NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 25/06/2021 3:59:40 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

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

Dated: 25/06/2021 4:00:43 PM AEST

Registrar

Important Information

As required by the Court's Rules, 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.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Porter

v

Australian Broadcasting Corporation and Another

NSD 206/2021

<u>Media intervenors' outline of submissions on order 3</u>

Summary

1. These submissions are made by the media intervenors in answer to the Applicant's Outline of Submissions on Proposed Order 3 dated 15 June 2021.

2. The media intervenors oppose the making of the proposed order 3. The Applicant has failed to establish a proper basis for the removal of the unredacted Defence and the unredacted Reply from the Court file.

3. There has been no finding that the allegations made in the Schedules to the Defence comprise scandalous and irrelevant matters introduced for some illegitimate purpose. The Applicant has abandoned his strike out application such that no such finding will be made. The Court would not conclude that the allegations advanced in the particulars to the Defence are so irrelevant to the issues in dispute, or lacking in substance, that the Defence should be removed. Absent such a conclusion, it is submitted that the Court would not accede to a fundamental derogation from the overarching principle of open justice, and the right of the public to inspect the pleadings filed by the parties to a proceeding, simply because the parties have agreed to that course.

4. The Applicant no longer presses his application for a suppression order. It is respectfully submitted that, as a consequence of that abandonment, the interim order must be discharged or revoked, and that the public ought to be entitled to inspect those parts of the Court file that are permitted pursuant to Rule 2.32(2).

Intervention

5. On 7 May 2021, the media intervenors were granted leave to appear on the application for orders pursuant to ss 37 AI and 37AF. On 1 June 2021, when the application for an order pursuant to Rule 2.28 was foreshadowed, the Applicant did not oppose a timetable that provided for the service of the Applicant's Submissions on the media intervenors, nor did he oppose the making of orders providing for the filing and service of submissions by the media intervenors.

6. The removal of a pleading from a court file is the removal of a document which the public is entitled to inspect, pursuant to rule 2.32(2)(c). By that application, the Applicant is seeking the suppression de facto of material ordinarily available for public inspection. But for the existing order made under s 37AI, members of the public would have been entitled to inspect the Court file and see the Defence and the Reply. The result is a derogation from the overarching principle of open justice, enlivening the media intervenors' interest.

7. The media are the eyes and ears of the general public[1]. Because of that special role, the media has the requisite standing to challenge a suppression order[2] and, by parity of reasoning, to be heard on an application that has the effect of restricting the public's access to the Court file. The Court has granted leave to media intervenors in similar applications: see, for example, *Appleroth v Ferrari Australasia Pty Limited* [2020] FCA 756.

Submissions

8. In their submissions dated 26 May 2021 at [4] to [20] (copy attached), the media intervenors set out the applicable legal principles concerning open justice and the right of members of the public to inspect pleadings, including pleadings that have been struck out.

9. In *Minister for Immigration and Border Protection v Egan* [2018] FCA 1320, Allsop CJ said, at [4]:

---

[1] *Attorney-General v Observer Limited* [1990] 1 AC 109 at 183F per Sir John Donaldson M.R.
[2] *Herald & Weekly Times Ltd v Williams* (2003) 130 FCR 435 at [17] (Full Court)

> "The principle of open justice is one of the overarching principles in the administration of justice, in this Court and all others. It lies at the heart of the exercise of judicial power as part of the wider democratic process. The principle involves justice being seen to be done. A key part of this task is enabling accurate and fair public reports of proceedings. Open justice is not an absolute concept, unbending in its form. It must on occasion be balanced with other considerations, including but not limited to considerations such as the avoidance of prejudice in the administration of justice or the protection of victims. Nevertheless, an order restricting the ordinary open justice approach is not lightly made. This balancing exercise is reflected in ss 17, 37AE and 37AG of the *Federal Court of Australia Act 1976* (Cth), as well as in the *Federal Court Rules 2011* (Cth): see e.g. rr 2.31, 2.32.

10. The principle of open justice is an overarching principle which guides the Court in its judicial and procedural operations - recognised by the Court's General Practice Note (GPN-ACCS) *Access to Documents and Transcripts Practice Note* issued by the Chief Justice on 25 October 2016: see *Champion on behalf of the Marlinyu Ghoorlie Claim Group v State of Western Australia* [2020] FCA 1175 at [30].

11. The open justice principle is ordinarily engaged when proceedings are commenced: *Bianca Hope Rinehart v Georgina Hope Rinehart* [2014] FCA 1241 at [31].

12. In *Treasury Wine Estates Limited v Maurice Blackburn Pty Ltd* [2020] FCAFC 226, the Full Court said, at [88]:

> "…In this Court…once a pleading is filed (see r 2.25 of the FC Rules) it is in the custody of the relevant District Registry (see r 2.31) and any member of the public may inspect it if it is identified in r 2.32(2) of the FC Rules (subject to r 2.32(1) and (3)). A pleading or similar document is identified in r 2.32(2)(c)…"

13. The mere fact that a pleading, or a part of a pleading, has been struck out does not warrant the making of a suppression or non-publication order, nor does it warrant the removal of the pleading, or part of it, from the Court file: see *Rush v Nationwide News Pty Ltd* [2018] FCA 357 at [195] – [196].

14. Rule 2.32 contemplates a right of access to all pleadings, including amended pleadings and previous versions. Allegations made in pleadings may change. Allegations may be augmented, varied or deleted, and the public is entitled to discern the change in the case that the relevant party seeks to advance. Causes of action that are made in a prior pleading may be abandoned. Proceedings may subsequently resolve. None of these events derogates from the right to inspect. Members of the public are presumed to understand that pleadings contain allegations, some of which may be tested and some of which may never be tested.

15. The power under rule 16.21(2) is consequent upon the exercise by the Court of the power under rule 16.21(1). In the exercise of the power under sub-rule (2), the Court will have regard to the nature and content of the material excised from the pleading. It is submitted that the Court must approach that task, having regard to the overarching principle of open justice and any competing considerations.

16. Similarly, the exercise of the power under rule 2.28 requires an antecedent conclusion that the material warrants removal because it is scandalous, vexatious or oppressive, or is otherwise an abuse of process.

17. In the present case, there has been no such conclusion. The Applicant indicated his intention to strike out parts of the Defence, but that application was overtaken by the resolution of the substantive dispute. For the reasons set out at below at [23] ff, the Court would not, in any event, conclude that the allegations made in the Schedules to the Defence are of a kind warranting a departure from the ordinary rule that struck out parts of a pleading will be made available for inspection by non-parties.

18. The mere fact that material is embarrassing, degrading or damaging does not warrant the striking out of that material, let alone its removal. The material must also be irrelevant to the issues in the proceedings: see *Chandrasekaran v Commonwealth (No 3)* [2020] FCA 1629 at [104]. Material should only be struck out (and potentially removed from the Court file) if it is scandalous *and irrelevant* to the dispute before the Court.

19. Embarrassment and damage to reputation has never been a proper foundation for the making of an order restricting publication[3]. It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms[4]. Parties must accept the damage to their reputation, and the possibility of consequential loss, which may be inherent in being involved in litigation[5].

---

[3] *Rush v Nationwide News Pty Ltd* [supra] at [187]-[188]
[4] *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131 at 142-3 per Kirby P
[5] *KPTT v Commissioner of Taxation* [2021] FCA 464 at [7]

20. In *Appleroth*, an application was made for a confidentiality order, pursuant to rule 2.32, prohibiting access by non-parties to material held on the Court file. The application was made after the discontinuance of the proceedings, in circumstances where the originating application was never served. The foundation for the application was personal embarrassment. The application was refused.[6]

21. It is notable that there are very few cases where the power under rule 2.28 (or the power under the cognate Order 41 rule 5) has been utilised. The circumstances in which the power has been utilised are foreign to the facts of the present case.

22. The Applicant has cited a number of instances of the prior exercise of the power, each of which is distinguishable from the facts of this case.

    (a) *Rio Tinto Ltd v Federal Commissioner of Taxation* [2004] FCA 335 pre-dated the present rule. There, the respondent Commissioner of Taxation was ordered to file a statement outlining the Commissioner's contentions and the facts and issues in the appeal as the Commissioner perceived them. The document was hopelessly deficient and an order was made for it to be *replaced* with a compliant statement.

    (b) In *Nyoni v Shire of Kellerberrin* [2011] FCA 1299, the second, third and fourth respondents sought the removal of certain paragraphs of the statement of claim from the Court file on the basis that they contained scandalous material *which was extraneous to the causes of action relied upon*. Siopis J declined to remove the material from the Court file but struck out the relevant paragraphs from documents on the Court file.

    (c) In *Warner v Wong, in the matter of Bellpac Pty Limited (Receivers and Managers Appointed) (In Liq) (No 4)* [2015] FCA 369, Griffiths J ordered the removal from the Court file of a defence filed two days prior to the commencement of the trial, in circumstances where the respondent – a litigant in person - had been ordered to file any defence two years earlier.

---

[6] Whilst not presently relevant, a subsequent application was made for an order under s 37AF to protect the interests of third parties, founded upon s 37AG(1)(c): see [2020] FCA 820; see also [2021] FCA 627

(d) *Cantarella Bros Pty Ltd v Du Bois* [2016] FCA 1115 was a breach of confidence claim, where orders were made to protect the confidentiality of the information the subject of the claim. The parties sought to have the pleadings *replaced* with redacted pleadings to preserve the subject matter of the proceedings.

(e) In *Sims v Suda Ltd (No 2)* [2015] FCA 281, a litigant in person made allegations of the commission by the respondent of a criminal offence, which allegations were found by the Court to be "unsupported and unsupportable". After striking out the statement of claim and dismissing the proceedings, orders were made for removal of the pleading.

(f) In *Australian Competition and Consumer Commission v Oscar Wylee Pty Ltd (No 2)* [2020] FCA 1361, a Statement of Agreed Facts and Joint Submissions (ie not a pleading) was superseded by an amended document and the original documents were removed for apparent convenience.

(g) *Rotel Co Ltd v Panasales Clearance Centre (Australasia) Pty Ltd (No 2)* [2008] FCA 629 was an application for costs following a number of applications, some of which were abandoned. Relevantly, the cross-claimants had sought leave to file and serve an amended cross-claim, which application was not ultimately pressed. The removal of the *draft* cross-claim from the Court file was ordered without consideration of the propriety of acceding to the parties' consent position.

(h) *Gill v Ethicon Sàrl (No 2)* [2019] FCA 177 concerned the "hard" closure of a class in a class action. Lee J ordered the removal of privileged material from the Court file.

23. In the present case, there is no material capable of satisfying the Court that the Defence (incorporating the Schedules) was filed for the illegitimate or collateral purpose of harming the Applicant, or was otherwise an abuse of the Court's processes. It was settled by respected Senior Counsel. Further, while the Applicant may assert that it contains highly damaging allegations concerning him, those allegations were germane to the defence of justification in respect of the Chase 2/Chase 3 imputations pleaded by the Applicant.

24. The statement made by the Respondents following the settlement of their dispute with the Applicant does not support a conclusion that the defence in respect of the Chase 2/Chase 3 imputations was improper. The Applicant pleaded imputations of guilt, together with "reasonable grounds for suspicion" imputations. The post-statement settlement statement engaged with the guilt imputations, which had never been defended as substantially true.

25. As previously submitted by the media intervenors in their submissions dated 26 May 2021 (at [29] ff), the Applicant elides the distinction between various grounds referred to in rule 16.21. There will be a real and profound difference in treatment between material that is truly scandalous and that which is not. Particulars are frequently struck out on the basis that they are prolix, lack specificity, or are otherwise embarrassing and vexatious. Defects in form have never been a basis for the making of a suppression order and would be an insufficient basis for the removal of a pleading from a Court file.

26. The Court would not, of its own motion, reach a conclusion that the allegations in the Schedules are so divorced from the real controversy as to warrant removal. Further, the Court would not conclude, of its own motion, that the particulars advanced by the Respondents are so devoid of content as to be wholly incapable of establishing, in conjunction with other facts, the substantial truth of the imputations which the Respondents sought to defend, such that they should be removed from the Court file.

27. On their face, the particulars all concern and are directed to the proof of the truth of the imputations that are sought to be defended as substantially true. They do not raise scandalous and irrelevant matters introduced for some illegitimate purpose. Even those particulars which concern admissions and tendency evidence are not so separate and distinct from the subject matter of the proceeding that the Court would conclude that they were included as an abuse of process – as foreign to the subject matter of the proceedings.

28. On 24 June 2021, in the matter of *Joanne Elizabeth Dyer v Sue Chrysanthou & Charles Christian Porter* (NSD426/2021), Thawley J released to the public and published on the Federal Court website 13 exhibits including:

(a) Exhibit 1[7] - dossier and letter from Kate's friends to the Prime Minister and others dated 23 February 2021, which contained graphic details of the alleged rapes; and

(b) Exhibit 5[8] - transcript of interview of Jo Dyer by the ABC consisting of 19 pages, which set out considerable detail concerning the alleged rapes.

29. Considering the content of these exhibits, it is difficult to see how the Court could conclude that the filing of the Defence (and the Schedules) constituted a serious abuse of process - that it was filed for an illegitimate purpose. Indeed, had the Applicant pressed his application for suppression of the Schedules to the Defence, that application would have failed, for want of utility, given the publication of these exhibits: see *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125; 83 NSWLR 52 at [76]. The release and publication of these exhibits provides an additional reason why the interim suppression order made by this Court in this proceeding must be revoked.

30. Given the Applicant's preference for settlement of the proceeding (and the underlying dispute) over the hearing of his strike-out application, there is no finding that the Defence constitutes an abuse of the Court's processes. The necessary antecedent conclusion for the removal of the Defence and the Reply from the Court's file has not been reached.

31. Further, there is no suggestion that a refusal to make order 3 would compromise the settlement that has been achieved by the parties. The Applicant released the Respondents with effect from the execution of the settlement deed. There has been compliance with the positive stipulations contained in clauses 2 and 3 of the deed. Relevantly, clause 3 required no more than the filing of consent orders. Had the *making* of consent orders in those terms been a condition of the settlement, the parties would have said so.

[7] https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/dyer-v-chrysanthou/Exhibit-1-redacted-as-at-25-June-2021-Redacted.pdf
[8] https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/dyer-v-chrysanthou/2021_05_25-Exhibit-5-redacted.pdf

32. It is not for the parties to pre-determine or regulate the orders that are made by a Court. Whilst settlement of disputes is to be promoted, the Court should not sanction agreements that abrogate the Court's exercise of its powers (including the power under rule 2.28) in a principled manner – a manner consistent with the overarching principle of open justice.

25 June 2021

D R Sibtain
Level 22 Chambers
Tel: 02 91512246
Email: d.sibtain@level22.com.au

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 26/05/2021 11:35:38 AM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

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

Dated: 26/05/2021 11:50:15 AM AEST

Registrar

Important Information

As required by the Court's Rules, 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.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Porter

v

Australian Broadcasting Corporation and Another

NSD 206/2021

Intervenors' outline of submissions on suppression orders

Summary

1. These submissions are made by the intervenors in reply to the Applicant's Outline of Submissions on Suppression Orders (**Applicant's Submissions**).

2. The intervenors oppose the continuation of the orders made pursuant to s 37AI of the *Federal Court Act* and submit that no further order should be made, either pursuant to s 37AF of the Act or pursuant to rule 2.32 of the *Federal Court Rules*, limiting access to or restraining the publication of the contents of the Defence filed 4 May 2021 or any other aspect of the proceeding.

3. The Applicant has failed to establish a proper basis for the making of a non-publication order pursuant to s 37AF of the Act or a confidentiality order pursuant to rule 2.32 of the Rules.

Legal principles

4. The fundamental rule is that the administration of justice must take place in open court[1]. It is so fundamental as to be of constitutional significance[2]. The principles of open justice are foundational to the exercise of judicial power under Chapter III of the

[1] *Scott v Scott* [1913] AC 417 at 441 per Lord Halsbury and at 445 per Lord Loreburn; *Dickason v Dickason* (1913) 17 CLR 50; *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J and at 532 per Stephen J; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 476-7 per McHugh JA; *John Fairfax Pty Ltd v Attorney-General (NSW)* (2000) 181 ALR 694 at [52] – [56] per Spigelman CJ; *John Fairfax Publications Pty Ltd & Anor v District Court of New South Wales & Ors* (2004) 61 NSWLR 344 at [18] per Spigelman CJ

[2] *John Fairfax Pty Ltd v Attorney-General (NSW)* (supra) at [53].

Constitution[3]. A court exercising judicial power of the Commonwealth must be, and appear to be, an independent and impartial tribunal[4].

5. The primacy of the public interest in open justice appears in s 37AE of the *Federal Court Act*[5].

6. Justice is enhanced where the courts are exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected[6]. It is of fundamental importance that the public should have confidence in the administration of justice. Justice should not only be done, it should manifestly and undoubtedly be seen to be done[7].

7. One of the normal attributes of a court is publicity[8]. In *Smith v Commonwealth of Australia (No 2)* [2020] FCA 837, Lee J said, at [14]:

> "The *first* reason reflects a fundamental tenet upon which our system of justice operates, namely, the principle of open justice. That principle is one of the most important aspects of our system of justice, and an essential feature of the judicial process: See *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* [2000] NSWCA 198; (2000) 181 ALR 694 (at 703–4 [52]–[57] per Spigelman CJ). The reason why open justice is important, and why it is described as a primary objective of the administration of justice in s 37AE of the Act is that, to the extent possible, proceedings in courts of justice should be exposed fully to public and professional scrutiny and, if necessary, criticism, by well-informed observers who are able to follow and comprehend the information that is taken into account in making decisions which are relevant to their interests. If interested observers are able to follow and comprehend the evidence, the submissions of parties, the submissions and the reasons for judgment, then the public confidence in the administration of justice will be enhanced and, as Gibbs J (as his Honour then was) observed in *Russell v Russell* (1976) 134 CLR 495 (at 520), "confidence in the integrity and independence of the courts" will be maintained."

---

[3] *Valentine v Fremantlemedia Australia Pty Ltd* [2013] FCA 1293 at [22]; *Hogan v Hinch* (2011) 243 CLR 506 at [20]

[4] *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; [2004] HCA 31 at [29]; see also *Crawford v Davidson-Crawford* [2019] NSWSC 728 at [19] per Ward CJ in Eq as to the essential features of a court.

[5] *Rush v Nationwide News Pty Ltd* [2018] FCA 357 at [184]; *Pascoe (Liquidator), in the matter of Matrix Group Ltd (in liq) (Trustee) (No 2)* [2021] FCA 426 at [17]; see also *Nationwide News Pty Ltd v Qaumi* (2016) 93 NSWLR 384 at [19] in respect of similar legislation in New South Wales

[6] *Russell v Russell* (supra) at 520-1 per Gibbs J; *Pascoe (Liquidator), in the matter of Matrix Group Ltd (in liq) (Trustee) (No 2)* [2021] FCA 426 at [17]; see also *Commissioner of the Australian Federal Police v Qing Zhao* (2015) 255 CLR 46 at [44]

[7] *The Queen v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 259.4, 262.10-263.2; *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256 at 259A-B; *AZAEY v Minister for Immigration and Border Protection* [2015] FCAFC 193 at [22]

[8] *John Fairfax Pty Ltd v Attorney-General (NSW)* (supra) at [55]

8. The publication of fair and accurate reports is vital to the proper working of an open and democratic society and to the maintenance of public confidence in the administration of justice[9]. In a free society public access to the conduct of the courts and the results of deliberations in the courts is a human right, as well as a mechanism for ensuring the integrity and efficacy of the institutions of the administration of justice[10]. To deny the public knowledge *of any part* of the proceedings of a court is a matter of gravity[11]. To exclude the public from proceedings is no mere matter of procedure[12].

9. The media are the eyes and ears of the general public[13]. In *Valentine v Fremantlemedia Australia Pty Ltd* [2013] FCA 1293, Mortimer J said, at [23]:

> "…In reporting on court proceedings, the media play a role as the "eyes and ears of the general public": *Attorney-General (UK) v Observer Ltd* [1990] 1 AC 109 at 183 per Sir John Donaldson MR. Whether that role is performed responsibly is a matter left for the public to judge. Reporting on proceedings accurately and in good faith is enhanced by, and sometimes requires, access to documents in a proceeding. Where parties to a proceeding have a public profile, media reporting is to be expected…"

10. Because of that special role, the media has the requisite standing to challenge a suppression order[14]. The entitlement of the media to report on court proceedings is a corollary of the right of access to the court by members of the public[15].

11. The power conferred upon the Court pursuant to s 37AF is an exceptional power[16]. Before making an order, there must be material before the Court upon which it may reasonably conclude that it is really necessary to make the order[17]. Further, the order

---

[9] *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (supra) at 481.
[10] *John Fairfax Publications Pty Ltd & Anor v District Court of New South Wales & Ors* (supra) at [99]
[11] *R v Tait* (1979) 24 ALR 473 at 487 per Brennan, Deane and Gallop JJ.
[12] *Russell v Russell* (supra) at 533
[13] *Attorney-General v Observer Limited* [1990] 1 AC 109 at 183F per Sir John Donaldson M.R.;
[14] *Herald & Weekly Times Ltd v Williams* (2003) 130 FCR 435 at [17] (Full Court); *Mirror Newspapers Ltd v Waller* (1985) 1NSWLR 1 at 7 – 9; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (supra) at 470; *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131; *Nationwide News Pty Ltd v District Court of New South Wales* (1996) 40 NSWLR 486 at 489D and 498F; s 37AH(2)(d) of the Federal Court Act
[15] *John Fairfax Publications Pty Ltd & Anor v District Court of New South Wales & Ors* (supra) at [20].
[16] *KPTT v Commissioner of Taxation* [2021] FCA 464 at [6] – [7]
[17] *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (supra) at 476-7, referred to with approval in *John Fairfax Publications Pty Ltd & Anor v District Court of New South Wales & Ors* (supra) at [39] – [40]

must do no more than is necessary to achieve the due administration of justice, or to achieve the objects of the statutory power[18].

12. The test of necessity is informed by its context and requires an evaluation of the proposed order and its identified purpose[19]. 'Necessary' is a strong word, and an order should only be made in exceptional circumstances[20]. An order is not necessary if it appears to the court to be convenient, reasonable or sensible[21], or desirable[22]. The Court is not permitted to engage in some 'balancing exercise' in which it weighs competing considerations[23].

13. Furthermore, a suppression order cannot be made unless it is "necessary" for one or more of the purposes specified in s 37AG[24].

14. If an order is futile or ineffective, it cannot be described as necessary[25]. If an order will not achieve the intended outcome, it cannot be, in all the circumstances, necessary. Under the common law, once the subject matter of the information has been publicly disclosed, a court has no power to make or to continue a non-publication order[26].

15. Embarrassment and damage to reputation has never been a proper foundation for the making of an order restricting publication[27]. It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms[28]. Parties must accept the damage

---

[18] *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (supra) at 476-7; *John Fairfax Publications Pty Ltd & Anor v District Court of New South Wales & Ors* (supra) at [39] – [40]
[19] *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (supra) at 476-7, referred to with approval in *John Fairfax Publications Pty Ltd & Anor v District Court of New South Wales & Ors* (supra) at [39] – [40]
[20] *Rinehart v Welker* (2016) 93 NSWLR 311 at [27]; *Rush v Nationwide News Pty Ltd* [2018] FCA 357 at [186]; *KPTT v Commissioner of Taxation* [supra] at [7]
[21] *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [31]
[22] *C7A/2017 v Minister for Immigration and Border Proctection (No 2)* [2020] FCAFC 70 at [14]
[23] *C7A/2017 v Minister for Immigration and Border Proctection (No 2)* [supra] at [12]
[24] *C7A/2017 v Minister for Immigration and Border Proctection (No 2)* [supra] at [13]
[25] *Fairfax Digital Australia and New Zealand Ltd v Ibrahim* (supra) at [76] – [78]
[26] *Attorney-General v Leveller Magazine* [supra]; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (supra) at 480C-481B; see also *Regina v DWF19 (No 1)* [2019] NFSC 3 at [49]
[27] *Rush v Nationwide News Pty Ltd* [supra] at [187]-[188]
[28] *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131 at 142-3 per Kirby P

to their reputation, and the possibility of consequential loss, which may be inherent in being involved in litigation[29].

16. Where the Court declines to make a non-publication order, or declines to treat material used in court as confidential, that material will ordinarily become publicly available[30].

17. It is an important part of the system of open justice that pleadings are ordinarily available for public inspection so that the public "may see what is the controversy brought to the court for resolution by it in its ordinary function as a court constituted under Chapter III of the Constitution". Untested allegations in a pleading will not be shielded from scrutiny[31].

18. The same scrutiny will be applied to allegations that are struck out. In *Rush v Nationwide News Pty Ltd* [2018] FCA 357 said, at [195] – [196], in respect of those parts of a defence that were struck out:

> "[195] Fourth, I doubt that the fact that parts of the Amended Defence will be struck out justifies the making of a suppression or non-publication order over the entirety of the pleading, or the parts that have been struck out. Nor does it warrant the removal of the pleading, or part of it, if that is possible, from the Court file. The principle of open justice demands and requires that the public be able to follow and understand all stages of a proceeding, including interlocutory steps such as the striking out of part of a defence. It is difficult to see how such a step could be fully understood, or fairly reported on, if the parts of the defence that are struck out are suppressed.
>
> [196] Of course, there may well be exceptional cases where the parts of a pleading that are struck out contain manifestly scandalous or vexatious material. This, however, is not such a case."

19. In *Chandrasekaran*, Wigney J said, at [104]:

> "The mere allegation of a scandalous fact does not necessarily render the pleading liable to be struck out as scandalous. Material which is degrading, and therefore scandalous, will not be struck out *unless it is also irrelevant*: *Cavill Business Solutions Pty Ltd v Jackson* [2005] WASC 138 at [25]. Scandal, in the context of r 16.21 of the Rules, 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 cause" and "any unnecessary (not relevant to

[29] *KPTT v Commissioner of Taxation* [supra] at [7]
[30] *Nicholls on behalf of the Bundjalung People of Byron Bay and Attorney General of New South Wales (No 2)* [2019] FCA 1797 at [18]
[31] *Rush v Nationwide News Pty Ltd* [supra] at [189] – [194]; *Llewellyn v Nine Network Australia Pty Limited* (2006) 154 FCR 293 at [24] - [29] and [36] – [37]

the subject) allegation bearing purely upon the moral character of an individual": *Cavill* at [25]."[32] (emphasis added)

20. In *Cavill*, Hasluck J said, at [25]:

> "…the mere allegation of a scandalous fact does not render the pleading liable to be struck out as scandalous, for material which is degrading and therefore scandalous will not be struck out unless it is also irrelevant. Scandal consists in 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 cause: to which may be added that any unnecessary (not relevant to the subject) allegation bearing purely upon the moral character of an individual is also scandalous." (emphasis added)

Submissions

21. These proceedings are brought by a former first legal officer of the Commonwealth and are to be heard by a Chapter III Court. The respondents are the national broadcaster and a journalist employed by that broadcaster.

22. Quintessentially, every aspect of the proceeding is and will be a matter of the highest public interest, concern and scrutiny.

23. When these proceedings were commenced, the applicant's legal representative issued a media release, informing the public of the commencement of the proceedings. Ms Giles, on behalf of the applicant, said:

> "…The claims made by the ABC and Ms Milligan will be determined in a Court in a procedurally fair process. Mr Porter will have and will exercise the opportunity to give evidence denying the false allegations on oath.
>
> The ABC and Ms Milligan having published these allegations have damaged the reputation of the Attorney-General. This Court process will allow them to present any relevant evidence and make any submissions they believe justifies their conduct in damaging Mr Porter's reputation.
>
> If the ABC and Ms Milligan wish to argue the truth of the allegations, they can do so in these proceedings. Under the Defamation Act it is open for the ABC and Ms Milligan to plead truth in their defence to this action and prove the allegations to the lower civil standard."

---

[32] *Faruqi v Latham* [2018] FCA 1328 at [93]; see also *James v Faddoul* [2008] NSWSC 176 at [9] – [10], where Latham J acknowledged that whilst the pleading contained "degrading material and allegations bearing on the moral character of the plaintiff", they were not irrelevant to the framed causes of action and would not be struck out. The statement of a scandalous fact that is material to the issue is not a scandalous pleading: *Millington v Loring* 6 QBD 190

24. Notwithstanding that public statement, the applicant now seeks to suppress parts of the proceeding.

25. The applicant applies to have various particulars of the respondents' defence struck out pursuant to rule 16.21. He is entitled to bring that application. However, the applicant also seeks orders that would prohibit scrutiny of the parts which are struck out and (potentially) those which remains. By his application for orders pursuant to s 37AF of the Act and/or rule 2.32, the applicant is attempting to hide from public scrutiny a proceeding that he himself launched into the public forum. The applicant has not demonstrated a proper basis for any such order.

26. The precise nature of the relief sought by the applicant has not been explained[33]. However, it is tolerably clear that the applicant seeks orders suppressing some or all of the particulars. Those orders are sought on three apparent bases:

    (a) If material is struck out, it ought to be suppressed. The applicant's submission appears to be that an order of that kind is necessary because the Court should "prevent or remedy" an abuse of process. It is also said to be necessary to prevent the respondents, other media defendants, and others generally from acting irresponsibly by abusing the Court's processes.

    (b) The particulars contain material that is deeply personal, confidential and potentially damaging to the deceased victim, AB. There is an interest in protecting complainants. According to the applicant, the order is protective of complainants.

    (c) The applicant's submission appears to be that disclosure of the particulars may dissuade persons from coming forward to give evidence to assist the applicant.

27. In the intervenors' submission, the Court would not grant the relief sought, as the applicant has failed to establish a proper basis for the making of any orders.

28. The substantive allegations the subject of the proceedings are publicly known. What the applicant seeks to suppress are the facts, matters and circumstances that may (or

[33] see [2] and [7] of the applicant's submissions on suppression orders

may not), at trial, establish the truth of one or more of the imputations on which he sues, or the contextual imputations.

29. The applicant elides the distinction between various grounds referred to in rule 16.21. There will be a real and profound difference in treatment between material that is truly scandalous and that which is not. Particulars are frequently struck out on the basis that they are prolix, lack specificity, or are otherwise embarrassing and vexatious. Defects in form have never been a basis for the making of a suppression order.

30. Similarly, the fact that particulars cause damage to the reputation of the applicant has never been a basis for the making of a making of a suppression order. Material which is degrading, and therefore scandalous, will not be struck out unless it is also irrelevant"[34]. In circumstances where damaging – even scandalous – particulars have some bearing on the subject matter of the proceedings, the Court would refuse to make a suppression order or a confidentiality order.

31. On their face, the particulars all concern, and are directed to the proof of, the truth or falsity of the imputations to which they are directed. They do not raise scandalous and irrelevant matters introduced for some illegitimate purpose. Even those particulars which concern admissions and tendency evidence are not so separate and distinct from the subject matter of the proceeding that the Court would conclude that they were included as an abuse of process – as foreign to the subject matter of the proceedings.

32. The applicant's submission appears to be that a suppression order is necessary as a sanction imposed upon the respondents, and third parties, not to abuse the processes of the Court by the filing of pleadings that do not comply with the Rules. That has never been a basis for the making of a non-publication or suppression order. The Rules themselves provide the sanction for defects in pleading: see rule 16.21. No further sanction is warranted or contemplated by s 37AG.

33. The second basis raised by the applicant should be rejected. The protection of certain complainants is the subject of express provision in s 37AG. However, it has no application in the present proceedings, and there is no other source of power for the making of such an order, founded on the protection of AB (or complainants generally).

[34] *Chandrasekaran v Commonwealth (No 3)* [2020] FCA 1629 at [104]

There is no application for protection by any person on behalf of AB and there is no material before the Court to suggest that any complainant is in need of protection. Before making an order, there must be material before the Court upon which it may reasonably conclude that it is really necessary to make the order[35]. There is no material before the Court that meets that description. To the extent that the allegations made by AB were, at some historical time, confidential, their substance has now been disclosed widely and publicly.

34. Similarly, the third basis raised by the applicant is no more than hypothetical conjecture. The applicant has not established, on admissible material, that there is a real threat that witnesses will not come forward to assist the applicant. Further, the submission lacks logical probity. Presumably, the publication of facts involving times, dates and places might encourage witnesses to come forward.

35. The intervenors seek leave to respond to any further submissions raised by the applicant, either in writing or in oral argument. Otherwise, it is submitted that the Court should refuse the relief sought by the applicant that all or part of the pleadings be suppressed or treated confidentially.

26 May 2021

D R Sibtain
Level 22 Chambers
Tel: 02 91512246
Email: d.sibtain@level22.com.au

[35] *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (supra) at 476-7, referred to with approval in *John Fairfax Publications Pty Ltd & Anor v District Court of New South Wales & Ors* (supra) at [39] – [40]