

# Federal court provides guidance on redaction

By PAUL BANNON

The Federal Court had cause to consider redaction of documents in two separate judgments it delivered outlining the position in relation to documents produced in the course of discovery or to be tendered as evidence in proceedings.

In the decisions, the court indicated that redaction should only take place with the other party's agreement or after obtaining a ruling from the court.

## The practice of redacting documents in litigation

In litigation, redaction, also known as masking, is the practice of selectively concealing part of a document otherwise being produced under a discovery obligation or to be otherwise tendered as evidence in proceedings.

The Federal Court of Australia's *Case Management Handbook*, prepared by members of the federal litigation section of the Law Council of Australia in conjunction with the court, contains information, guidance, ideas and suggestions about tools and techniques available in the court



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based on the experiences of both judges and practitioners.

In its section on discovery, there is a subsection dealing with the three scenarios which may give rise to redaction. They are relevance, confidentiality and privilege – issues upon which the Federal Court has now provided helpful guidance.

## Redaction of discovered documents

In *MG Corrosion Consultants Pty Limited v Gilmour*,<sup>1</sup> Barker J had occasion to consider the practice of redacting information in discovered documents. At the outset, his Honour made the observation that: "over a number of years, particularly in complex commercial litigation (although not limited to that) the practice has developed whereby, in the course of giving

standard or general discovery, the party giving discovery has taken the liberty of redacting parts of the information in an otherwise relevant document. The parties may make a unilateral decision concerning the relevance or confidentiality of the redacted material, but without having first obtained the agreement of the other party or an order of the Court to make the redaction".<sup>2</sup>

Barker J quoted with approval the views of Logan J of the Federal Court in a 2010 judgment<sup>3</sup> where his Honour stated: "save in cases where a privilege is claimed, the whole document should be produced unless there were prior agreement to the contrary from the opposing party or some prior dispensation by the Court".<sup>4</sup>

Barker J then considered in detail the three instances where redaction of documents generally arises.

### Relevance, or irrelevance to matters in issue

His Honour stated that ordinarily it is undesirable for a party to go through a whole, apparently integrated document and make unilateral decisions about the relevance of certain words, sentences, paragraphs or sections.

If the other party's sensible agreement to redaction cannot be obtained (and his Honour noted the lawyers' obligation to act cooperatively in litigation), then an application to the court to rule on redaction is appropriate.

### Client or legal professional privilege

His Honour noted that client or legal professional privilege over material would be claimed on giving discovery, and the document in question might possibly be the subject of redaction in that regard or alternatively not made available for inspection.

However, the document would need to be disclosed in a discovery list as one held by the party, and the claim of privilege made so that the other party to

whom discovery is being given has the opportunity to contest the claim to privilege.

### Commercial sensitivity

His Honour was of the view it was quite inappropriate for a party claiming confidentiality because of commercial sensitivity to redact the information unilaterally or not produce the document at all. All that the discovering party is claiming in the circumstances is that the document should have limited circulation.

In such circumstances, the obligation on the discovering party is to apply early for an appropriate confidentiality order under s.50 of the *Federal Court of Australia Act 1976* (the Act), even if the parties agree that a confidentiality regime is required.

This course is necessary because it is not open to the parties unilaterally to set the bounds of confidentiality – the court must be satisfied as to the appropriateness of the proposed confidentiality regime under the Act.<sup>5</sup>

### Parties should try to agree on redaction of documents

In his Honour's view, the administration of justice is best served, first, by the parties endeavouring to agree on redaction where one party considers that redaction is appropriate, or if the parties are unable to come to some agreement about that, to apply to the court to obtain a ruling on relevance.

Where confidentiality is in issue, his Honour observed it was quite feasible for a party to indicate formally or informally to the other party that there are relevant documents, but that they fall into the confidential category and that inspection will not be given pending an application to the court for an appropriate confidentiality order, which application should be made promptly.

### Protection of confidential information

His Honour reviewed whether protection of confi-

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dential information was sufficiently ensured by the implied undertaking of a party who receives pre-trial disclosure or discovery in the course of the trial, not to use

the information for any purpose apart from the litigation, unless by sanction of the court.

His Honour envisaged that when the party obtaining discovery is a trade rival, confidentiality may be destroyed once and for all, at least so far as the rival is concerned, and the obligation not to use the documents except for the purposes of the litigation is impossible to perform.

Hence, an appropriately worded confidentiality order may be sought, perhaps restricting production of a complete copy to the lawyers and/or expert for the other party with a redacted copy to the other party itself.

#### Redacting documents tendered in evidence

In the second case, Rares J, in *Singtel Optus Pty Limited v National Rugby League Investments Pty Limited*,<sup>6</sup> dealt with an example of redaction of commercially sensitive information in evidence to be tendered in an expert's report.

The proceedings involved detailed consideration and expert evidence of the manner by which the applicants (Optus) provided a service called TV Now. The circumstances in which that service is provided by Optus to the public involved an examination of the method by which it used its information technology infrastructure, the internet and other forms of digital communication to structure the service.

An expert explored those matters in detail in a report.

#### Order under s.50

Optus sought an order

*"It is undesirable for a party to ... make unilateral decisions about the relevance of certain words."*

under s.50 of the Act that specific internet protocol (IP) addresses, port numbers, file names, server names and locations, equipment model numbers and specifica-

tions be redacted from any copies of the expert's report that are made available for public inspection and that those matters not be disclosed in open court or in evidence given in the proceedings.

Evidence was led on the application of Optus' concern that disclosure would make the infrastructure vulnerable to persons with illegitimate reasons for seeking to access or deal with their technologies.

His Honour held that the redactions proposed were "limited, specific and appropriate for achieving the purpose for which the order has been sought".<sup>7</sup>

This purpose was: "to disclose fully to the Court and the parties, in a secure way, technical aspects of means of delivery of its services, the subject of the proceedings, without having to expose itself to vulnerability for misuse by persons who would deal with that information in a way that was contrary to its legitimate commercial and private interests".<sup>8</sup>

His Honour was satisfied it was appropriate to make an order under s.50 of the Act to prevent prejudice to the administration of justice. □

#### ENDNOTES

1. [2011] FCA 1514.
2. Ibid at [10].
3. *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 4)* [2010] FCA 863.
4. Ibid at [98].
5. His Honour cited the High Court decision in *Hogan v Australian Crime Commission* [2010] HCA 21 as supporting this position.
6. [2011] FCA 1509.
7. Ibid at [4].
8. Ibid. □

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