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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD206/2021
File Title:	CHARLES CHRISTIAN PORTER v AUSTRALIAN BROADCASTING CORPORATION ACN 429 278 345 & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

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Important Information

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APPLICANT'S OUTLINE OF SUBMISSIONS ON PROPOSED ORDER 3

NSD 206/2021

CHARLES CHRISTIAN PORTER

Applicant

AUSTRALIAN BROADCASTING CORPORATION AND LOUISE MILLIGAN

Respondents

A. BACKGROUND

1) These submissions are in support of order 3 in the proposed consent orders signed by the representatives of the parties emailed to the Court on 31 May 2021 to give effect to a settlement of these proceedings.

2) The proposed consent orders were on the following terms:

BY CONSENT:
1 The proceedings be discontinued.
2 No order as to costs.
3 The unredacted Defence and unredacted Reply be permanently removed from the Court file.
THE COURT NOTES:
4 That the First Respondent agrees to the following publication:
On 26 February 2021, the ABC published an article by Louise Milligan. That article was about a letter to the Prime Minister containing allegations against a senior cabinet minister. Although he was not named, the article was about the Attorney General Christian Porter.
The ABC did not intend to suggest that Mr Porter had committed criminal offences alleged. The ABC did not contend that the serious accusations could be substantiated to the applicable legal standard – criminal or civil. However, both parties accept that some readers misinterpreted the article as an accusation of guilt against Mr Porter. That reading, which was not intended by the ABC, is regretted.

3) At 4.05pm on 31 May 2021, after receiving the proposed orders the Court wrote to the parties and noted the following:

1. *The necessary order is that "Leave be granted to the applicant to file a notice of discontinuance within 7 days on the basis that there be no order as to costs". Her Honour has no issue with the making of an order in these amended terms.*
2. *Order 2 is appropriate. Her Honour has no issue with the making of an order in these terms.*
3. *Justice Jagot's present view is that order 3 cannot be made merely by consent between the parties. Her Honour's present view is that the intervening parties may still have a right to be heard about any order continuing, or having the effect of continuing, the suppression orders. Mr Dowling's interlocutory application also remains unresolved.*

4) At 5.11pm on 31 May 2021, Ms Carnabuci, the General Counsel of the first respondent, emailed the Court on behalf of all parties, relevantly:

> *I am responding on behalf of Ms Giles and ABC Legal.*
> *The Parties agree with the proposal made by Her Honour in relation to order 1 and an amended consent order will be provided shortly.*
> *In relation to Order 3, the ABC has agreed as part of the settlement of the matter to unredacted copies of the Defence and the Reply being removed from the court file. As such, in the parties' view if her Honour were to make this order, the question of suppression would no longer arise.*

5) The Court held a case management hearing on 1 June 2021, and case management orders were made for this hearing.

6) On 4 May 2021, the respondents filed their defence (the **Defence**) that contained three schedules (the **Schedules**). On 4 May 2021, the applicant filed his reply (**Reply**). The applicant immediately notified the respondents and then the Court that he considered that the Defence contained irrelevant and scandalous material that should be struck out from the document and requested that the Defence not be uploaded by the Court to the online Court File until his objection could be heard. The Court responded that the Defence and Reply filed on 4 May 2021 would not be published onto the Online File before the parties had an opportunity to be heard. Save to reach agreement with the respondents, the applicant has never objected to his Reply being available to the public or on the Court file.

7) On 5 May 2021, the applicant filed an interlocutory application (**Interlocutory Application**) that sought various orders including an order (5) pursuant to Federal Court Rules 2011 (**FCR**) r16.21(2) that the Schedules be removed from the Court file as they contain material of a kind mentioned in rule 16.21(1)(a) (scandalous material), (b) (frivolous or vexatious material), (c) (is evasive or ambiguous) or is otherwise an abuse of process.

8) On 7 May 2021, there was a case management hearing and orders (entered on 10 May 2021) were made including interim suppression orders over parts of the Defence and Reply to preserve the status quo and case management directions. The Interlocutory Application was listed for hearing on 1 and 2 June 2021. On 7 May 2021, redacted versions of the Defence and Reply were filed with the Court – proposed order 3 does not affect these documents.

9) On 13 May 2021, the applicant filed his submissions in support of his Interlocutory Application. On 21 May 2021, the respondents wrote to the applicant proposing mediation. On 24 May 2021, the applicant accepted the respondents' offer to hold a mediation. The mediation ran from 28 to 31 May 2021 resulting in a settlement deed that provided for the proposed consent orders now before the Court.

10) The making of the consent orders, with the agreed amendment the Court proposed on 31 May 2021, will bring these proceedings to an end, with the filing of a notice of discontinuance.

11) The Court should make proposed consent order 3 for the reasons that follow.

B. THE INTERVENORS

12) There is no application for a suppression order. The proposed consent orders will discharge the interim suppression orders.

13) The applicant, in these circumstances, objects to any role or intervention by the media publisher or Mr Dowling in relation to proposed consent order 3 – a matter inherently between the parties and the Court. Neither the media publishers nor Mr Dowling have a sufficient interest to warrant intervention and their involvement only serves to increase time and costs for the parties contrary to FCR r9.12 and s37M of the *Federal Court Act 1976*.

C. FEDERAL COURT RULES AND PRINCIPLES

Power to remove documents from the Court file

14) FCR r16.21 permits parties (and only parties) to apply to have pleadings removed from the Court file:

> *Application to strike out pleadings*
>
> *(1) A party may apply to the Court for an order that all or part of a pleading be struck out on the ground that the pleading:*
>
> *(a) contains scandalous material; or*
>
> *(b) contains frivolous or vexatious material; or*
>
> *(c) is evasive or ambiguous; or*

(d) is likely to cause prejudice, embarrassment or delay in the proceeding; or

(e) fails to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading; or

(f) is otherwise an abuse of the process of the Court.

(2) A party may apply for an order that the pleading be removed from the Court file if the pleading contains material of a kind mentioned in paragraph (1)(a), (b) or (c) or is otherwise an abuse of the process of the Court.

FCR r6.01 is an equivalent rule for parties (and only parties) in respect of other documents, but also applies to pleadings.

15) FCR r2.26 provides a Registrar the power to refuse to accept a document that is an abuse of process of the Court or is frivolous or vexatious. FCR r2.27 identifies other circumstances when documents will not be accepted for filing. The Court maintains its own power and initiative to remove pleadings accepted for filing under FCR r2.28(1)(a)(i).

16) A party may also apply under FCR r2.28(2) for an order that a document, including pleadings, be removed from the Court file if the Court is satisfied that the document is otherwise an abuse of process or should not under rule 2.27 have been accepted for filing.

17) FCR r2.28(1)(a)(ii) provides that a document which has been accepted for filing will be removed from the Court file where the Court has ordered that the document be removed from the Court file on the application of a party under rule 6.01 or subrule 16.21(2).

18) A document removed from a Court file under rule 2.28, however, must be stored (a) if an order mentioned in this rule specifies a way to store the document – in a way specified in the order and (b) otherwise – as directed by the District Registrar: FCR 2.28(3).

19) As Colvin J explained in *AMB19 v Minister for Home Affairs* [2020] FCA 439, at [82]:

Importantly, acceptance of a document for filing does not mean that the document remains part of the record. A judge of the Court has power to direct that a document be removed from the Court file. In my view, that includes, in an appropriate case, directing the removal of an originating process.

See also *McDonald v Registrar Colbran* [2019] FCA 1937 at [38] per Charlesworth J as to the power of the Court to remove documents from the Court file, and *Manolakis v Carter* [2008] FCAFC 183 where the Full Court (per Spender, Graham and Tracey JJ) at [72] and [74] held that scandalous allegations in a notice of appeal, applications and supporting affidavits would have justified orders that those documents be removed from the Court file had it been necessary.

20) These powers have been exercised on numerous occasions in the Federal Court including in relation to pleadings and documents the equivalent of pleadings, see for example:

a) In *Rio Tinto Ltd v Federal Commissioner of Taxation* [2004] FCA 335 at [58]-[60], Sundberg J ordered that a statement of facts issues and contentions and amended SFIC the commissioner had filed that were embarrassing and oppressive be removed from the Court file under the equivalent of FCR r6.01 and the inherent power of the Court.

b) In *Nyoni v Shire of Kellerberrin* [2011] FCA 1299 at [64]-[65], Siopis J ordered those paragraphs of a statement of claim containing scandalous material be struck-out of the Court file.

c) In *Warner v Wong (No 4)* [2015] FCA 369 at [12]-[13], Griffith J ordered that a defence be removed from the Court file because its filing was an abuse of process.

d) In *Sims v Suda Ltd (No 2)* [2015] FCA 281 at [47], Gilmour J ordered that the statement of claim be removed from the Court file because it contained unsupportable allegations of the commission by the respondent of a criminal offence found to be scandalous and an abuse of process: leave to appeal dismissed *Sims v Suda* [2015] FCA 967 per Siopis J.

e) In *Cantarella Bros Pty Ltd v Du Bois* [2016] FCA 1115 at [11]-[14], after proceedings were discontinued Rares J ordered those parts of the statement of claim, that prima facie, <u>in dispute but not determined</u>, contained asserted confidential information be redacted and removed form the Court file and made

orders to remove or redact other documents that referred to that information from the Court file.

f) In *Australian Competition and Consumer Commission v Oscar Wylee Pty Ltd (No 2)* [2020] FCA 1361 at [13], in the context of confidential and commercially sensitive information in penalty proceedings for admitted contraventions Katzman J ordered that the Statement of Agreed Facts and Joint Submissions that had been superseded by an amended version be removed from the Court file in lieu of a suppression order over that document.

21) Further, in *Rotel Co Ltd v Panasales Clearance Centre (Australasia) Pty Ltd (No 2)* [2008] FCA 629 at [11] per Tracey J the Court noted by consent orders that the parties had removed draft amended pleadings from the Court file that had formed part of an application to amend to which objection had been taken. See also in *Gill v Ethicon Sarl (No 2)* [2019] FCA 177, where Lee J at [34] acknowledged without criticism the parties taking steps to remove privileged material from the evidence and submissions on the Court file.

22) FCR 2.28(3) means that the Court may make for orders regarding the storage and preservation of any document removed from the Court file and even without such an order the District Registrar will be responsible to maintain the custody and storage of such documents on formal removal form the file.

Consent orders on settlement

23) There is an important public policy in encouraging the fair and appropriate settlement of litigation: *ACCC v Woolworths* (2003) 198 ALR 417 per Mansfield J at [21]. It is a general principle of judicial restraint in the scrutiny of proposed settlements particularly in the case of settlements between parties legally represented and able to understand and evaluate the desirability of agreeing to a settlement that the court will not refuse to give effect to terms of settlement which may be within the Court's jurisdiction and are otherwise unobjectionable.

24) Proposed order 3 is an order sought under the FCR. The court must approach proposed order 3 in the way that best promotes the overarching purpose of the FCR

in ss37M and 37N of the *Federal Court Act 1976* which include the promotion of negotiated outcomes to avoid costly and lengthy proceedings.

FCR 16.21, abuse of process and defamation

25) Wigney J recently described the terms used in FCR 16.21(1) in *Chandrasekaran v Commonwealth (No 3)* [2020] FCA 1629 at [99]-[110] (citations removed):

(a) The word "vexatious" in the context of rules such as FCR 16.21 is an "omnibus expression" that includes material that is scandalous, discloses no reasonable cause of action, is oppressive or embarrassing or the inclusion of which is otherwise an abuse of the processes of the Court. Material in a pleading would also be considered to be vexatious or frivolous if it was included in the pleading with the intention of annoying or embarrassing, or for a collateral purpose, or if it raises matters that are "obviously untenable or manifestly groundless": [103];

(b) Material which is degrading, and therefore scandalous will not be struck out unless it is also irrelevant. Scandal, in the context of FCR 16.21, means "the allegation of anything which is unbecoming to the dignity of the Court to hear or is contrary to good manners or which charges some person with a crime not necessary to be shown in the case" and "any unnecessary (not relevant to the subject) allegation bearing purely upon the moral character of an individual": [104];

(c) A pleading is likely to cause prejudice or embarrassment, for the purposes of FCR 16.21(1)(d), if it is susceptible to various meanings, contains inconsistent allegations, includes various alternatives which are confusingly intermixed, contains irrelevant allegations or includes defects which result in it being unintelligible, ambiguous, vague or too general. Such a pleading could equally be characterised as evasive or ambiguous for the purposes of FCR 16.21(1)(c) of the Rules: [105];

(d) A pleading may be considered to be embarrassing if it suffers from narrative, prolixity or irrelevancies to the point that it is not a pleading to which the

other party can reasonably be expected to plead to: *Fuller v Toms* (2012) 247 FCR 440 at [80], [84]. A party cannot be expected to respond to mere context, commentary, history, narrative material or material of a general evidentiary nature: [106];

(e) A pleading may also be struck out as embarrassing if it is plain that the pleading party cannot call any evidence at the hearing to substantiate the pleading: [107].

(f) Abuse of process is a concept that is flexible and it "*applies in any circumstances in which the Court's processes are used for an illegitimate purpose, or are used in a way which would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute*": [112]; *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [25]; *Rogers v The Queen* (1994) 181 CLR 251 at 255-256, 286.

26) It is long been a category of abuse of process for statements to be made under absolute privilege to a Court that introduce damaging irrelevant matter or to make allegations which may have ruinous consequences to the person attacked which cannot be substantiated by evidence: *Clyne v New South Wales Bar Association* (1960) 104 CLR 186. In the context of defamation proceedings such conduct in pleadings would be improper, unjustifiable or lacking in bona fides and justify an award of aggravated damages: *Triggell v Pheeney* (1951) 82 CLR 497.

D. SUBMISSIONS

27) The effect of proposed order 3 will be to discharge the interim suppression orders entered on 10 May 2021.

28) The FCR recognise that the question of whether documents such as the Schedules contain material that is scandalous, frivolous, vexatious, evasive or ambiguous or is otherwise an abuse of process is an interparty dispute save the ability of the Court to remove documents on its own motion to protect its processes. This is because an opposing party takes objection to a document another party has filed with the Court.

29) In settling these proceedings, the first respondent has made a statement that the serious accusations made against the applicant in the article complained of could not be substantiated to the civil or criminal standard, and the second respondent has agreed to the first respondent making such a statement. The applicant at all times has strenuously denied those allegations.

30) Both respondents have agreed as part of their settlement with the applicant to file consent orders with the Court, including proposed order 3, which seek the relief in paragraph 5 of the Interlocutory Application save the addition that the unredacted Reply also be removed.

31) Paragraph 5 of the Interlocutory Application alleged that the Schedules contained material that was scandalous, frivolous, vexatious, evasive, and/or ambiguous and otherwise an abuse of process such that the material should be removed from the Court file. It was also the applicant's position throughout and in bringing these proceedings that the allegations made within the Schedules could not be proven or substantiated.

32) The applicant would have alleged that the Schedules were a prolix narrative containing many scandalous allegations that were incapable of rationally affecting a fact in issue or being supported by admissible evidence. He also would have alleged that the particulars, as a whole, in form and substance were contrary to any proper principles of pleading. The applicant would have alleged that the issues with the particulars were extensive and intertwined between the Schedules.

33) The applicant would also have alleged at the hearing of the Interlocutory Application that the filing of the Schedules under absolute privilege was an abuse of process - drafted predominantly to harm him, rather than to inform him of the case he had to meet on the defences. Were the applicant's allegations in respect of the Schedules correct and he succeeded at Trial he likely would have been entitled to a substantial award of aggravated damages in accordance with *Triggell v Pheeney* from the filing of the Schedules.

34) The settlement means that the allegations about the Schedules have been resolved between the parties and will not now be argued at a hearing of the Interlocutory Application or at the Trial. The compromise of these serious allegations is a powerful reason for the Court to make proposed order 3.

35) It would be completely contrary to the interests of justice, the overriding purposes of s37M and the promotion of settled outcomes if the parties were required to litigate at this time paragraph 5 of the Interlocutory Application. It would be the applicant's submissions, if that course is required, that the Schedules contained material that was scandalous, frivolous, vexatious, evasive, and/or ambiguous and otherwise an abuse of process, but the settled resolution of those serious allegations between the parties without judicial finding informs the important interest of the Court in making proposed order 3.

36) The removal of the Schedules will not affect the integrity of the Court file as illustrated in the cases above where pleadings and other documents have been removed. Further, the integrity of the Court records will be maintained as r2.28(3) provides.

37) There is in these circumstances no reason for the Court not to make proposed consent order 3. The Court has the power. The Court has given effect to consent orders in relation removal of documents from the Court file in the past. The principle of judicial restraint in the scrutiny of proposed settlements means it is in the interest of justice to make this order and further the making of this order will resolve and finalise these proceedings.

38) It follows from the foregoing argument that it is neither necessary nor appropriate for the Court to make any decision upon the early motion however if the Court is against us, we rely on the submissions and evidence on strike out application as filed.

15 June 2021

Bret Walker and Barry Dean
Counsel for the Applicant