

NOTICE OF FILING

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File Title:	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v HSBC BANK AUSTRALIA LIMITED ACN 006 434 162
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Sia Lagos".

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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VID 1368 of 2024

Federal Court of Australia

District Registry: Victoria

Division: General

Australian Securities and Investments Commission

Plaintiff

HSBC Bank Australia Limited (ACN 006 434 162)

Defendant

HBAU'S SUBMISSIONS IN SUPPORT OF SUPPRESSION AND NON-PUBLICATION ORDER

Introduction

1. By interlocutory application dated 6 February 2025, the defendant (**HBAU**) seeks a suppression and non-publication order pursuant to s 37AF(1)(b) of the *Federal Court of Australia Act 1976* (Cth) (**Act**) over limited information within the plaintiff's (**ASIC**) statement of claim.
2. In support of its application, HBAU relies on the affidavit of Scott Malcolm Ellis affirmed on 6 February 2025 (**Ellis Affidavit**). HBAU also seeks a suppression and non-publication order over two paragraphs of the Ellis Affidavit which concern HBAU's global fraud controls.

Applicable power and principles

3. Section 37AG(1) of the Act limits the grounds upon which a suppression or non-publication order may be made. HBAU submits that the Court ought be satisfied on the basis of the evidence in the Ellis Affidavit that a suppression and non-publication order is necessary to prevent prejudice to the proper administration of justice pursuant to s 37AG(1)(a) of the Act.¹
4. Section 37AE of the Act requires the Court to take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice. The principle of open justice is not an end in itself, but is adopted to ensure public confidence in the administration of justice.²

¹ HBAU's interlocutory application erroneously refers to s 37AF(1)(a) of the Act when the reference should be to s 37AG(1)(a).

² See *Commonwealth of Australia v De Pyle* [2024] FCAFC 43 at [26] citing *Hogan v Hinch* (2011) 243 CLR 506 at [20] and *Russell v Russell* (1976) 134 CLR 495 at 520.

5. HBAU bears the onus of persuading the Court to make the order. That onus is a heavy one.³ In *The Country Care Group Pty Ltd v Commonwealth Director of Public Prosecutions (No 2)* the Full Court (Allsop CJ, Wigney and Abraham JJ) summarised the relevant principles as follows:⁴

Suppression or non-publication orders should only be made in exceptional circumstances ... That is both because the operative word in s 37AG(1)(a) is “necessary” and because the court must take into account that a primary objective of the administration of justice is to safeguard the public interest of open justice ... The paramount consideration is the need to do justice; publication can only be avoided where necessity compels departure from the open justice principle ...

The critical question is whether the making of a suppression or non-publication order is “necessary to prevent prejudice to the proper administration of justice”. The word “necessary” in that context is a “strong word” ... It is nevertheless not to be given an unduly narrow construction ... The question whether an order is necessary will depend on the particular circumstances of the case. Once the court is satisfied that an order is necessary, it would be an error not to make it ... There is no exercise of discretion or balancing exercise involved ...

The order is necessary to prevent prejudice to the proper administration of justice

6. In this proceeding ASIC allege, among other things, that HBAU failed to have adequate controls for the prevention and detection of frauds and scams on its customers’ accounts. In pleading that case, ASIC refers in its statement of claim to aspects of HBAU’s fraud prevention and detection systems and controls. HBAU does not seek to suppress the entirety of the statement of claim, nor all information within the statement of claim which relates to HBAU’s fraud prevention and detection systems and controls. Rather, HBAU seeks to suppress only that information which specifically concerns HBAU’s:
- (a) fraud rules (which are the highlighted parts in the particulars to paragraph 27(c), items 16, 25, 26, 28(c)(A)(G)(L), 37, 39 and 43 of Schedule B in the statement of claim in Confidential Exhibit SE-1); and
 - (b) global fraud controls (which are the highlighted parts in particulars (A), (G), (I) and (L) to paragraph 28(c) and items 5, 7, 12, 14, 16, 23, 25, 26, 29, 34 and 39 of Schedule B).

³ *Australian Competition and Consumer Commission v Valve Corporation (No 5)* [2016] FCA 741 (Edelman J) at [8]; *C7A/2017 v Minister for Immigration and Border Protection (No 2)* [2020] FCAFC 70 at [14]).

⁴ (2020) 275 FCR 377 at [7]-[9].

7. In relation to particulars (A), (G) and (L) to paragraph 28(c) and items 16, 25, 26 and 39 of Schedule B, the principal concern for HBAU is the global fraud controls (though those highlighted parts also reveal information about fraud rules).
8. HBAU's fraud rules are individual conditions that are programmed into its fraud management systems to detect potentially fraudulent transactions and facilitate the interception of transactions.⁵ Mr Ellis gives evidence of being informed by Matthew Hannan, the Head of Fraud Management for HBAU's Wealth and Private Banking division, that if the fraud rules referred to in the statement of claim were disclosed to the public there is a high risk that threat actors would be able to use that information to evade HBAU's fraud controls and cause harm to customers and HBAU.⁶
9. The information sought to be redacted relates to fraud rules which are still used in the fraud management systems used by HBAU and HSBC banks in other markets.⁷ The disclosure of that information would reveal to potential threat actors the nature of the activities which HSBC's fraud systems are targeting and what activities enliven the rules.⁸ This risk is significant in circumstances where threat actors include sophisticated criminal organisations who run large-scale scam centres with significant operational and technological resources directed to identifying ways to deceive customers and banks without triggering fraud controls.⁹
10. HBAU's fraud rules are regarded as highly confidential within HBAU. Only a very small number of specialist staff are privy to them.¹⁰ At the time HBAU was disclosing information regarding its fraud rules to ASIC as part of its response to compulsory notices, the bank informed ASIC about the highly sensitive nature of that information.¹¹ Mr Ellis gives evidence on information from Mr Sharma, the Associate General Counsel – Head of Regulatory Legal at HBAU, that ASIC acknowledged the sensitivity around the fraud rules and agreed that the information would be treated as strictly confidential and maintained in a secure and restricted system.¹²
11. The nature of information that falls within the category of HSBC's global fraud controls is set out at paragraph 22 of the Ellis Affidavit and the potential significance of that information is set out at paragraph 25 of the Ellis Affidavit. To avoid recording within these submissions information that is itself confidential and sought to be the subject of a suppression order, we have not repeated that information in these written submissions. Information concerning HSBC's global fraud controls is similarly restricted within

⁵ Ellis Affidavit, [18].

⁶ Ellis Affidavit, [19].

⁷ Ellis Affidavit, [20](a).

⁸ Ellis Affidavit, [20](b).

⁹ Ellis Affidavit, [20](c).

¹⁰ Ellis Affidavit, [21](a).

¹¹ Ellis Affidavit, [17].

¹² Ellis Affidavit, [17].

HSBC.¹³ For the reasons set out in paragraphs 22 and 25 of the Ellis Affidavit, because disclosure of the type of information which is sought to be suppressed would itself provide information of potential value to threat actors and pose a high risk of harm to customers,¹⁴ HBAU applies to have those paragraphs suppressed under s 37AF of the Act.

12. The information the subject of the application is limited in scope and concerns only information which goes to fraud rules and global fraud controls, which is information that is treated very sensitively within HBAU due to the potential ramifications of it falling into the hands of criminals seeking to evade such rules and controls and cause harm to customers. In the circumstances, a suppression and non-publication order limited to the redaction of that information from an otherwise publicly available document is necessary to prevent prejudice to the proper administration of justice.
13. While each application for suppression or non-publication turns on its own facts, an analogy can be drawn between the risk to HBAU's customers if information concerning the bank's fraud rules and controls was accessed by a threat actor and the risk of identity theft to customers whose personal details are disclosed and accessed by a threat actor. That latter risk was the subject of an application for s 37AF orders considered by Katzmann J in *Bayles by his litigation representative Bayles v Nationwide News Pty Limited (No 3)*¹⁵ and Kennett J in *Australian Securities and Investments Commission v Ferratum Australia Pty Limited (in liq)*.¹⁶ In each instance the Court held that it would bring the administration of justice into disrepute if the Court were to publish sensitive personal financial information or details which would leave consumers vulnerable to identity theft.

Duration of order

14. A secondary issue is the duration for which the s 37AF order should operate. Section 37AJ of the Act provides that a suppression or non-publication order is to operate for a period specified in the order and is to operate for no longer than is reasonably necessary to achieve the purpose for which it is made. It is difficult to be precise as to how long information about HBAU's fraud rules and global fraud controls will remain highly sensitive information that could be misused by persons engaged in fraud and scam activity. It is also difficult to be precise as to how long the high risk to customers will continue to persist.

¹³ Ellis Affidavit, [24].

¹⁴ HBAU notes in particular the inference referred to in the second sentence to paragraph 25 of the Ellis Affidavit.

¹⁵ [2020] FCA 1397 at [2].

¹⁶ [2023] FCA 1043 at [58].

15. Mr Ellis gives evidence that the fraud rules will continue to be in use, subject to updates, for at least the next five years, and for a longer period in some cases.¹⁷ Given that uncertainty and the high risk of customer harm, this is an appropriate case for the suppression and non-publication order to be expressed to operate “until further order”.
16. There is conflicting authority about whether a suppression or non-publication order expressed to operate “until further order” satisfies the requirements of s 37AJ(3). In *Giddings v Australian Information Commissioner*¹⁸ the Full Court quoted the High Court’s observation in *Hogan* that, in relation to the predecessor of the current provisions (at [29]):

It has been assumed, no doubt correctly, that an order made under s 50 of the Federal Court Act may be made until further order and, in any event, may be vacated if the continuation of the order no longer appears to the Court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth. As a general proposition, a court remains in control of its interlocutory orders and a further order will be appropriate, for example, where new facts and circumstances appear or are discovered, which render unjust the enforcement of the existing order.
17. However, as Kennett J noted in *Ferratum Australia*, the regime considered by the High Court in *Hogan* contained no counterpart of s 37AJ requiring orders to operate for “no longer than is reasonably necessary” and for a period “specified by reference to a fixed or ascertainable period or by reference to the occurrence of a specified future event”.
18. In *Porter v Dyer*,¹⁹ Besanko and Abraham JJ tentatively concluded that “such authority as we been able to find” suggests that a concluding date or event for a suppression order must be identified.²⁰ The opposite conclusion is often reached. In *Clime Capital v UGL Pty Ltd (No 2)*,²¹ Anastassiou J referred to 19 cases in which orders had been made “until further order”. His Honour followed that practice in *Clime Capital*.
19. In the present case, the suppression and non-publication order will no longer be necessary only when the information being protected is no longer current or sufficiently relevant to HBAU’s fraud prevention and detection such that its public disclosure presents an unacceptable risk. In those circumstances, it would be open for the Court to decide this as an appropriate case to provide that the order operate “until further order”. If, however, the Court is inclined to impose a date by which the order is to operate given

¹⁷ Ellis Affidavit, [21](b).

¹⁸ [2017] FCAFC 225.

¹⁹ [2022] FCAFC 116; 402 ALR 659.

²⁰ *Australian Competition and Consumer Commission v Air New Zealand Limited (No 3)* [2012] FCA 1430 at [24] per Perram J; *Oreb v Australian Securities and Investments Commission* [2016] FCA 321; (2016) 154 ALD 124 at [94] per Markovic J.

²¹ [2020] FCA 257.

the terms of s 37AJ of the Act, then in light of the evidence from Mr Ellis and the high risk of customer harm, it would be appropriate to set a date of 10 years.

Date: 12 February 2024

M HODGE

K A LOXLEY