 129, 134.

33 *Parish* (1980) 43 FLR 129, 146.

was necessary to make the order to avoid prejudice to one of the parties. '[A] party should not be seriously prejudiced merely because non-disclosure may present a somewhat distorted picture of the litigation to the public'.[34] It should be emphasised that what is being protected here is the public interest in the administration of justice rather than the private interests of the parties.

In *Herald & Weekly Times v Williams*,[35] the Full Court of the Federal Court removed a suppression order on information that identified a well-known Australian Rules footballer who had sought judicial review of a taxation appeal. Justice Merkel commented in that case that the footballer had not presented evidence that showed he had been deterred from commencing the appeal despite the obvious interest that the media had in his affairs.[36] It was not reasonable for him to assume that the protection he had been granted before the Administrative Appeals Tribunal would continue in the courts.[37] The Full Court of the Federal Court considered it possible that a s 50 order might be granted 'if there was a real risk that the applicant would be prevented or deterred from bringing the proceeding if a suppression order were not made' although that was not the position in that case.[38]

The *Hogan* case

For a number of years the Australian Crime Commission (the ACC) has been investigating allegations that taxable income has been concealed by tax advisers and their prominent clients. This has been part of Operation Wickenby, which is a multi-agency taskforce established to investigate offshore tax avoidance schemes and has resulted in a number of court cases. Actor Paul Hogan is one of the people who have been investigated and the events that led to the matter currently before the High Court began when the ACC required Mr Hogan's accountants to produce his personal taxation documents as part of those investigations. Paul Hogan[39] claimed legal professional privilege in the documents. Justice Emmett in the Federal Court held that the documents in dispute had been brought into existence for the predominant purpose of either requesting or providing legal advice[40] but the ACC resisted the claim for privilege with the argument that the documents had been created for fraudulent or criminal purposes.[41] Paul Hogan sought further and better discovery of documents in relation to the ACC's claim that the documents in dispute were not privileged because of fraud. The documents that are being fought over in the High Court

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34 *Parish* (1980) 43 FLR 129, 147 (Franki J).

35 (2003) 130 FCR 435.

36 *Herald & Weekly Times v Williams* (2003) 130 FCR 435, 445.

37 *Herald & Weekly Times v Williams* (2003) 130 FCR 435, 441.

38 *Herald & Weekly Times v Williams* (2003) 130 FCR 435, 441, 446 (Merkel J).

39 The proceedings were initially commenced by his adviser who was then replaced by Paul Hogan: *Hogan v ACC* (No 4) [2008] FCA 1971, [2].

40 *A3 v ACC (No 2)* [2006] FCA 929.

41 *P v ACC* (2008) 250 ALR 66, 68.

are not the privileged documents, but others that were put into evidence by his lawyers to support that discovery application. These documents have come to be called the 'contentious documents';[42] they contain a schedule of inferences that set out allegations that the ACC planned to make to support its argument that the documents were created in furtherance of crime or fraud and confidential advices written by Paul Hogan's accountant.

The ACC ultimately abandoned its argument concerning the loss of privilege and returned the documents that had been seized.[43] However, the documents that were put into evidence by Paul Hogan's lawyers to support the application for further and better discovery remained on the court file. When those documents were tendered they had been protected by a non-publication order.[44] Various non-publication orders had been sought and supported by both sides and in the early stages of the proceedings Paul Hogan was referred to by a pseudonym. The Federal Court granted orders suppressing the names of persons being investigated and any information that might directly or indirectly identify them. Individuals being investigated wished to avoid damage to their reputation and the embarrassment of publicity.[45] The ACC also argued for non-publication orders on the grounds that disclosure would prejudice its investigations,[46] although Allsop J expressed some concern because the ACC had itself courted publicity with media releases that disclosed the general nature of the investigation being undertaken.[47]

Later in the proceedings the ACC withdrew its support for the non-publication order that protected the documents tendered by Paul Hogan's lawyers. While the ACC's position had changed the order was extended on 19 May 2008 with the consent of the ACC under the understanding that the question of the s 50 orders would be revisited. The ACC accepted the confidentiality order for the time being but said 'a time must come as it were when confidentiality in relation to this case ceases to be of any meaning'.[48] Justice Emmett allowed the status quo to be maintained 'at least for a short time anyway'.[49] His Honour later revoked the s 50 orders[50] and Paul Hogan's name was revealed,[51] although there had been earlier suspicions and speculation about his identity.[52] The newspapers were given the opportunity to adduce evidence to show whether significant parts of the material in question were already in the public domain. Paul Hogan had himself revealed publicly that he was being investigated by the ACC and it had been reported in the media that he was the subject

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42 *Hogan v ACC* (2009) 177 FCR 205, 207.
43 *Hogan v ACC (No 4)* [2008] FCA 1971, [4].
44 *Federal Court of Australia Act 1976* (Cth) s 50.
45 *C v ACC* [2005] FCA 1736, [11].
46 *C v ACC* [2005] FCA 1736, [12].
47 *C v ACC* [2005] FCA 1736, [20]–[22].
48 *Hogan v ACC* (2009) 177 FCR 205, 212.
49 *Hogan v ACC* (2009) 177 FCR 205, 212.
50 *P v ACC* (2008) 250 ALR 66, 80.
51 Susannah Moran, 'Hogan associates in ACC tax probe', *The Australian* (Sydney), 22 August 2008, 5.
52 *P v ACC* [2008] FCA 1377.

of a special investigation. However, there was no information discovered in the public domain concerning the personal, financial or taxation affairs in the detail that is contained in the documents that were the subject of the s 50 order.[53]

After the ACC withdrew its support for the s 50 order that had protected the documents tendered by his lawyers Paul Hogan argued that the orders should remain in force. Nationwide News Pty Ltd and John Fairfax Pty Ltd intervened and sought revocation of the orders and access to the documents.[54] The solicitor acting for Paul Hogan had worked on the basis that the ACC would either consent to, or at least not oppose, confidentiality in these proceedings. The solicitor said that without that understanding about confidentiality Paul Hogan's personal financial information would have been withheld or only used in a redacted form in open court.[55] However, as Emmett J pointed out when the matter came before him, it was for the court to decide whether the s 50 orders ought to be continued, it was not a matter to be agreed between the parties.[56]

Paul Hogan also argued that the age of the internet and other electronic research has made it too easy to delve into the personal affairs of prominent figures before the courts and that a non-publication order was necessary to protect his right to maintain confidentiality in relation to his personal, financial and taxation affairs. He argued that there was other material available to the public that disclosed the nature of the proceedings and was sufficient to satisfy the public interest in open justice without disclosing his personal information.[57] However, the availability of other information was irrelevant when considering whether it was *necessary* in order to prevent prejudice to the administration of justice to suppress evidence that had been tendered in open court. Justice Emmett acknowledged that Paul Hogan was effectively compelled to disclose that information to the court, but his Honour was not convinced that it was only because of the s 50 orders that the evidence was tendered or that public disclosure would prejudice the administration of justice. His Honour refused access to material that was on the court file but not in evidence. For the material that was admitted into evidence in open court Emmett J revoked the non-publication order and granted access to the media and members of the public.[58] Paul Hogan appealed that decision to the Full Court. A majority in the Full Court of the Federal Court upheld Emmett J's decision.[59]

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53 *P v ACC* (2008) 250 ALR 66, 79.
54 Under *Federal Court Rules* O 46 r 6.
55 *P v ACC* (2008) 250 ALR 66, 78.
56 *P v ACC* (2008) 250 ALR 66, 79.
57 *P v ACC* (2008) 250 ALR 66, 78.
58 *P v ACC* (2008) 250 ALR 66, 80.
59 *Hogan v Australian Crime Commission* (2009) 177 FCR 205 (Moore and Jessup JJ, Gilmour J dissenting).

Paul Hogan argued before the Full Court that the primary judge had not properly balanced the relevant competing interests. The majority judges[60] concluded that the various interests were not evenly balanced at the start, rather open justice is the norm and a party seeking to establish the exception of non-publication is required to satisfy the court that such an order is necessary to prevent prejudice to the administration of justice.[61] The majority judges held that Emmett J had adopted the correct approach.[62]

Derogation from open justice

Justice Gilmour, in dissent, was more sympathetic to Paul Hogan's argument that when weighing the various interests the degree of derogation from the principle of open justice should be considered. The argument was that even with a non-publication order on the contentious documents, other material such as the transcript of the hearing was still available and the public would be able to follow the argument and understand the fundamental questions involved without knowledge of the personal details.[63] Given that other material was available, the degree of derogation from the principle of open justice would not be as great.

The metaphor of 'weighing in the scales' the countervailing public interests was used by Bowen CJ in *Parish*.[64] His Honour went on to suggest that it was not necessary to load the entire weight of the principle of open justice on one side; rather, the degree of derogation ought to be considered.[65] With respect, if this approach is adopted there is a risk that the concept of open justice will be diminished. It would no longer be simply that the courts are open, the process is transparent and subject to certain exceptions that are necessary to protect other public interests, the public may hear and see everything. There will be a fundamental shift if the courts begin asking: is enough information available for the public to understand what is going on? Another metaphor suggests itself — not of scales but of judges acting as gatekeepers when they determine what information is necessary or relevant for the public to access.

Justice Gilmour considered context to be relevant to the issue of derogation in the *Hogan* case. It involves a celebrity and the media interest goes beyond a desire to understand the nature of the proceedings:

> Ordinarily such matters do not attract any degree of public attention. It is not difficult to understand why the interveners have an interest in the confidential material. It is likely, no doubt,

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60 Jessup, J, Moore J agreeing.
61 *Hogan v ACC* (2009) 177 FCR 205, 224.
62 *Hogan v ACC* (2009) 177 FCR 205, 224 (Jessup J, Moore J agreeing).
63 *Hogan v ACC* (2009) 177 FCR 205, 237.
64 *Parish* (1980) 43 FLR 129, 133–4.
65 *Parish* (1980) 43 FLR 129, 136.

> to attract wide attention in the media if made available, but not, I venture to suggest, to enable the public to understand why interlocutory discovery orders were made.[66]

With respect, why the media are interested ought not to be a relevant consideration. A perception that the information that is publicly available is what the judiciary considers to be necessary to understand the nature of the proceedings would undermine the object of maintaining public confidence in the process.

The subject matter of the proceedings

A fundamental difference between the majority and minority judges in the Full Court arose from the way the judges characterised the nature of the information in the contentious documents. Paul Hogan argued before the Full Court that the information was inherently confidential and was comparable to the commercially confidential material that was protected in *Australian Broadcasting Commission v Parish.*[67] Justice Jessup[68] rejected that argument and emphasised that the documents were not themselves subject to legal professional privilege. His Honour acknowledged that individuals will legitimately seek to keep information of this kind from the view of others and the world at large and that equity will enforce duties of confidence. However, breach of confidence was not claimed in this case. The ACC had not breached Paul Hogan's confidence; the information had been tendered in open court by his own lawyers. Justice Jessup concluded that it is almost meaningless to characterise the information as 'inherently confidential', as Paul Hogan sought to do, when the court's jurisdiction to provide protection arose from s 50 of the *Federal Court of Australia Act 1976* (Cth) and the necessity to prevent prejudice to the administration of justice. Indeed, Paul Hogan had succeeded in his claim and the privileged documents had been returned. When considered in that way 'the subject matter of the litigation — the claim to legal professional privilege — would not be endangered'[69] by disclosing to the public the documents on the court record.

Justice Gilmour, in dissent, took a different approach. He categorised the subject matter of the discovery application as being concerned with confidential information. It was in the public interest that the court deal appropriately with such confidential material and 'possible embarrassment or personal prejudice is very much subordinated to [that]'.[70] The very disclosure of the confidential information was sufficient prejudice.

There is a wealth of authority supporting the view that non-publication orders are appropriate when the subject matter of the litigation would be destroyed by publication.

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66 *Hogan v ACC* (2009) 177 FCR 205, 236–7.
67 (1980) 43 FLR 129.
68 Moore J agreeing.
69 *Hogan v ACC* (2009) 177 FCR 205, 226.
70 *Hogan v ACC* (2009) 177 FCR 205, 235.

Trade secret cases are the obvious example.[71] A broad categorisation of the subject matter of this litigation as concerning the control of confidential information in the form of legal professional privilege might deal with this particular dispute, but that resolution would leave some fundamental issues unresolved. What if the tender of the confidential information had been in support of further and better particulars in some other matter? In *Herald & Weekly Times Ltd v Williams*,[72] for instance, the Full Court of the Federal Court set aside suppression orders in judicial review proceedings arising from an Australian Rules footballer's taxation appeal.

Justice Gilmour also construed prejudice to the administration of justice as a reference to the public interest in doing justice between the parties.[73] In his Honour's opinion that included 'the particular public interest in having the court deal responsibly with the confidential affairs of citizens'.[74] This does not require the confidential information to be the subject of the proceedings. His Honour was concerned about the compelled public disclosure of confidential documents:

> It would be a curious result if, in attempting to preserve claims to legal professional privilege, an applicant was compelled to advance evidence of private and confidential information upon an interlocutory dispute which was effectively forced upon him by [arguments advanced by] the other party.[75]

Was Paul Hogan compelled to disclose his personal information to the court?

Compelled disclosure

There are two ways of looking at Paul Hogan's position in relation to disclosure of the documents. One interpretation is that he had no option but to disclose, another is that his lawyers would have limited the information that they disclosed had they been aware that confidentiality would not be maintained. The primary judge, Emmett J, acknowledged that Paul Hogan had little choice if he wished to succeed.

> It would be fair to 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.[76]

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71 *Parish* (1980) 43 FLR 129, 132.

72 (2003) 130 FCR 435.

73 Citing Bowen CJ in *Australian Broadcasting Commission v Parish* (1980) 43 FLR 129, 133.

74 *Hogan v ACC* (2009) 177 FCR 205, 232 (Gilmour J).

75 *Hogan v ACC* (2009) 177 FCR 205, 235.

76 *P v ACC* (2008) 250 ALR 66, 80.

However, his Honour was not convinced that public disclosure would have prevented Paul Hogan from pursing his application.[77]

In the Full Court Gilmour J, in dissent, thought it was evident that Paul Hogan had no choice but to rely upon the material if he was to advance his application.[78] Justice Gilmour was more sympathetic to the dilemma Paul Hogan faced; in his Honour's opinion s 50 orders ought to be granted to resolve such dilemmas in the interests of the administration of justice.[79] However, Jessup J[80] focused upon the fact that, while the status quo was temporarily maintained with a s 50 order, Paul Hogan was aware that the ACC had withdrawn its support for confidentiality and that it could not be assumed that the non-publication orders would be continued indefinitely: knowing that, he 'made his own call'.[81]

When a court compels disclosure of confidential information in evidence a non-publication order may reduce the detrimental effect of that compulsion. In *Chapman v Luminis*,[82] witnesses were compelled to give evidence about the secret and sensitive indigenous cultural secrets of the Ngarrindjeri women that had been central to the Hindmarsh Island bridge controversy. The Ngarrindjeri women were not parties in *Chapman v Luminis* and public disclosure, especially disclosure to men, was contrary to their beliefs. Justice von Doussa considered public interest immunity[83] and held that the public interest in admitting evidence that was important to establish the factual base upon which the issues in the case would be resolved outweighed the public interest in preserving the Ngarrindjeri women's confidentiality.[84] Four women who had read the secret envelopes were required to file witness statements and to give evidence, despite the obligations of confidence that bound them.[85] However, the disclosure was closely controlled. Evidence was held *in camera*, male lawyers[86] were excluded from the court and each party was limited to two female lawyers. Nothing relating to the evidence from the closed sessions was allowed to be removed from the court and the findings were subject to a suppression order.[87] This disclosure in a controlled environment ensured full disclosure to the court of

77 *P v ACC* (2008) 250 ALR 66, 80.
78 *Hogan v ACC* (2009) 177 FCR 205, 232.
79 *Hogan v ACC* (2009) 177 FCR 205, 234.
80 Moore J agreeing.
81 *Hogan v ACC* (2009) 177 FCR 205, 220.
82 (2000) 100 FCR 229.
83 *Evidence Act 1995* (Cth) s 130.
84 *Chapman v Luminis Pty Ltd* (2000) 100 FCR 229. Breach of South Australian Aboriginal heritage protection legislation was also argued unsuccessfully.
85 *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62, 154.
86 But not the male judge.
87 *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62, 154.

information relevant to the case[88] in circumstances where witnesses who were bound by strong obligations of confidence were very reluctant to disclose.[89]

When a court compels pre-trial exchange or disclosure of private documents the parties[90] are under an implied undertaking not to use the information for a purpose unrelated to the proceedings.[91] The principle underlying this obligation is that there is a public interest in maintaining rights of privacy and confidence and that compulsion to disclose should go no further than justice requires.[92] That is until the material is tendered in open court, and justice may then require that it be made public. The public nature of trials means that potential claimants may forgo legal redress or settle on unfavourable terms to avoid publicity and in doing so they pay a price for the overall public interest in an open court system. In that sense private interests are sacrificed to the public interest. However, there is a significant difference between involuntary and voluntary disclosure. As Paul Hogan's argument about redaction of the documents shows, he did have choice — albeit a difficult one for which he might have paid a high price of weakening his case by restricting disclosure. Nevertheless, the contentious documents contained his personal information that his lawyers tendered and in that sense the disclosure was not compelled.

The deterrent effect

Paul Hogan's solicitor told the court that without the s 50 order his client's personal financial information would have been withheld or only used in a redacted form in open court.[93] On that basis, he was not compelled to disclose the information but could have proceeded with a more limited disclosure. As discussed above, the Full Court of the Federal Court in *Herald & Weekly Times v Williams*[94] recognised that the deterrent effect[95] might justify a non-publication order.[96] The problem for Paul Hogan was that Emmett J was not convinced that it was only because of the s 50 orders that the evidence was tendered.[97]

When considering the deterrent effect the question arises: is the reference in s 50 to the administration of justice confined to justice between the parties[98] or a broader concept

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88 *Chapman v Luminis Pty Ltd* (2000) 100 FCR 229, 239.
89 *Chapman v Luminis Pty Ltd* (2000) 100 FCR 229, 239.
90 And third parties who know the source of the information.
91 *Hearne v Street* (2008) 225 CLR 125.
92 *Hearne v Street* (2008) 225 CLR 125, 159.
93 *P v ACC* (2008) 250 ALR 66, 78.
94 (2003) 130 FCR 435.
95 See the discussion of the problems courts face in assessing risks associated with the deterrent effect and establishing some sort of standard in Joseph Jaconelli, *Open justice: a critique of the public trial* (2002) 168. Could this be objectively tested? Should the courts take into account the overly sensitive?
96 *Herald & Weekly Times v Williams* (2003) 130 FCR 435, 446 (Merkel J); although not in that case.
97 *P v ACC* (2008) 250 ALR 66, 80.
98 *Australian Broadcasting Commission v Parish* (1980) 43 FLR 129, 133–4.

that extends beyond the parties involved in the immediate case to the deterrent effect on future litigants in similar circumstances? If confined to the parties then views may differ upon whether in this case Paul Hogan took a calculated risk that resulted in public disclosure of his personal information, or it is unfair to withdraw confidentiality at a late stage in the proceedings when he could, and arguably would, otherwise have disclosed only edited versions. Once we look beyond the parties in the immediate proceedings the deterrent effect raises broader public interests. It is also in the public interest that courts are properly informed. The courts already consider the public interest in the future supply of information when they protect police informers with anonymity. The deterrent effect of public disclosure may diminish the range of sources available to the courts themselves and it is important to protect the integrity of that information flow.

The search for truth

Justice LeBel in the Supreme Court of Canada has suggested that the oldest of the rationales for open justice is 'probably the connection between openness and the pursuit of truth'.[99] If evidence before a court is exposed to public scrutiny any falsities or inaccuracies that may creep in stand a better chance of being detected. It is always in the interest of the administration of justice that the courts be properly informed. However, the search for truth will not be served if the deterrent effect of public disclosure diminishes the range of sources available to the courts. The message from *Hogan* ought not to be: public disclosure is inevitable and so redact or withhold confidential information whenever possible.

In a Canadian case concerning confidentiality orders over technical information on the environmental assessment of nuclear reactors,[100] the Supreme Court of Canada accepted that it was in the public interest to prevent the information from entering the public domain so that access could be granted to the parties in the proceedings including the environmental organisation Sierra Club. As well as the interest in a fair trial the Supreme Court also considered the beneficial impact of non-publication on the search for truth.[101] Denying public and media access to documents relied on in the proceedings would, to some extent, impede the public search for truth.[102] However, the search for truth might also be promoted by a confidentiality order.[103]

> If the [confidentiality] order is denied, then the most likely scenario is that the appellant will not submit the documents with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of … evidence on cross-examination. In addition, the

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[99] *Named Person v Vancouver Sun* [2007] 3 SCR 253, 272–3, 295.

[100] *Sierra Club of Canada v Canada (Minister of Finance)* [2002] 2 SCR 522 ('*Sierra Club*').

[101] There was also a public security interest: *Sierra Club* [2002] 2 SCR 522, 550.

[102] *Sierra Club* [2002] 2 SCR 522, 551.

[103] *Sierra Club* [2002] 2 SCR 522, 551.

> court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.[104]

In the Federal Court of Australia, von Doussa J in *Chapman v Luminis*[105] also emphasised the public interest in the courts endeavouring to discover the truth:

> [T]he proper administration of justice … requires that evidence necessary to elucidate the true facts should be available. However …, such availability does not necessarily require disclosure to the public at large, or even to all those participating in the proceedings of a court or tribunal.[106]

Justice is not served if the possibility of full public disclosure leads to complete withdrawal and availability to no-one beyond the information source. It is in the wider public interest that information is critiqued and tested, even if that happens within the controlled environment of a closed court.

Having said that, it is by no means clear that the public interest in full disclosure should necessarily save Paul Hogan's personal information from public disclosure in this case. It may turn out to be unfortunate that full consideration of the s 50 order was put off to another time when the order was temporarily continued on 19 May 2008,[107] but Paul Hogan did elect to tender the documents in open court knowing that the non-publication order might later be removed. This case is not analogous to the Canadian nuclear power producer protecting confidential agreements with Chinese suppliers, or the confidante of indigenous cultural secrets who risked contempt of court proceedings to protect those secrets.[108] It seems unlikely that the Federal Court would have been denied the information in the *Hogan* case.[109]

Before the High Court

Oral argument was heard by the High Court in the *Hogan* case on 4 February 2010. Arguments were made concerning the nature of open justice, the confidential nature of the documents, the meaning of s 50 and the circumstance in which open justice might be displaced to ensure the interests of justice. These concepts have been considered above in relation to the Federal Court decisions. However, one submission by counsel for the newspaper proprietors raises interesting broader issues that resonate with arguments for the public search for truth and transparency. The newspapers argued that a focus upon Paul

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104 *Sierra Club* [2002] 2 SCR 522, 551–2.
105 (2000) 100 FCR 229.
106 *Chapman v Luminis Pty Ltd* (2000) 100 FCR 229, 247, citing *Aboriginal Sacred Sites Protection Authority v Maurice* (1986) 10 FCR 104.
107 *Hogan v ACC* (2009) 177 FCR 205, 211.
108 *Chapman v Saunders* [2001] FCA 4
109 *P v ACC* (2008) 250 ALR 66, 80.

Hogan's private affairs is too narrow and emphasised that the Australian Crime ACC is a publicly funded body and its conduct is something that the public is entitled to scrutinise.[110] The newspapers argued that the public is entitled to know what case had been alleged against Paul Hogan and have access to material that might enable the public to judge the conduct of the ACC that had abandoned those allegations.[111] Openness and transparency in public administration is an important principle.[112] However, relying upon evidence before the courts as a means of ensuring public accountability is a somewhat hit and miss approach. It is true, as counsel for the newspapers has argued, that this case concerns more than Paul Hogan's private affairs and to treat it as such is to adopt too narrow a focus, but it is also true that the media interest has focused more upon the public figure than the public body. Freedom of information (FOI) is a more appropriate regime of accountability for the executive,[113] although as FOI applications for documents relating to Project Wickenby have shown it can be a long and tortuous process[114] and the media would undoubtedly face claims for exemption of documents affecting enforcement of the law.[115] Nevertheless, the relevant transparency in this case is that of the courts not the executive and it is open justice that ought to be measured against the administration of justice.[116]

Conclusion

I have argued that compelled disclosure to the public domain can lead to suppression of information and that it is sometimes necessary to divulge confidential information in a controlled environment to ensure that full disclosure is made. This has been argued in the context of access to information by the courts and the importance of full disclosure in the administration of justice. Paradoxically, the threat of full disclosure to the public domain may sometimes also diminish the range of information sources publicly available. Even when there is disclosure in a controlled environment, such as before a court with non-publication orders in place, there will still be some public disclosure, for instance in

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110 *Hogan v ACC* [2010] HCA Trans 004 [2400], [2435].

111 *Hogan v ACC* [2010] HCA Trans 004 [2450].

112 For a discussion of the history of secrecy in Australian public administration and the objectives underlying transparency see Kirby J in *Osland v R* (2008) 234 CLR 275, 301–3.

113 Australian freedom of information legislation does not grant access to documents held by the courts. See discussion in Sharon Rodrick, 'Open Justice, the Media and Avenues of Access to Documents on the Court Record' (2006) 29 *University of New South Wales Law Journal* 90, 96.

114 *Re SRRRRR and SRTTTT v Commissioner of Taxation* [2008] AATA 181.

115 *Freedom of Information Act 1982* (Cth) s 37.

116 The Honourable JJ Spigelman has argued that the principle of open justice does not create some kind of freedom of information legislation but rather serves the operation of the legal system: J Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (2006) 29 *University of New South Wales Law Journal* 147, 156.

published judgments and orders.[117] That is preferable to complete withdrawal of information and a retreat by the source into the private realm.

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[117] *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294.