

**Federal Court of Australia**  
**District Registry: New South Wales**  
**Division: General**

**ESAFETY COMMISSIONER**  
Applicant

**X CORP.**  
Respondent

**COMMISSIONER'S NOTE ON THE PRINCIPLES RELEVANT TO *EX PARTE***  
**DISCLOSURE — FOR 10 MAY 2024**

1. This note summarises the relevant principles in respect of an applicant’s duty of disclosure in an *ex parte* application, and the consequences flowing from any material breach of such duty.
2. **Content of the duty.** The duty was described by Gageler J in *Aristocrat Technologies Australia Pty Ltd v Allam* as “an elementary principle of our ordinarily adversarial system of justice that full and fair disclosure must be made by any person who seeks an order from a court *ex parte*, with the result that failure to make such disclosure is ordinarily sufficient to warrant discharge of such order as might be made”.<sup>1</sup>
3. **Consequence of material non-disclosure.** As is apparent from the phrase “ordinarily sufficient” in *Allam* above, the Court has a discretion to set aside or continue interlocutory relief in the absence of such disclosure. The suggestion at X Corp.’s Submissions at [17] that a material non-disclosure “requires” an injunction to be discharged is wrong.
4. **The Court has a discretion whether to discharge the injunction.**<sup>2</sup> Any order made in consequence of a material non-disclosure is “not void but is irregular and therefore voidable”.<sup>3</sup> The Court retains a discretion to continue interlocutory relief in the event of non-disclosure.<sup>4</sup> The Court will consider the circumstances of the case, including the practical realities of urgent *ex parte* applications, what would be achieved by setting aside an order, the innocence (or otherwise) of the non-disclosure, and any acquiescence under the order.<sup>5</sup> In *Westwind Air Charter Pty Ltd v Hawker de Havilland Ltd*, Murray J noted the existence of this discretion, and stated “an injunction will not be automatically discharged and there needs to be consideration of whether or not the materiality was sufficient to justify discharge without examination of the merits and of

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<sup>1</sup> [2016] HCA 3; 90 ALJR 370 at [15].

<sup>2</sup> See generally *Palaris Mining Pty Ltd v Short* [2012] QSC 224 at [37] (Applegarth J); *Honeywell Ltd v Acciona Infrastructure Projects Australia Pty Ltd* [2023] NSWSC 663 at [76]-[79] (Rees J); *Liberty Financial Pty Ltd v Scott* [2002] FCA 345 at [83] (Weinberg J); *Valuestream Investment Management Ltd v Richmond Management Pty Ltd (No 2)* [2012] FCA 914 at [96] (Barker J).

<sup>3</sup> *Savcor Pty Ltd v Cathodic Protection International APS* (2005) 12 VR 639 at [32] (Gillard AJA, Ormiston and Buchanan JJA agreeing) (**Savcor**).

<sup>4</sup> See *Spry on Equitable Remedies* (Thomson Reuters, 9<sup>th</sup> ed, 2014) 515; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 6<sup>th</sup> ed, 2015) 985 [31.85]; Zuckerman et al, *Zuckerman on Australian Civil Procedure* (LexisNexis, 2018) 387-88 [10.87]-[10.89].

<sup>5</sup> See *Savcor* at [29]-[34].

the circumstances generally”.<sup>6</sup> This discretion extends to whether to dissolve the injunction *ab initio* or *in futuro*.<sup>7</sup>

5. **Even if past non-disclosure has occurred, an applicant can make a new application on fresh material.**<sup>8</sup> Thus in *Baycolt Investments Pty Ltd v Raynard Pty Ltd*, Pullin J explained “even if there has been non-disclosure, this does not necessarily prevent the Court in the proper case from regranting the injunction forthwith on notice and on the merits”.<sup>9</sup> To similar effect, Northrop J stated in *Barneys Blue-Crete Pty Ltd v Australian Workers' Union* that “the suppression of the relevant facts does not prevent a fresh application for an injunction being heard and determined in the light of all relevant facts”.<sup>10</sup>

**Date: 9 May 2024**

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<sup>6</sup> (1990) 3 WAR 71 at 87 (emphasis added).

<sup>7</sup> *Showcase Realty Pty Ltd v Circosta* [2021] NSWSC 355 at [7] (Rees J).

<sup>8</sup> *Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* (1988) 20 FCR 540 at 543 (Davies, Gummow and Lee JJ); *Nexdius Pty Ltd v Exposure Scientific LLC* [2017] NSWSC 1608 at [81] (Stevenson J).

<sup>9</sup> [2002] WASC 11 at [36].

<sup>10</sup> (1979) 43 FLR 463 at 475.