

CASENOTE: Berryman v NextDC Limited [2026] FCA 1065 (28 July 2026)

Mr Berryman ('**Employee**' or '**Applicant**') commenced a proceeding against NextDC ('**Employer**') in the Federal Court of Australia. The Applicant sought relief under section 323 of the *Fair Work Act 2009* (Cth), alleging that the Employer had failed to pay him in full for his work. The Employee also sought additional compensation and penalties.

Interim relief

On 28 July 2026, at the first case management hearing, the Respondent pressed for interlocutory suppression and non-publication orders under Part VAA of the *Federal Court of Australia Act 1976* (Cth) ('**FCA Act**'). The Applicant consented to the Respondent's orders, in effect prohibiting publication of the whole of the Applicant's concise statement and the as-yet unfiled concise response from the Respondent.

As the proceeding was to be referred to mediation, the interlocutory application was recast as an 'interim' application for relief. In considering whether the orders should be made, the question emerged:

- whether (as the proceeding would be referred to mediation) an interim suppression order was appropriate;
- if such an order (if granted) would be appropriate on an interim basis until mediation were completed.

Lee J heard the application. His Honour considered the main section, being section 37AF of the FCA Act. That section provides (in part)

37AF Power to make orders

- (1) *The Court may, by making a suppression order or non-publication order on grounds permitted by this Part, prohibit or restrict the publication or other disclosure of:*
 - (a) *information tending to reveal the identity of or otherwise concerning any party to or witness in a proceeding before the Court or any person who is related to or otherwise associated with any party to or witness in a proceeding before the Court; or*
 - (b) *information that relates to a proceeding before the Court and is:*
 - (i) information that comprises evidence or information about evidence; or
 - (ii) information obtained by the process of discovery; or
 - (iii) information produced under a subpoena; or
 - (iv) information lodged with or filed in the Court.
- (2) *The Court may make such orders as it thinks appropriate to give effect to an order under subsection (1).*

His Honour found that the powers in section 37AF of the FCA Act may only be exercised on the grounds of section 37AG; and that such section has as its touchstone the element of 'necessity';

in the sense that the Court may make a suppression order only on limited grounds. Key to those grounds, are only if the Court finds it necessary:

- to prevent prejudice to the proper administration of justice (section 37AG(1)(a);
- to prevent prejudice to the interests of the Commonwealth or of a State or Territory in relation to national security (section 37AG(1)(b);
- to protect the safety of any person (section 37AG(1)(c); and
- to avoid causing undue distress or embarrassment to a party or witness in a criminal proceeding involving an offence of a sexual nature including indecency (section 37AG(1)(d).

As the application finally emerged, it was pressed on three bases: namely that the suppression order was necessary on the basis of *price-sensitive information*, said to be trade secrets, which could be of benefit to trade rivals. Further, the information about amounts unpaid to the Applicant might permit conclusions to be drawn about *confidential pricing arrangements* and otherwise commercially sensitive material. Finally, there was information concerning the *amount of commission* sought by the Applicant (including how this was calculated) which was also commercially sensitive.

His Honour found that the scheme in the FCA Act reflected the primacy of open justice – and noted that it was concerning that the judge was asked to make the order in chambers. Such an order would have prevented a news publisher or any person with sufficient interest in the question to be heard: section 37AH(2)(d)-(e) of the FCA Act.

His Honour declined to make an order prohibiting publication of the whole of the concise statement. Instead, his Honour gave leave to the Respondent to propose a further order directed only to those parts of the concise statement which contained trade secrets or commercially sensitive information. His Honour found that there was no warrant for suppression orders on any wider basis, and would reconsider if the proposed order were narrowed.

Rationale of the decision

Applications for suppression were (and have remained, until a few years ago) relatively common. As Lee J noted, many are made by consent without consideration of authority. There are also a range of permissive decisions (granting wide suppression orders) which have been commented on by more recent decisions in the Federal Court – and not always favourably.

This decision and the Court decisions in *Super Retail Group*¹ marks a clear departure from previous practice; in granting such relief. It also does something else.

Rather than permit a blanket approach to ‘the whole’ of a particular document, the effect of Lee J’s emphasis in this proceeding is to identify the source of confidentiality or trade secret as the proper basis for a suppression order. In so doing his Honour greatly narrows the focus of orders likely to be granted, and eliminates the possibility of wide-ranging suppression in the future.

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11 August 2026

¹ At first instance, see [2024] FCA 954. See also on appeal (single judge, Wigney J) at [2024] FCA 954.