FEDERAL COURT OF AUSTRALIA

Schröder-Turk v Murdoch University [2019] FCA 1152

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| File number: |  |
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| Judge: | **JACKSON J** |
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| Date of judgment: | 29 July 2019 |
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| Catchwords: | **PRACTICE AND PROCEDURE** - confidentiality of proceedings - s 16 of *Public Interest Disclosure Act 2003* (WA) - direction made requiring notice of possible effect of provision to be affixed to court documents |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 340, 545, 562, Part VAA Div 2*Federal Court of Australia Act 1976* (Cth) ss 21, 23*Federal Court Rules 2011* (Cth) r 2.32*Evidence Act 1906* (WA) ss 20A-20M*Murdoch University Act 1973* (WA) s 5*Public Interest Disclosure Act 2003* (WA) ss 3, 5, 7A, 15, 16*Witness Protection Act 1991* (Vic) s 10(7) |
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| Cases cited: | *Australian Competition and Consumer Commission v Oakmoore Pty Ltd (No 2)* [2018] FCA 1170*Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1*CDJ v VAJ (No 1)* [1998] HCA 67; (1998) 197 CLR 172*Chairperson of the Royal Commission into the Management of Police Informants v Chief Commissioner of Victoria Police* [2019] VSCA 154*Chief Commissioner of Police v ABC* (2010) 31 VR 176*Deputy Commissioner of Taxation v Hawkins (Inspection Application by Matrix Group and Anor)* [2016] FCA 164; (2016) 341 ALR 255*Fencott v Muller* (1983) 152 CLR 570*Kizon v Palmer* (1997) 72 FCR 409*Parker v Australian Building and Construction Commissioner* [2019] FCAFC 56; (2019) 365 ALR 402*R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141*R v JP* [2008] VSC 86*Re an Application under section 10 of the Witness Protection Act 1991* [2018] VSC 810*Rizeq v Western Australia* [2017] HCA 23; (2017) 262 CLR 1*Van Stokkum v The Finance Brokers Supervisory Board* [2002] WASC 192 |
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| Date of hearing: | 17 July 2019 |
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| Date of last submissions: | 18 July 2019 (Applicant)24 July 2019 (Respondent) |
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| Registry: | Western Australia |
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| Division: | Fair Work Division |
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| National Practice Area: |  |
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ORDERS

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|  | WAD 303 of 2019 |
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| BETWEEN: | GERD SCHRÖDER-TURKApplicant |
| AND: | MURDOCH UNIVERSITYRespondent |

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| JUDGE: | JACKSON J |
| DATE OF ORDER: | 29 JULY 2019 |

THE COURT ORDERS THAT:

1. All documents filed in court by the parties must contain, on the front page (being the page immediately after the court-generated cover sheet), in font no smaller than the font used in the rest of the document, the following:

**IMPORTANT NOTICE: PLEASE READ**

Any non-party, including any member of the public, who seeks or has access to this document should consider obtaining legal advice before disclosing any information in, from, or concerning this document. The applicant in this proceeding makes a claim pursuant to the *Public Interest Disclosure Act 2003* (WA).Sections 16(1) and (3) of that Act contain prohibitions on disclosure that may apply. The penalties for breach of those prohibitions include substantial fines and/or imprisonment.

Neither the parties nor the Court offer any legal advice in this regard, and should **not** be taken to do so by affixing this notification to this document. This notification has been affixed to this document pursuant to an order made by the Honourable Justice Jackson on 29 July 2019 that such a notification should be affixed to all documents filed in this proceeding.

**THIS NOTICE IS TO BE ATTACHED, AND REMAIN ATTACHED, TO ANY COPY OF THIS DOCUMENT.**

1. The applicant must, within 7 days from the date of this order, uplift from the court file all documents that the applicant has filed in court to date and refile them with the notice set out in the preceding paragraph affixed to the front page of each.
2. The interlocutory application filed on 14 June 2019 is otherwise dismissed.
3. Each party has liberty to apply in relation to the subject matter of the interlocutory application on 3 days' written notice to the other party.
4. By 4.00 pm on Monday 5 August 2019 the parties must confer and file a minute of consent orders in relation to disclosure to legal advisers for the purposes of these proceedings, and in relation to the costs of the application (or, if agreement cannot be reached, separate minutes).

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JACKSON J:

1. The applicant, Gerd Schröder-Turk, is an associate professor at Murdoch University, an employee of the University, and a member of the University Senate. He has commenced proceedings against the University seeking remedies pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) and s 340 and s 545 of the *Fair Work Act 2009* (Cth), concerning action adverse to him which the University is said to have taken. The applicant claims that the University took the action because he exercised workplace rights in making certain complaints, and in exercising his right to academic freedom.
2. The present interlocutory application arises because of another aspect of the applicant's claims, being an allegation that the University contravened the *Public Interest Disclosure Act 2003* (WA) (***PID Act***) by engaging in detrimental action against the applicant after he made an appropriate disclosure of public interest information. This application relates to obligations of confidentiality which the *PID Act* imposes.
3. This court clearly has jurisdiction in respect of the *Fair Work Act* claims: *Fair Work Act* s 562, and see s 545. The *Fair Work Act* claims and the *PID Act* claim arise out of a common substratum of facts; in particular, the alleged adverse or detrimental action of the University on which the applicant relies is the same in relation to both sets of claims. I proceed on the basis that the *PID Act* claim falls within the jurisdiction of the court, in accordance with the principles set out in *Fencott v Muller* (1983) 152 CLR 570 at 606‑610 (noting that the term 'accrued jurisdiction' is best avoided: *Rizeq v Western Australia* [2017] HCA 23; (2017) 262 CLR 1 at [55]). The respondent has made no submission to the contrary.
4. The applicant now seeks an order relating to the publication of information or documents derived from these proceedings and the confidentiality of the proceedings. In support of his application the applicant relies upon the affidavit of Bridie Murphy sworn 14 June 2019.

## The *PID Act*

1. In order to understand how the issue has developed, it is first necessary to refer to certain provisions of the *PID Act*.
2. The long title of the Act describes it as:

An Act to facilitate the disclosure of public interest information, to provide protection for those who make disclosures and for those the subject of disclosures, and, in consequence, to amend various Acts, and for related purposes.

1. Section 3(1) relevantly defines 'public interest information' to mean:

information that tends to show that, in relation to its performance of a public function (either before or after the commencement of this Act), a public authority, a public officer, or a public sector contractor is, has been, or proposes to be, involved in -

(a) improper conduct …

1. 'Public authority' is relevantly defined in s 3(1) to include 'a body that is established or continued for a public purpose under a written law'.
2. Section 5(1) provides: 'Any person may make an appropriate disclosure of public interest information to a proper authority'.
3. Section 7A(2) provides that in certain circumstances, a person may make a disclosure to a journalist of substantially the same information that was the subject of a disclosure of public interest information that the person has already made under the Act.
4. Section 15 provides:

A person who takes or threatens to take detrimental action against another because or substantially because anyone has made, or intends to make, a disclosure of public interest information under this Act commits an act of victimisation which may be dealt with as a tort.

The applicant relies on this provision to give him a right of action under the *PID Act* against the University.

1. The present application concerns restrictions on disclosure that are found in s 16. Section 16(1) relevantly provides:

A person must not make a disclosure (an ***identifying disclosure***) of information that might identify or tend to identify anyone as a person who has made an appropriate disclosure of public interest information under this Act unless -

(a) the person who made the disclosure of public interest information consents to the disclosure of information that might identify or tend to identify him or her; or …

(d) the disclosure is made in accordance with an order of a court or any other person or body having authority to hear, receive and examine evidence …

1. Section 16(3) is the key provision for the purposes of the present application. In so far as it is relevant, it provides that:

A person must not make a disclosure of information that might identify or tend to identify anyone as a person in respect of whom a disclosure of public interest information has been made under this Act (***identifying information*)** unless -

(a) the person in respect of whom the disclosure of public interest information has been made consents to the disclosure of information that might identify or tend to identify him or her; or …

(d) the disclosure is made in accordance with an order of a court or any other person or body having authority to hear, receive and examine evidence …

1. For each of s 16(1) and s 16(3), the penalty for a breach is $24,000 or imprisonment for 2 years.
2. So in broad terms, the *PID Act* creates a scheme under which (among other things) persons can disclose information that tends to show that, in relation to its performance of a public function, a public authority has been involved in improper conduct. If that occurs, the person making the disclosure, and persons in respect of whom a disclosure, has been made have the benefit of certain protections. One of the protections is a prohibition on what is called victimisation of the person making the public interest disclosure. And there are restrictions on disclosure that might identify as such, or tend to identify as such, either the person making the disclosure, or persons in respect of whom the disclosure has been made. Breach of those restrictions is a criminal offence. The restrictions may be lifted by the consent of the relevant persons. They also do not prevent disclosure made in accordance with an order of a court.
3. The University has not yet filed a defence in these proceedings, but it seems likely that the question of whether the applicant made an appropriate disclosure of public interest information will be an issue in the proceedings. In oral submissions, the University reserved its position as to whether it is a 'public authority' for the purposes of the *PID Act*, as a body that is established or continued for a public purpose under a written law. But counsel for the University did indicate that it had been proceeding on that basis up until now. It is sufficient for me to say that I will also proceed on that basis, for the limited purpose of determining this application. More broadly, in the absence of full argument on the point (the appropriate occasion for which is at trial), I go no further for the moment than to observe that there is a real possibility that s 16 does apply to the present circumstances.

## The issue on the interlocutory application

1. The issue arises because s 16 of the *PID Act* arguably restricts disclosure of information in the course of these proceedings, and disclosure about the proceedings.
2. The applicant originally filed and served redacted versions of the originating application and statement of claim on 28 May 2019, although unredacted versions were provided to my Chambers at the same time. The applicant also filed, but did not serve, written submissions explaining the redactions. They said that the redactions related to two matters, one of which was the *PID Act* (the other is not presently relevant).
3. In the initial written submissions the applicant gave consent under s 16(1)(a) to being identified, and his counsel renewed and confirmed that consent in the course of the present application, so any restrictions imposed under s 16(1) fall away for present purposes. But the submissions said that, on at least one view, s 16(3) prohibited service of the originating application and statement of claim on the University so, out of an abundance of caution, orders permitting service were sought.
4. After considering the submissions, on 5 June 2019 I ordered that unredacted copies of the originating application, statement of claim and written submissions be served on the University.
5. On 7 June 2019 the Australian Broadcasting Corporation (**ABC**) requested the ability to inspect and photocopy the originating application and statement of claim as well as a notice of acting that had been filed on behalf of the University.
6. The present application was filed on 14 June 2019, with the applicant seeking an order permitting unredacted copies of the documents filed thus far to be placed on the court's file.
7. On 19 June 2019 I made that order with the consent of both parties. I also, by consent, ordered that all documents filed by the parties be filed in unredacted form, and that no party is prevented by s 16(1) or s 16(3) of the *PID Act* from disclosing any information in a document filed and/or served by that party. In my view, these orders were convenient and appropriate to ensure that there was no doubt about the parties' ability to take ordinary steps in the conduct of the proceedings. (I did not make the orders because I had formed any view that s 16 of the *PID Act* would otherwise prohibit those steps.)
8. The application of 14 June 2019 also sought an order in relation to access to filed documents under r 2.32 of the *Federal Court Rules 2011* (Cth), but that is no longer pressed. The sole order sought which remains in issue is:

For the purpose of s 16(1)(d) and s 16(3)(e) of the *Public Interest Disclosure Act 2003* (WA), pursuant to s 23 of the *Federal Court of Australia Act 1976* (Cth), it is ordered that neither s 16(1) nor s 16(3) of the *Public Interest Disclosure Act 2003* (WA) prevents:

(a) a person from publishing any information or document, including without limitation the documents placed on the Court file in accordance with order 1 [the order made on 19 June 2019 that certain documents be filed in unredacted form], deriving from this proceeding; or

(b) a person from referring to any matter, circumstance or thing connected with the allegations in the statement of claim in connection with, or for the purpose of, this proceeding.

1. The University opposes this order. So the issue is whether I have power to make the order sought and whether, subject to any limitations on that power, it is appropriate to be made. In the course of oral submissions other orders, less broad than the order set out above, were raised as possibilities. I will address those below.
2. On 3 July 2019, and after giving the parties an opportunity to object, I directed that the court give the ABC access to the unredacted versions of the documents, at the same time making the ABC aware that the applicant had sought an interlocutory order under the *PID Act* which might affect the ABC's ability to broadcast information contained in the documents. Neither party objected to this course. The ABC did not, however, seek leave to appear at the hearing of this application.

## Disclosure of these reasons

1. At the hearing I pointed out to the parties that things said in the course of the application and the publication of these reasons could, in themselves, possibly be characterised as disclosure that breached s 16(3). In terms of whether the prohibitions in that sub-section could apply to such disclosure, counsel for the applicant referred me to *Kizon v Palmer* (1997) 72 FCR 409. There, Lindgren J (at 430‑431, Jenkinson and Kiefel JJ agreeing) discussed a number of authorities to the effect that statutory provisions restricting disclosure of information to 'persons' have consistently been construed as not prohibiting disclosure to courts. That is because courts, in the words of Dixon CJ in *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1 at 6, 'would hardly be called persons'. Lindgren J concluded that in contexts such as the present, a court is not a 'person'.
2. In my view it follows that any person involved in the publication of these reasons will not contravene s 16(3) of the *PID Act*, even though the reasons (at least) tend to identify a person in respect of whom a disclosure of public information has been made under the *PID Act*. While the authorities discussed by Lindgren J deal with disclosure *to* a court, it can hardly be said that any stricter view could be taken as to disclosure *by* a court. There is therefore no need for me to consider such constitutional issues as might otherwise arise out of construing s 16(3) as potentially prohibiting disclosure of information by officers of this court.
3. That view of the usual meaning of 'person' does not necessarily prevent a party or other person who discloses the content of these reasons after publication from breaching s 16(3). Nevertheless, the only person (other than the applicant) whom these reasons tend to identify within the meaning of s 16(3) is the University. In the course of oral submissions, the University helpfully indicated that it consents to the disclosure of information in, or by way of, these reasons. Therefore, anyone disclosing these reasons or the information contained in them will not, solely by making that disclosure, breach s 16(3).

## Source, nature and limits of power

1. When I made the orders on 5 June and 19 June 2019, I did so pursuant to s 23 of the *Federal Court Act*, which empowers the court, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, as the court thinks appropriate. There was no controversy at the hearing that this was a relevant source of power to make the order sought, and that an order made pursuant to it may have consequences under s 16(3)(e) of the *PID Act*, in the sense that any disclosure made in accordance with the order will not breach the prohibition in s 16(3).
2. It was also uncontroversial that, whatever the source, the power is discretionary.
3. Submissions were, however, directed to three further matters, one concerning an alternative source of the power and the other two concerning the limits of the power.
4. In relation to the first of these, counsel for the applicant submitted that power to make the order could be found in s 16(3)(e) if the *PID Act* itself, independently of s 23 of the *Federal Court Act*. This, it was said, follows from Dixon J's recognition in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 165 that some provisions 'must be taken to perform a double function', in that they both deal with substantive legal relations and give jurisdiction with reference to them. Counsel also referred to cases decided in relation to non-disclosure provisions in the *Witness Protection Act 1991* (Vic), where it has been held that s 10(7) of that Act, by force of which those provisions do not apply to 'a disclosure that is authorised or required by an order of the Supreme Court', empowers that court to make an order authorising disclosure: see *Chief Commissioner of Police v ABC* (2010) 31 VR 176; *Re an Application under section 10 of the Witness Protection Act 1991* [2018] VSC 810; and *Chairperson of the Royal Commission into the Management of Police Informants v Chief Commissioner of Victoria Police* [2019] VSCA 154.
5. I have doubts about the applicability of these cases to the present situation. In *Ex parte Barrett*, the provision in question (s 58E of the *Commonwealth Conciliation and Arbitration Act 1904* (Cth)) expressly authorised the giving of directions. The creation of substantive liabilities or substantive legal relations was the unexpressed second function in the 'double function'. So it was the inverse of s 16(3) of the *PID Act*, where it is the substantive liability (prohibition) that is express, and the authorisation (power) that is not.
6. I also do not consider that s 10(7) of the *Witness Protection Act* is on all fours with s 16(3)(e) of the *PID Act*. While the part of s 10(7) I have quoted does not expressly empower the Supreme Court of Victoria to make an order authorising or requiring disclosure, it does clearly contemplate that that particular court will make an order that authorises or requires disclosure for the specific purpose of s 10(7). Section 16(3)(e) of the *PID Act* is less direct. It only contemplates that an order has been made, seemingly by any court for any purpose, and that disclosure may occur 'in accordance with' that order. Compared to s 10(7) of the *Witness Protection Act*, the step from there to a conclusion that the section itself authorises the order is a longer one to take.
7. The second matter concerning the power to make the order on which I received submissions concerned the extent to which the *PID Act* limited the discretion. If in truth a source of the discretion exists in that Act, then to that extent, express and implied limitations found in the Act must limit the discretion. That follows from the basic principle that s 16(3)(e) must be construed in the context of the Act as a whole. If, however, s 23 of the *Federal Court Act* is the source of the power, there is a question as to whether the discretion is relevantly limited by the *PID Act*.
8. In *Parker v Australian Building and Construction Commissioner* [2019] FCAFC 56; (2019) 365 ALR 402 the Full Court had occasion to consider whether s 23 of the *Federal Court Act* empowered the court to make an order requiring the publication of an advertisement in relation to conduct that contravened the *Fair Work Act*. Besanko and Bromwich JJ (Reeves J agreeing) held that it did, observing (at [371]) that '[t]he terms of s 23, whilst not at large, are substantially unfettered in relation to matters in which this Court has jurisdiction, as the Court thinks appropriate.' Their Honours went on to say, however (at [376]) that:

Even with the wide powers available under s 23, due and primary regard should be had to the specific legislation giving rise to the seeking of the order in the first place. That is not to fetter the breadth of the power in s 23, but rather to appropriately confine and restrain its exercise. Section 23, even though available as a source of power, should not lightly be used to bypass the limitation of the specific statutory power available. That is not to say that the wider power should never be used in that way, but rather that to do so requires proper justification, especially in light of the High Court's decision in the *Section 545 Powers Case* [*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; 262 CLR 157]. Reasons need to be given to bypass specific limitations of that kind.

1. The University also referred to *CDJ v VAJ (No 1)* [1998] HCA 67; (1998) 197 CLR 172 at [53], where Gaudron J observed:

It is well settled that, if a discretionary power is conferred by a statute which is silent as to the matters which govern its exercise, the discretion is confined only by the subject matter with which the legislation is concerned. At least that is so if the discretion is conferred on an administrative tribunal. Where a general and unconfined discretion is conferred on a court, it is also governed by the requirement that it be exercised judicially and consistently with the judicial process. It is also well settled that, where a power is granted to a court, it is not to be confined by reference to matters which are not required by the terms of the statutory provision by which it is conferred or the context in which it appears.

(citations omitted)

1. I also have doubts about the applicability of aspects of these dicta to the present situation. First, in *Parker* both the Act conferring the power (the *Federal Court Act*) and the Act giving rise to the occasion for its exercise (the *Fair Work Act*) were Commonwealth statutes. Here the situation is perhaps a less common one where the first act is Commonwealth legislation and the second is State legislation. It seems to me that constitutional issues might arise about the extent to which the latter can fetter the exercise of power under the former: see the reference in *Fencott v Muller* at 607 to 'the limitation upon the capacity of non-federal laws to affect federal courts'. Second, in *CDJ v VAJ (No 1)*, Gaudron J was only dealing with one Commonwealth statute (the *Family Law Act 1975* (Cth)), not the interaction of two pieces of legislation. (I also note that her Honour was in dissent although, with respect, I do not consider that detracts from the correctness of the propositions she put in the paragraph quoted).
2. The third matter raised in submissions concerning limits on the power related to the proper construction of s 16(3)(e). While, on its face, it imposes no limitations on the kinds of orders that may be made, to which it gives effect as an exception to the prohibition in s 16(3), the University submitted that I should read it down by reference to the explanatory memorandum accompanying the Evidence and Public Interest Disclosure Amendment Legislation Bill 2011 (WA), which relevantly says (at pages 24-25):

The purpose of section 16(1)(d) is to permit an identifying disclosure being made in circumstances where a court or person acting judicially has ordered that evidence be given under the PCRP provisions [ss 20A-20M of the *Evidence Act 1906* (WA)] or journalist protection provisions.

Section 16(3) is similar in purpose and effect to section 16(1) except that it applies to identifying information. …

1. The PCRP provisions are 'professional confidential relationship protection provisions' that were introduced at the same time as s 16(3)(e), to enable the claims of professionals to refuse to answer questions about their clients to be tested in court. They are now found in s 20A to s 20F of the *Evidence Act 1906*.
2. I also doubt the correctness of the respondent's submission as to this third matter. It is not necessary to go into the well-established principles concerning when and in what way resort may be had to extrinsic materials for the purposes of construing a statute. Suffice to say that on its face, s 16(3)(e) is neither ambiguous nor limited to the mischief identified in the explanatory memorandum. It may be that the reference in the paragraph to 'any other person or body having authority to hear, receive and examine evidence' suggests that it is also directed at those functions when they are performed by a court. But it is by no means clear that it is confined to the very specific situations of the PCRP provisions or the journalist protection provisions (which are at s 20G to s 20M of the *Evidence Act 1906*).
3. Ultimately, it is not necessary to resolve any of these doubts for the purposes of this interlocutory application. For reasons set out below, I decline to make the order sought by the applicant, whether the power arises under s 23 of the *Federal Court Act* or under s 16(3)(e) of the *PID Act*. I will assume, favourably to the applicant (and without deciding), that the discretion to make the orders sought is broad and that the *PID Act* does not relevantly fetter or otherwise limit that discretion, as such. Even on those assumptions, it is surely incontrovertible that the objects of the *PID Act* and of s 16 are relevant factors to take into account when exercising the discretion. That is consistent with the quote from *Parker* which I set out above. It is also incontrovertible that, as Gaudron J observed in *CDJ v VAJ (No 1)*, any broad discretion reposed in the court must be exercised judicially and consistently with the judicial process. As will be seen, in my view those principles are sufficient to dispose of the application.

## Consideration of the applicant's submissions

1. The applicant filed written submissions in support of the application. With respect, I had difficulty understanding how some aspects of those submissions were relevant to the order sought. For example, the applicant relied on provisions in Part VAA, Div 2 of the *Federal Court Act*, which concerns the court's powers to make suppression and non‑publication orders. It may be that the principles of open justice referred to there, in particular in s 37AE, bear on the exercise of the discretion that arises here. But in the present case, no one is yet seeking suppression of anything, so there is no need for anyone to discharge the 'heavy onus' which, I accept, must be discharged before any order under Div 2 can be made: see eg *Australian Competition and Consumer Commission v Oakmoore Pty Ltd (No 2)* [2018] FCA 1170 at [22].
2. In any event, the crux of the applicant's written submissions was that for various reasons, orders should be made 'to permit disclosure without the threat of contravention of s 16(1) or (3) lingering in the air'. Since, as I have said, the applicant has given his consent for the purposes of s 16(1)(a), it is only the possibility of a contravention of s 16(3) that might linger.
3. The written submissions advanced five reasons why the order sought should be made. I will comment on each in turn.
4. *First*, the applicant submitted that this will be the first case considering the operation of the *PID Act*, so there is a public interest in favour of an open court and not a closed court or suppression. But, as I have said, at this point no one is seeking a closed court, or suppression of anything. I accept that the principle of open justice is fundamental to the operation of this court, but I am not persuaded at present that allowing the *PID Act* to operate according to its terms, in relation to information that is disclosed or proposed to be disclosed in the course of these proceedings, is inconsistent with that principle.
5. It may transpire that someone relies on s 16 in order to seek suppression of evidence or submissions that would otherwise be given or made in open court. But the appropriate time to consider the merits of any such application will be when the application is made. Then it can be addressed by reference to specific information which may be disclosed, and on the merits of the issues as they emerge in the facts and circumstances which then obtain. I am reluctant to make a blanket order permitting disclosure of information that would otherwise be a breach of the *PID Act* in the abstract, without regard to specific information in a specific context. At present, I am not persuaded that it is necessary to do so.
6. It is also important to distinguish between the application of the principle of open justice to hearings conducted in open court, and its application to documents filed in the course of proceedings. Rule 2.32 of the *Federal Court Rules* permits non‑parties to have access to certain filed documents, such as pleadings, unless an order restricting access has been made. But for other documents, such as witness statements, affidavits and submissions, non-parties must apply for leave to inspect. That is because 'open justice is not a freestanding right and may be restricted where the interests of justice require otherwise': *Deputy Commissioner of Taxation v Hawkins (Inspection Application by Matrix Group and Anor)* [2016] FCA 164; (2016) 341 ALR 255 at [8] (Pagone J).
7. Factors relevant to the grant of leave under r 2.32(4) of the *Federal Court Rules* include whether, and if so to what extent, the document has been referred to in open court, and whether access to the document is necessary or desirable to facilitate an understanding of the proceedings and thus of the judicial process: *Van Stokkum v The Finance Brokers Supervisory Board* [2002] WASC 192 at [27] (McLure J, as she then was), applied in *Hawkins* at [8]. So, at least for documents that are not in the category where r 2.32 permits access by default, there is a mechanism enabling a case by case consideration of whether access, and thus disclosure, should be granted. Such issues and risks as arise under s 16 of the *PID Act* would be relevant considerations there. That is another reason why a broad consideration such as open justice does not justify a broad dispensation from s 16(3) in the present circumstances.
8. In any event, I doubt that such interest as might be provoked by any novelty of legal issues in this case adds much to the basic importance of open justice. That is so even where, as here, there is a public interest element to those issues.
9. *Second*, the applicant submitted that since the applicant has consented to disclosure of his identity under s 16(1)(a), s 16(3)(a) should not be permitted to 'stymie and suppress the conduct of the proceeding'. I also do not consider that this adds much. Although there are of course parallels and similarities between s 16(1) and s 16(3), on their face they are directed to different things. Section 16(1) is about the protection of the person making the disclosure. Section 16(3) is about the protection of persons in respect of which the disclosure is made. The long title to the Act, which I have quoted, reflects that difference of focus. It is difficult to see how the attitude of the person protected by s 16(1) should impinge on the protections to be afforded (or not afforded as the case may be) to persons who may wish to take the benefit of s 16(3).
10. *Third*, it was submitted that the subject matter of the alleged public interest disclosure is a matter of public interest and the subject of public debate, and so is a factor favouring the 'free flow of information'. There was evidence in Ms Murphy's affidavit of media reports on that subject matter, including a report quoting the applicant. I accept that there is a measure of public interest in the issue, although it is difficult to gauge how much interest, or how current it is. That may be a factor that is legitimate to take into account in considering whether to make an order which has effect under s 16(3)(e). Section 7A, which I have mentioned above, contemplates that disclosure to a journalist may be made in some circumstances. But there is no reason to think that in the absence of the order sought, public debate will be impaired in any way. And for similar reasons to those I gave in relation to the first reason the applicant has advanced, I doubt that this point adds much to the already strong predisposition the court will have in favour of open justice.
11. *Fourth*, the applicant submitted that the fact that the University is a statutory body whose objects include the advancement of learning and knowledge, and the provision of university education (*Murdoch University Act 1973* (WA) s 5), is relevant because it is consistent with those objects to favour rather than disfavour open proceedings. However the connection between educational objects of the University and the desirability of information about the University being disclosed in or as a result of court proceedings seems to me to be a tenuous one. Once again, it does not add much to the already strong predisposition of the court in favour of open justice.
12. *Fifth*, it was said that the ongoing conduct of the present litigation will be hampered unless orders are made alleviating the burden of s 16(1) and s 16(3) of the *PID Act*. It is difficult to see why that is so. I have made orders giving the parties unrestricted ability to file and serve documents. If, hypothetically, a third party seeks access to those documents and is denied access, that will not hamper the conduct of the proceedings. Conceivably, if a party seeks orders protecting the alleged confidentiality of any information in the course of any hearing or judgment, that could hamper the litigation. But no such orders have yet been sought. Experience shows that if they are sought, it is likely that it will be possible to deal with the issue pragmatically, in a variety of ways that do not impair the process of the court.
13. It will be evident that the written submissions filed on behalf of the applicant have not persuaded me to make the order sought. However in oral submissions counsel for the applicant made some stronger points. One was that the statement of claim, which contains detail as to the alleged public interest disclosure and who it is about, is, with the consent of the University, available for inspection and in unredacted form on the court file. The applicant submits this means the University's interest in the protections afforded by s 16(3) should be given less weight than it otherwise would be.
14. I accept that is a relevant consideration and I take it into account. I do not place a great deal of weight on it, however, because the University is not the only person who, potentially, is entitled to the protection of s 16(3). It is not clear from the statement of claim and the limited evidence filed thus far whether the proceedings will involve information tending to identify any individual as a person in respect of whom a disclosure of public interest information has been made. In those circumstances, it would not be appropriate to authorise in advance the disclosure of any such person's identity without at least giving him or her an opportunity to be heard.
15. That is also an answer to the perhaps even stronger point that these reasons are in the public domain, and they tend to identify the University as a person in respect of whom an alleged public interest disclosure has been made. Also, there may be a difference for the purposes of the discretion between information that tends to identify a person and information that directly identifies the person.
16. Counsel for the applicant submitted that while the objective evident from s 16(3) was a relevant consideration, it should be given diminished weight in circumstances where s 15 of the *PID Act* prohibits victimisation and where the applicant has raised an arguable case that victimisation has occurred. But I see no real connection between the two; clearly prohibition of victimisation and protection of the identity of certain persons are both among the objectives of the *PID Act*. Counsel did not explain how those objectives were in any way inconsistent with each other or how the prohibition on victimisation might otherwise require lifting or modification of the prohibition in s 16(3).
17. Counsel for the applicant also pointed to the possibility that a person may risk criminal sanction by talking about something which anyone can find out by going to the court file. But it does not follow that the court should permit in broad terms disclosure of the contents of the court documents on other occasions, or every other disclosure of information which might otherwise breach s 16(3). As will become apparent, in my view different measures are appropriate to deal with the risk.
18. Counsel raised as another example that the applicant, as a member of the University Senate, may take the view that s 16(3) prevents him talking about the alleged public interest disclosure to another member of the Senate, even though that other member is aware of the disclosure. But if that is indeed a consequence of the proper construction of the legislation, then I need to give it due weight. In any event, I do not consider that a hypothetical situation like that warrants a blanket exemption, nor do I consider it possible or desirable to make orders, in advance, covering what is no doubt a large number of such hypotheticals.
19. Counsel for the applicant also made submissions based on the risk incurred by non-parties (which may include employees and contractors of parties) if they disclose the contents of documents filed or evidence adduced in the proceedings, if that tends to identify the a person in respect of whom a disclosure of public interest information has been made under the Act. For example on one, admittedly broad, view of the prohibition in s 16(3), an employee of a company that obtains a copy of the statement of claim could contravene the provision merely by giving that document to another employee. That is in circumstances where contraventions potentially attract criminal sanctions.
20. In that regard, counsel referred me to the following passage from *R v JP* [2008] VSC 86 at [26] (Whelan J), which concerned a restriction on publication of the identity of protected witnesses that is found in s 10(5) of the Victorian *Witness Protection Act*:

The protection of the identity of persons to whom the *Witness Protection Act* applies is a matter of great significance. It may in some cases truly be a matter of life and death. Section 10(5) is expressed in very wide terms. There is considerable potential for uncertainty as to its application in a particular case. A person's status as a participant whose identity is protected under s.10(5) is itself a matter which cannot be disclosed. These are circumstances which do not necessarily arise in relation to other statutory prohibitions on publication. Given these matters, where the source of the information in question is a judgment or sentence of the Court itself in my view the court ought not to deliver judgment or sentence and leave the matter of compliance with s.10(5) unaddressed. This is particularly so where the court is of the view that disclosure of some parts of the judgment, or sentence could be disclosed without contravening s.10(5), and some parts could not. In my view in such circumstances it is necessary in order not to prejudice the administration of justice that the court should order that the material which the Court considers cannot be disclosed without contravening s.10(5) is prohibited from publication. It seems to me that otherwise the recipients of the information in the judgment or sentence are placed in an unnecessarily uncertain and potentially dangerous position, and the risk of a disclosure and breach of s.10(5) is unacceptably high.

1. I accept that potential risk to third parties of breaching s 16(3) of the *PID Act* is a relevant factor in the exercise of the discretion here. It is the strongest point in favour of the orders sought. I note, however, that Whelan J's comments were directed towards clarifying what could and *could not* be disclosed. That is different to the broad permission to disclose sought here. I also note that in the passage quoted, his Honour confined the relevant observations to cases 'where the source of the information in question is a judgment or sentence of the Court itself'. In my view that qualification is relevant here. It is one thing for the court to put into the public domain information potentially exposing a large number of third parties to the risk of breach, many of whom will have little or no appreciation of that risk. It is another for the risk of breach to arise because a specific person has sought access to information on the court file - information of which the court is not the author. A third situation is when information is disclosed in open court; that is perhaps between the first two in terms of the level of risk and the court's responsibility for it.
2. In so far as these reasons are concerned, as I have said, the risk does not arise. In terms of any future judgment or orders which the court may publish, the risk is hypothetical. It can be addressed if and when any later judgment is delivered or relevant order made.
3. Which brings me to the main factor that, in my view, weighs decisively against making the order sought in the present application. I have already adverted to it in my comments on the first point advanced in the applicant's written submissions. The risks against which the order putatively guards are hypothetical. It might be said that risks are always hypothetical by their very nature. But here, with the exception of the originating process and statement of claim already filed, the order would not refer to any specific disclosure of any specific information, by any specific person, to any specific person.
4. In my view, the interests of justice do not require that such a broad pre-emptive order be made. In terms of documents filed to date, there is no evidence of any particular person being exposed to the risk, other than the ABC. And the ABC is a sophisticated media organisation able to obtain expert advice and make its own assessment of what it can and cannot disclose. The court specifically drew the ABC's attention to the issue to make sure it was not overlooked.
5. Perhaps the greatest level of risk of inadvertent breach at present is that another non-party seeks access to documents on the court file without being aware of the possible application of s 16(3) of the *PID Act*. As I have said, r 2.32 of the *Federal Court Rules* provides a mechanism by which that risk may be addressed appropriately, on a case by case basis, in so far as the documents are not in the class of documents to which the court routinely gives access without leave. In relation to that latter class, and even in relation to documents where leave to inspect is required, it seems to me that the risk is addressed appropriately by directing that when a party files a court document, the first page of the document contain a prominent notice as to the issue. With this possibility in mind, at the hearing I directed the parties to bring in minutes or, preferably, an agreed minute of wording appropriate for that purpose. They were able to reach agreement and that wording, with some modifications, is reflected in the orders I will make.

## Conclusion and orders

1. Weighing in favour of the orders sought is the risk to third parties and the fact that unrestricted access to the statement of claim is already available to members of the public, without objection from the University. But I must give due regard to the objects of the *PID Act* which relevantly include the obvious objective of s 16(3), to protect the identity of *any* persons in respect of whom a disclosure under that Act has been made. In my view it would not be exercising the discretion judicially, and consistently with the judicial process, to impair the achievement of those objects by granting what would, in effect, be a blanket exemption from s 16(3), unlimited as to time and divorced from any consideration of the particular circumstances that may apply to particular disclosures. The interests of the administration of justice do not require that I do so; in the absence of the exemption, the *PID Act* will be permitted to operate according to its terms and at this stage I do not see that this will unduly hamper the conduct of the proceedings.
2. I will, as I have said, make a direction drawing attention to the potential risks in relation to documents on the court file. I will also make that direction in relation to the documents that have already been filed, requiring them to be uplifted and re-filed with the notice added.
3. The risks associated with evidence led and submissions made in open court, and the publication of reasons and judgments, can be addressed as and when they arise. They can be addressed, as they should be, by reference to what is proposed to be disclosed, by whom, to whom, on what occasion and in what circumstances.
4. I see no reason to think at this point that this will result in frequent applications for such orders, so as to impose an unworkable administrative burden for the parties or the court. But I might turn out to be wrong about that. For that reason, I will grant liberty to apply. If the present orders prove impracticable, they can be varied or further orders can be made.
5. I have mentioned that counsel for the applicant suggested modified forms of orders if I were minded to decline to make an order in the terms sought in his client's application. One suggestion was that paragraph (a) of the orders sought be limited to disclosure of the statement of claim and originating process that are already on the file. I see no need to make such an order if those documents have the notice affixed to them. As I have said, the orders I have already made permit reference to those documents for the purposes of the proceedings. If any person wants to disclose those documents or their contents for some other reason, that can be addressed when it arises. In any event, limiting the scope of paragraph (a) of the order would hardly confine it, in view of the breadth of paragraph (b).
6. At the hearing, counsel for the University indicated that it would consent to an order that the applicant may disclose to its legal advisers such information as is reasonably necessary for the purposes of the conduct of these proceedings. This was in response to a possible concern about a breach of s 16(3) in those circumstances which counsel for the applicant raised. I am prepared in principle to make such an order should it be thought necessary. I will direct the parties to confer as to a minute of the order.
7. The applicant has been largely unsuccessful on the application, but perhaps not entirely, and it may be that it was appropriate to raise this issue at the outset in any event. I will therefore hear from the parties as to costs.

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| I certify that the preceding seventy-five (75) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jackson. |

Associate:

Dated: 29 July 2019