FEDERAL COURT OF AUSTRALIA

Porter v Australian Broadcasting Corporation [2021] FCA 863

File number(s):	NSD 206 of 2021
Judgment of:	**JAGOT J**
Date of judgment:	30 July 2021
Catchwords:	**PRACTICE AND PROCEDURE** – where parties settled proceeding – where interim suppression and non-publication orders were made – where parties proposed consent orders including order to permanently remove unredacted pleadings from Court file under r 16.21(2) of *Federal Court Rules 2011* (Cth) (**Court Rules**) – where such order is important aspect of compromise between parties – where such order would prevent public from inspecting unredacted documents under r 2.32(2) – principle of public interest in open justice fundamental not absolute – Court to facilitate just resolution of disputes and give effect to contractual bargains between parties – unredacted documents to be removed from Court file on ground that it is necessary to prevent prejudice to proper administration of justice. **PRACTICE AND PROCEDURE** – interaction of *Federal Court of Australia Act 1976* (Cth) (**Court Act**) and Court Rules – Court's powers to make suppression and non-publication orders under s 37AF (on grounds in s 37AG(1) and under limits imposed by ss 37AJ and 37AH) and to remove documents from Court file under rr 2.28 and 2.29 – operation of r 2.32 and timing of non-party inspection right. **PRACTICE AND PROCEDURE** – consent orders and orders made in chambers – when orders may be made in chambers and not in open court.
Legislation:	*Federal Court of Australia Act 1976* (Cth) ss 17, 37AA, 37AE–37AI, 37M, 37N *Federal Court Rules 2011* (Cth) rr 1.32, 1.35, 1.36, 2.21, 2.25–2.29, 2.31, 2.32, 9.12, 16.21, 20.03 *Judiciary Act 1903* (Cth) s 78B
Cases cited:	*Appleroth v Ferrari Australasia Pty Limited* [2020] FCA 756 *Attorney-General v Observer Ltd* [1990] 1 AC 109 *Cantarella Bros Pty Ltd v Du Bois* [2016] FCA 1115

Chandrasekaran v Commonwealth of Australia (No 3) [2020] FCA 1629
Coleman v Power [2004] HCA 39; (2004) 220 CLR 1
D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12; (2005) 223 CLR 1
David Syme & Co v General Motors-Holden's Ltd [1984] 2 NSWLR 294
Dring v Cape Intermediate Holdings Ltd [2019] UKSC 38; [2020] AC 629
Dyer v Chrysanthou (No 2) (Injunction) [2021] FCA 641
Hearne v Street [2008] HCA 36; (2008) 235 CLR 125
Hogan v Australian Crime Commission [2010] HCA 21; (2010) 240 CLR 651
John Fairfax Group Pty Ltd v Local Court (NSW) (1991) 26 NSWLR 131
Keyzer v La Trobe University [2019] FCA 646
KPTT v Commissioner of Taxation [2021] FCA 464
Lange v Australian Broadcasting Corporation [1997] HCA 25; (1997) 189 CLR 520
Levy v Victoria (1997) 189 CLR 579
Llewellyn v Nine Network Australia Pty Ltd [2006] FCA 836; (2006) 154 FCR 293
McLaughlin v Glenn [2020] FCA 679
Minister for Immigration and Border Protection v Egan [2018] FCA 1320
Oldham v Capgemini Australia Pty Ltd (No 2) [2016] FCA 1101
Prothonotary of the Supreme Court of New South Wales v Shane Dowling [2017] NSWSC 664
R v Davis (1995) 57 FCR 512
R v Legal Aid Board; Ex parte Kaim Todner (a firm) [1999] QB 966
Reynolds v JP Morgan Administrative Services Australia Ltd (No 2) [2011] FCA 489; (2011) 193 FCR 507
Rinehart v Rinehart [2014] FCA 1241; (2014) 320 ALR 195
Rinehart v Welker [2011] NSWCA 403; (2011) 93 NSWLR 311
Rush v Nationwide News Pty Ltd [2018] FCA 357; (2018) 359 ALR 473
Russell v Russell [1976] HCA 23; (1976) 134 CLR 495
Scott v Scott [1913] UKHL 2; [1913] AC 417
SM Employment Pty Ltd v Commissioner of Taxation [2019] FCA 464
The Country Care Group Pty Ltd v Commonwealth Director of Public Prosecutions (No 2) [2020] FCAFC 44; (2020) 275 FCR 377
Treasury Wine Estates Limited v Maurice Blackburn Pty Ltd [2020] FCAFC 226

	Valentine v Freemantlemedia Australia Pty Ltd [2013] FCA 1293 *Williams v Forgie* [2003] FCA 991
Division:	General Division
Registry:	New South Wales
National Practice Area:	Other Federal Jurisdiction
Number of paragraphs:	118
Date of hearing:	9 July 2021
Counsel for the Applicant:	Mr B Walker SC with Mr B Dean
Solicitor for the Applicant:	Company Giles Pty Ltd
Counsel for the Respondents:	Ms R Enbom QC with Ms K Lindeman
Solicitor for the Respondents:	Australian Broadcasting Corporation Legal Services
Counsel for the Intervening Parties:	Mr D Sibtain
Solicitor for the Intervening Parties:	Thomson Geer
Counsel for Mr Dowling:	Mr Dowling appeared in person

ORDERS

NSD 206 of 2021

BETWEEN:	**CHARLES CHRISTIAN PORTER** Applicant
AND:	**AUSTRALIAN BROADCASTING CORPORATION** First Respondent
	LOUISE MILLIGAN Second Respondent
ORDER MADE BY:	**JAGOT J**
DATE OF ORDER:	**30 JULY 2021**

THE COURT ORDERS THAT:

1. The New South Wales District Registrar cause a copy of the unredacted defence filed 4 May 2021 and the unredacted reply filed 4 May 2021 to be placed into an envelope marked "NSD206/2021 Charles Christian Porter v Australian Broadcasting Corporation and Anor, Unredacted Defence and Unredacted Reply, removed from the Court file pursuant to orders made on 30 July 2021. Not to be opened or made available for inspection by the public other than by leave of the Court".
2. The envelope referred to in order 1 be sealed and stored by the New South Wales District Registrar in the New South Wales District Registry in a manner and location as decided by the New South Wales District Registrar.
3. The interim suppression and non-publication orders made on 10 May 2021 and subsequently amended on 21 May 2021, 25 May 2021 and 28 July 2021 be revoked.
4. Order 3 be stayed for a period of 14 days.
5. The interlocutory application filed by Shane Dowling on 11 May 2021 (the **Dowling interlocutory application**) be dismissed.
6. Shane Dowling pay the costs of the parties of and in connection with the Dowling interlocutory application as agreed or taxed.
7. The intervening parties and the parties each pay their own costs of and in connection with the hearing on 9 July 2021 and all related case management hearings.

8. The intervening parties and the parties may seek to vary order 7 by filing and serving, within seven days, a written submission not exceeding two pages setting out the varied order sought and the reasons in support.

9. If the intervening parties or parties file and serve any written submission under order 8, the other parties and/or intervening parties may file and serve, within seven days, a written submission in response not exceeding two pages.

AND THE COURT ORDERS BY CONSENT THAT:

10. Leave be granted to the applicant to file a notice of discontinuance within seven days on the basis that there be no order as to costs.

11. The unredacted defence and unredacted reply be removed from the Court file.

Note: order 11 is made on the ground that it is necessary to prevent prejudice to the proper administration of justice.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JAGOT J:

1. Background

1 This proceeding involves a claim for defamation. The parties settled the proceeding. On 31 May 2021 the parties forwarded an agreed email to the Court indicating that they would be grateful if I made orders by consent in chambers as follows:

> **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 [Australian Broadcasting Corporation (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 the 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.

2 In an email in response I said:

> Justice Jagot has considered the proposed consent orders. Her Honour notes 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.

3 I also informed the parties that, as a result, the proceeding would remain listed in open court the following morning.

4 The parties responded to the effect that they agreed that order 1 needed to be amended as I proposed. As to proposed consent order 3, they said "[i]n 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". This response did not answer the issue of concern. The issue of concern was the appropriateness of making consent order 3 at all or as proposed (in chambers) without hearing from the intervening parties in particular. Also, it may not necessarily be the case that if an order for removal of a pleading from the Court's file is made the question of a suppression order does not arise. This is explained below.

5 Evidence of the settlement was filed in accordance with subsequent orders. On 31 May 2021 the parties entered into a **deed** of settlement and release. Recital G to the deed records that the parties had agreed, without admission as to liability, to settle the proceeding on the terms and conditions set out in the deed. Clause 2.1 of the deed provides that the ABC would publish a statement within 24 hours in the form set out in Sch 2 to the deed and permanently attach an editor's note to the publication the subject of the proceeding (an article published on 26 February 2021 about a "historical rape allegation against Cabinet Minister"). Clause 3.1 provides that the parties would file the consent orders in the form set out in Sch 3 to the deed (reflecting the terms of the consent orders set out above). Clause 4 provides that, with effect from execution of the deed, Mr Porter releases the ABC and Ms Milligan from all claims connected in any way to the publication. Clause 5 provides that the deed may be pleaded in bar to any claim which is released. Clause 7 relates to mediation costs. Clause 7.1 relates to mediation costs and is redacted. Clause 7.2 provides that the quantum paid by the ABC pursuant to cl 7.1 will remain confidential and will not be disclosed subject to certain exceptions.

6 The **intervening parties** are Nationwide News Pty Ltd, Fairfax Media Publications Pty Ltd and the Age Company Pty Ltd. I granted the intervening parties leave to be heard in respect of an interlocutory application filed by the applicant, Mr Porter, on 5 May 2021 seeking orders that Sch 1, 2 and 3 of the respondents' defence be struck out under r 16.21(1) and, relying on r 16.21(a), (b), (c) and/or (f), that those Schedules be removed from the Court file under r 16.21(2) of the *Federal Court Rules 2011* (Cth) (the **Court Rules**).

7 Mr Dowling filed an interlocutory application on 11 May 2021 seeking leave to be heard in respect of Mr Porter's application for suppression/non-publication orders under s 37AF of the *Federal Court of Australia Act 1976* (Cth) (the **Court Act**). This is a reference to the fact that Mr Porter had also filed an interlocutory application on 6 May 2021 seeking orders under s 37AI of the Court Act suppressing the content of Sch 1, 2, and 3 of the respondents' defence until further order. In response, on 10 May 2021, I made interim suppression and non-publication orders in respect of Sch 1, 2 and 3 of the respondents' defence and (at the request of the respondents) para's 2(ll) to (pp) and 8 of the reply to the defence under s 37AI of the Court Act. These orders have subsequently been amended but the amendments are not material to the remaining issue in the case, which is whether I should make order 3 as proposed by consent between the parties.

8 Accordingly, as at 21 May 2021 (and today), the position was (and is) that:

(1) there is an undetermined interlocutory application by Mr Porter seeking to strike out and remove from the Court file Sch 1, 2 and 3 of the respondents' defence under r 16.21(1) and (2) respectively of the Court Rules;

(2) there are interim suppression and non-publication orders under s 37AI of the Court Act in respect of Sch 1, 2 and 3 of the respondents' defence and para's 2(ll) to (pp) and 8 of the reply to the defence;

(3) the intervening parties had been granted leave to be heard in respect of the making of any permanent suppression and non-publication orders under s 37AF of the Court Act in respect of Sch 1, 2 and 3 of the respondents' defence and para's 2(ll) to (pp) and 8 of the reply to the defence;

(4) there is an undetermined application by Mr Dowling for leave to be heard in respect of the making of any permanent suppression and non-publication orders under s 37AF of the Court Act in respect of Sch 1, 2 and 3 of the respondents' defence and para's 2(ll) to (pp) and 8 of the reply to the defence; and

(5) the parties (that is, Mr Porter, the ABC and Ms Milligan) had settled the proceeding. The terms of settlement included that the parties would file the proposed consent orders.

9 In those circumstances, I made directions enabling the parties, the intervening parties and Mr Dowling to file affidavits and submissions setting out their respective positions and listed the matter for hearing in open court on 9 July 2021. The issue requiring resolution is whether I

should make order 3 as proposed by consent between the parties, Mr Porter, the ABC and Ms Milligan.

10 Having now: (a) heard from the parties and the intervening parties in open court, and (b) reviewed the terms of the deed between the parties, I am satisfied that in the particular circumstances of this case (as explained below) it is necessary to make proposed consent order 3 to prevent prejudice to the proper administration of justice. My reasons follow.

2. The statutory provisions

11 It is necessary to understand a number of provisions of the Court Act and the Court Rules.

2.1 The Court Act

12 Part VAA of the Court Act deals with suppression and non-publication orders.

13 Section 17(1) provides:

> Except where, as authorized by this Act or another law of the Commonwealth, the jurisdiction of the Court is exercised by a Judge sitting in Chambers, the jurisdiction of the Court shall be exercised in open court.

14 Section 17(1), on its own terms, is not absolute (it operates subject to the Court Act and any other law of the Commonwealth). One provision of the Court Act which authorises the exercise of jurisdiction in other than open court is s 17(4) which provides:

> The Court may order the exclusion of the public or of persons specified by the Court from a sitting of the Court where the Court is satisfied that the presence of the public or of those persons, as the case may be, would be contrary to the interests of justice.

15 Another such provision is s 17(2) which provides:

> The jurisdiction of the Court may be exercised by a Judge sitting in Chambers in:
>
> (a) a proceeding on an application relating to the conduct of a proceeding;
>
> (b) a proceeding on an application for orders or directions as to any matter which, by this Act or any other law of the Commonwealth, is made subject to the direction of a Judge sitting in Chambers; and
>
> (c) a proceeding on any other application authorized by the Rules of Court to be made to a Judge sitting in Chambers.

16 Section 37AE provides:

> In deciding whether to make a suppression order or non-publication order, the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

17 By s 37AF the Court may make a suppression or non-publication order in respect of "information" including "information lodged with or filed in the Court": s 37AF(1)(b)(iv).

18 A suppression or non-publication order under s 37AF can only be made on one of the grounds in s 37AG(1) including that the "order is necessary to prevent prejudice to the proper administration of justice": s 37AG(1)(a).

19 By s 37AH(2) the persons entitled to be heard in relation to the making of a suppression or non-publication order are the applicant for the order, a party, the Government (or an agency of the Government) the Commonwealth or a State or Territory, a news publisher, and "any other person who, in the Court's opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should be made".

20 If an application for a suppression or non-publication order is made, s 37AI(1) permits the Court to make a suppression or non-publication order on an interim basis, "without determining the merits of the application". If such an interim order is made, the Court must determine the application as a matter of urgency: s 37AI(2). The order I made on 10 May 2021 (as subsequently amended) was made under s 37AI(1) on the basis that it was not possible to hear the merits of Mr Porter's application until some weeks after the filing of his interlocutory application.

21 Contravention of a suppression or non-publication order is a criminal offence: s 37AL(1).

22 By s 37M(1) of the Court Act, "[t]he overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes" according to law and as quickly, inexpensively and efficiently as possible. By s 37M(2) the overarching purpose includes the following objectives:

> (a) the just determination of all proceedings before the Court;
>
> (b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
>
> (c) the efficient disposal of the Court's overall caseload;
>
> (d) the disposal of all proceedings in a timely manner;
>
> (e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

23 By s 37M(3), "[t]he civil practice and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them … must be exercised or carried out, in the way that best promotes the overarching purpose."

24 Section 37M(4) defines the civil practice and procedure provisions as the Court Rules and "any other provision made by or under this Act or any other Act with respect to the practice and procedure of the Court".

25 Parties and their lawyers are subject to a duty to conduct any proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose: s 37N(1)-(3).

2.2 The Court Rules

26 The Court may make any order that the Court considers appropriate in the interests of justice: r 1.32.

27 The Court may dispense with or make an order that is inconsistent with the Court Rules: rr 1.34 and 1.35.

28 The Court may make orders other than in open court: r 1.36.

29 Rule 2.21 provides how documents may be lodged with the Court (in effect, by presenting or sending the document to a Registry of the Court).

30 Rule 2.25(1) provides that a document is filed when it is lodged under r 2.21 and is accepted in the Registry by stamping the document as "filed".

31 A Registrar may refuse to accept a document for filing if the Registrar is satisfied that the document is an abuse of the process of the Court or is frivolous or vexatious on the face of the document or by reference to any documents already filed or submitted for filing with the document: r 2.26.

32 Rule 2.27 deals with formal requirements which must be satisfied for a document to be filed.

33 By rules 2.28 and 2.29 documents accepted for filing or on a Court file may be removed from the file (and, if necessary, replaced with a redacted version of the document) either on the Court's own initiative or on the application by a party under r 6.01 or r 16.21(2) or if the Court is satisfied that the document is otherwise an abuse of process of the Court or should not have been accepted for filing under r 2.27. Rules 2.28(3) and 2.29(4) provide that:

A document removed from a Court file under this rule must be stored:

(a) if an order mentioned in this rule specifies a way to store the document - in the way specified in the order; or

(b) otherwise - as directed by the District Registrar.

34 Rule 2.31(1) provides that the District Registrar of a District Registry has custody and control over each document filed in a Registry in a proceeding and the records of the Registry. By r 2.31(2) a person may remove a document from a Registry if a Registrar has given written permission for the removal because it is necessary to transfer the document to another Registry or the Court has given the person leave for the removal.

35 Rule 2.32 provides for the inspection of a document in a proceeding. Subject to some limitations (with respect to privilege and confidentiality) a party may inspect any document in a proceeding: r 2.32(1). A person who is not a party may inspect certain specified documents in a proceeding, including a pleading: r 2.32(2). By r 2.32(3), however, a person who is not a party is not entitled to inspect a document that the Court has ordered be confidential or is forbidden from, or restricted from publication to, the person or a class of persons of which the person is a member. By r 2.32(4) a person may apply to the Court for leave to inspect a document that the person is not otherwise entitled to inspect. If the person is entitled to inspect a document, they may also obtain a copy of the document on payment of a fee: r 2.32(5).

36 It will be recalled that rr 2.28 and 2.29 provide that a document may be removed from a Court file on the application by a party under r 6.01 or r 16.21(2). Rule 6.01 provides that:

> If a document filed in a proceeding contains matter that is scandalous, vexatious or oppressive, a party may apply to the Court for an order that:
>
> (a) the document be removed from the Court file; or
>
> (b) the matter be struck out of the document.

37 Rule 16.21 provides that:

> (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.

38 It will be recalled that Mr Porter applied to strike out Sch 1, 2 and 3 of the defence under r 16.21(1) and to remove those Schedules from the Court file on the basis that they contain material of a kind mentioned in r 16.21(1)(a), (b), (c) and/or (f).

3. The submissions

39 The submissions for Mr Porter were straightforward. The proceeding included a dispute as to whether Sch 1, 2 and 3 of the defence should be struck out under r 16.21(1)(a), (b), (c) and/or (f) and removed from the Court file under r 16.21(2). This dispute was raised in good faith by Mr Porter as apparent from his interlocutory application filed on 5 May 2021. The parties settled the entirety of the proceeding including this dispute on the basis set out in the deed including the filing of the proposed consent orders. The settlement of the proceeding including the dispute about the defence was lawful. There is a public interest in parties being encouraged to settle disputes, reflected in the terms of ss 37M and 37N of the Court Act. It is not proposed that Sch 1, 2 and 3 of the defence disappear. The Court should give effect to the agreement of the parties for the settlement of the proceeding, including the dispute about the defence, by making appropriate orders. Orders could include orders for the storage of Sch 1, 2 and 3 of the defence by the District Registrar.

40 It was further submitted for Mr Porter that once it was accepted, as it must be, that the parties had reached a lawful compromise of the entirety of the proceeding, including the dispute about the defence, the only issue was whether effect should not be given to the lawful compromise on some proper principled basis. There is no such principled basis. First, the Court Rules permit a document, which includes a pleading, to be removed from the Court file. Second, there is nothing about the nature of the proceeding, a claim for defamation, which suggests the Court should not give effect to the lawful compromise of the parties. Third, there is nothing about the nature of the parties which suggests the Court should not give effect to the lawful compromise of these parties. All are equal before the law.

41 It was also submitted for Mr Porter that the intervening parties had no right to be heard about the making of proposed consent order 3, and nor did Mr Dowling. The parties were not seeking the making of a suppression or non-publication order so the intervening parties had no right to

be heard under s 37AH(2)(d). Mr Dowling was not a "news publisher" as defined in s 37AA of the Court Act and was not a person with any interest in the proceeding as provided for in s 37AH(2)(e) of the Court Act. While the Court may require the assistance of a contradictor or grant a person leave to intervene if their intervention will be useful (for example, see r 9.12 of the Court Rules), Mr Dowling's submissions and evidence disclose that he is not able to provide the Court with any proper assistance. Mr Porter also accepted that the interim suppression and non-publication orders made on 10 May 2021 (and subsequently amended) should be revoked, consequential on the making of the proposed consent orders.

42 It was submitted for Mr Porter that the practical effect of this would be that: (a) the unredacted defence and unredacted reply would be removed from the Court's file and thus would not be amenable to inspection under r 2.32(2), (b) the unredacted defence and unredacted reply could be stored in the Registry other than on the Court's file for the proceeding, and (c) the parties and intervening parties holding copies of the unredacted defence and unredacted reply would be bound not to use the documents other than for the purpose of the proceeding, consistent with the implied undertaking in respect of documents filed in litigation (***Hearne v Street*** [2008] HCA 36; (2008) 235 CLR 125). Since the hearing, and with the agreement of the parties, I varied the interim suppression and non-publication orders on 28 July 2021 to permit the South Australian Coroner's Court access to the unredacted defence in accordance with a request received from that Court.

43 As to proposition (c) above, I infer that the basis for this proposition is that the implied *Hearne v Street* obligation applies to the unredacted defence and unredacted reply because the redacted parts of those documents have not been read or referred to in open court in a way that discloses their contents and, as a result, r 20.03(1) of the Court Rules is not engaged. Rule 20.03(1) provides that "[i]f a document is read or referred to in open court in a way that discloses its contents, any express order or implied undertaking not to use the document except in relation to a particular proceeding no longer applies". However, it is necessary, in this regard, to refer to ***Treasury Wine*** *Estates Limited v Maurice Blackburn Pty Ltd* [2020] FCAFC 226 which concerns the *Hearne v Street* obligation. In obiter dicta in *Treasury Wine* at [87]-[89] the Full Court dealt with an argument that the *Hearne v Street* obligation did not apply at all to a pleading. The Full Court accepted that argument in circumstances where the pleadings in issue in that case had not been the subject of any order restricting access. However, in doing so, the Full Court referred to two cases to the effect that the *Hearne v Street* obligation does not apply to pleadings at all: *Helicopter Aerial Surveys Pty Ltd v Garry Robertson* [2015] NSWSC at

[35] and *Canterbury-Bankstown Council v Payce Communities Pty Ltd* [2019] NSWSC 1419; and one case to the contrary: *eisa Limited v Damien Brady* [2000] NSWSC 929 at [21].

44 The application or not of the *Hearne v Street* obligation to the unredacted defence and unredacted reply was not the subject of any argument before me in the present case. The scope for debate about that issue reinforces the conclusions I have reached below to the effect that: (a) if it is not to be deleted from the Court Rules, the only proper grounds for making an order that a document be "confidential" under r 2.32(3)(a) are the grounds which permit the making of a suppression or non-publication order under s 37AG(1) of the Court Act, (b) the only proper grounds for making an order that a document be removed from a Court file under rr 2.28 or 2.29 of the Court Rules are also the grounds which permit the making of a suppression or non-publication order under s 37AG(1) of the Court Act, and (c) applying for an order that a document be "confidential" under r 2.32(3)(a) and removed from the file under rr 2.28 or 2.29 cannot be permitted to avoid the stringent standard that would otherwise apply if a suppression or non-publication order is sought, as the effect of the orders is the same; both impact the right the public would otherwise have to inspect or seek leave to inspect documents filed in the Court, and both should meet the requirement of "necessity" for the making of the order, in effect, to prevent prejudice to the proper administration of justice: s 37AG(1)(a).

45 Because the application of the *Hearne v Street* obligation to the unredacted defence and unredacted reply was not the subject of any argument before me, it is necessary that I give the parties, particularly Mr Porter (proposed consent order 3 being primarily in his interest), an opportunity to consider their position in that regard. Accordingly, the revocation of the interim suppression and non-publication orders which Mr Walker SC agreed should occur, should also be stayed for a period of 14 days to enable any further applications, as may be seen to be necessary whether as a matter of abundant caution or otherwise, to be filed.

46 The intervening parties submitted that the effect of proposed consent order 3 was a de facto suppression order. Proposed consent order 3 would mean that a document the public would ordinarily be entitled to inspect under r 2.32(2)(c) of the Court Rules would not be available for inspection. The result would be a derogation from the overarching principle of open justice. Given that a "news publisher" has a right to be heard about any suppression or non-publication order (s 37AH(2)(d) of the Court Act), a news publisher should also have the right to be heard about any application for removal of a document from a Court file. As will become apparent, I agree with this submission.

47 The intervening parties submitted that there is a sound and principled basis for concluding that Sch 1, 2 and 3 of the defence (and the unredacted reply) should not be removed from the Court's file. The basis is the requirement for open justice, as reflected in s 37AE of the Court Act. The principle of open justice is fundamental.

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

> 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.

49 There are numerous judicial statements to similar effect. For example, in ***Russell*** *v Russell* [1976] HCA 23; (1976) 134 CLR 495 at 520, Gibbs J said:

> It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted "publicly and in open view" (*Scott v. Scott* [1913] A.C. 417, at p. 441). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for "publicity is the authentic hall-mark of judicial as distinct from administrative procedure" (*McPherson v. McPherson* [1936] A.C. 177, at p. 200).

50 In *Russell* also at 520 Gibbs J said:

> Of course there are established exceptions to the general rule that judicial proceedings shall be conducted in public; and the category of such exceptions is not closed to the Parliament. The need to maintain secrecy or confidentiality, or the interests of privacy or delicacy, may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court.

51 The intervening parties noted that the mere fact that a pleading or part of a pleading has been struck out does not mean that it warrants the removal of the pleading or part of it from the file. In *Rush v Nationwide News Pty Ltd* [2018] FCA 357; (2018) 359 ALR 473 Wigney J said:

(1) suppression or non-publication orders should only be made in exceptional circumstances: ***Rinehart v Welker*** [2011] NSWCA 403; (2011) 93 NSWLR 311 at

[27]; ***Rinehart*** *v Rinehart* [2014] FCA 1241; (2014) 320 ALR 195 at [23]. 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 in open justice: *Rinehart v Welker* at [32]; *Rinehart* at [25]. The paramount consideration is the need to do justice; publication can only be avoided where necessity compels departure from the open justice principle: *Rinehart v Welker* at [30]; *Rinehart* at [26]: at [186];

(2) in *Rinehart v Welker*, Bathurst CJ and McColl JA referred with approval to the statement of Lord Woolf MR in *R v Legal Aid Board; Ex parte Kaim Todner (a firm)* [1999] QB 966 at 978 that "[i]n general … parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation" and said at [54]:

> It is the price of open justice that allegations about individuals are aired in open court. Such individuals, particularly if they are parties, can make their response to such allegations public in the same forum. The media, the vehicle by which such allegations are usually published to the world, would be obliged to publish any response to ensure any report of the proceedings was fair: s 29 of the *Defamation Act 2005* (NSW).

At [187];

(3) the Court Rules provide that the pleadings filed by a party are ordinarily available for public inspection. That is an important part of the system of open justice. As Rares J pointed out in ***Llewellyn*** *v Nine Network Australia Pty Ltd* [2006] FCA 836; (2006) 154 FCR 293 at [29], the reason that the pleadings may be inspected by the public is 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": at [189]; and

(4) 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: at [195].

52 The intervening parties referred to *Chandrasekaran v Commonwealth of Australia (No 3)* [2020] FCA 1629 in which 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 the subject) allegation bearing purely upon the moral character of an individual": *Cavill* at [25].

53 They referred also to *KPTT v Commissioner of Taxation* [2021] FCA 464 at [7] in which I said "parties must accept the damage to their reputation, and the possibility of consequential loss, which may be inherent in being involved in litigation", quoting *Rinehart* at [21]-[31] as summarised in *The Country Care Group Pty Ltd v Commonwealth Director of Public Prosecutions (No 2)* [2020] FCAFC 44; (2020) 275 FCR 377 at [8].

54 The intervening parties referred to *Appleroth v Ferrari Australasia Pty Limited* [2020] FCA 756 where the applicant discontinued the proceeding and sought (unilaterally and not by consent) an order that documents he had filed be designated to be "confidential" so that they would be immune from inspection under r 2.32(3)(a) of the Court Rules (which provides that a person who is not a party is not entitled to inspect a document that the Court has ordered "be confidential"). Justice Snaden refused the application saying that:

(1) the Court's power to grant relief in the nature of the orders that are sought is not in question. Relief of that nature is discretionary. That discretion must be exercised judicially. Doing so requires that the court take account of the matters that incline in favour of the orders that the documents filed to date remain beyond public reach; and that those matters be weighed against others that incline the other way: at [8];

(2) as stated in *R v Davis* (1995) 57 FCR 512 at 514 "…exposure to public scrutiny is the surest safeguard against any risk of the courts abusing their considerable powers": at [11];

(3) it is only in exceptional and special cases that courts are entitled to exclude public access to the processes with which they deal: *David Syme & Co v General Motors-Holden's Ltd* [1984] 2 NSWLR 294, 299 (Street CJ), 307 (Hutley AP, Samuels JA agreeing). In ***John Fairfax*** *Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131, Kirby P (in dissent but not on this issue) said (at 142-143):

> 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… A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of

> privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported.

At [12];

(4) "…mere embarrassment, inconvenience or annoyance will not suffice to ground an application for suppression or non-publication": ***Keyzer*** *v La Trobe University* [2019] FCA 646 at [29]: at [13]; and

(5) "…it is an inevitable feature of litigation in open court that persons who are mentioned in passing may suffer embarrassment and distress. But that is a price the community has to pay for the undoubted benefit of court proceedings being, except in very exceptional circumstances, conducted in public", quoting *Williams v Forgie* [2003] FCA 991 at [14]: at [14].

55 Another relevant case, not mentioned by the intervening parties, is ***McLaughlin*** *v Glenn* [2020] FCA 679. In *McLaughlin*, the parties settled the proceeding. A suppression order was sought by consent after settlement. The suppression order related to one document that was not part of any document which a non-party has a right to inspect under r 2.32(2) (a complaint to the Australian Human Rights Commission (**AHRC**)). Another was the statement of claim. Justice Abraham made the suppression orders and said:

(1) "…I considered that, given there was a current application to inspect the access documents, and that the fact of the parties consenting to the orders does not relieve the Court of its obligation to determine if the relevant orders ought to be made, that the application be listed for hearing": at [3];

(2) in *SM Employment Pty Ltd v Commissioner of Taxation* [2019] FCA 464 at [8] Logan J said:

> …I can see no interest of justice which would be served by unrestricted access to the details of that condition, or, for that matter, those of his wife or children, particularly having regard to the disposition of this case. Indeed, it may very well be that unrestricted disclosure would be subversive of the consensual position reached by the parties as to the disposition of the case, and, for that matter, the underpinning of that consensual disposition, which is the reaching of a repayment agreement satisfactory to the Commissioner. It seems to me that the furtherance of that agreement would possibly be put in jeopardy by any unrestricted disclosure.

At [23];

(3) in *Cantarella Bros Pty Ltd v Du Bois* [2016] FCA 1115 Rares J ordered that pleadings be kept confidential after the proceeding settled when a bona fide claim of confidentiality had been asserted, even though the Court had not and would not now determine that claim because of the settlement: at [24];

(4) there is an undoubted very significant public interest in the settlement of litigation: ***Reynolds*** *v JP Morgan Administrative Services Australia Ltd (No 2)* [2011] FCA 489; (2011) 193 FCR 507 at [30]. These proceedings have been settled by agreement at an early stage, which as Mortimer J observed in ***Valentine*** *v Freemantlemedia Australia Pty Ltd* [2013] FCA 1293 at [13] is an outcome the Court strives to achieve. Here the parties have achieved finality through agreement which may be undermined if a third party has access to and could report on matters which the parties seek to keep confidential: at [27]; and

(5) in *Oldham v Capgemini Australia Pty Ltd (No 2)* [2016] FCA 1101 Mortimer J also observed at [30]:

> Second, the settlement of the proceeding strengthens the case to refuse access. In my opinion, and even in the absence of evidence about the precise terms of settlement of this proceeding, it would be inimical to the negotiation process which leads to the settlement of a proceeding in this Court, its discontinuance without judicial pronouncement of any kind, and the accompanying closing of the Court's file with no further proceedings in open court, for a sensitive document such as the AHRC Complaint to be released over an applicant's opposition. It would not be unusual for parties (not just applicants) in proceedings such as this to have as one of the motivations for settlement a desire to keep from the public gaze detailed factual allegations of the kind which are frequently set out in complaints made to the Commission. The Court should be mindful not to frustrate these consequences of settlement which may be in the contemplation of parties when they agree to resolve a proceeding by agreement.

56 The intervening parties also provided a helpful summary of cases in which an order had been made for the removal of a document from a Court file as relied upon in the written submissions for Mr Porter. The summary follows:

> (a) *Rio Tinto Ltd v Federal Commissioner of Taxation* [2004] FCA 335 pre-dated the present rule. There, the respondent Commsissioner 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.

(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.

57 According to the intervening parties, there was no proper justification for the making of consent order 3 as the parties proposed in the present case as: (a) Sch 1, 2 and 3 of the defence had not been filed for any illegitimate or collateral purpose, (b) the material in Sch 1, 2 and 3 of the defence were relevant to the defence of justification, (c) the defence was settled by senior counsel, (d) the Court had not found the material in Sch 1, 2 or 3 of the defence to contain scandalous, frivolous or vexatious material or to be evasive or ambiguous or otherwise to be an abuse of process of the Court as provided for in r 16.21(1)(a), (b), (c) and/or (f) of the Court Rules, (e) material had been released in proceeding NSD426/2021, Dyer v Chrysanthou, consequential upon ***Dyer*** *v Chrysanthou (No 2) (Injunction)* [2021] FCA 641, (f) had Mr Porter pressed his application for a suppression and non-publication order it would have failed for lack of utility given the material already released, (g) refusal to make consent order 3 as proposed would not compromise the settlement as the deed into which the parties entered does

not require order 3 to be made as a condition precedent to the settlement, and (h) it is not for parties to pre-determine or regulate orders that are made by the 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 under r 2.28, in a principled manner consistent with the overarching principle of open justice.

58 The intervening parties said that, in the ordinary course, when a proceeding settled the documents remained on the Court file available for inspection under and in accordance with r 2.32(2) and Mr Porter should not obtain "special treatment" merely because the parties had agreed to removal of Sch 1, 2 and 3 of the defence and the unredacted reply from the Court file.

59 Mr Dowling contended that: (a) the proceeding is a political and governmental matter as it involves a Minister of the Crown suing a publicly funded broadcaster in a federal court in a matter raising issues about the fitness of the Minister to continue as such or hold the positon of Attorney-General of the Commonwealth, (b) Mr Porter named Mr Dowling's website in his filed documents and cannot now argue that Mr Dowling cannot be part of the political debate, (c) no order can be made which would infringe on the principle of open justice or the implied freedom of political communication recognised in ***Lange*** *v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520 and *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1, (d) no party had responded to his notice of a constitutional matter under s 78B of the *Judiciary Act 1903* (Cth) (the **Judiciary Act**) to the effect that ss 37AF and 37AH(2) of the Court Act and rr 2.28 and 2.29 of the Court Rules are invalid as they infringe on the implied freedom of political communication recognised in ***Lange***, and that any order for the suppression or non-publication of documents or their removal from the Court file would also be invalid for the same reason, and (d) the political and governmental nature of the matter is disclosed by the media release issued for Mr Porter on 15 March 2021 referring to Mr Porter as the Attorney-General.

60 Mr Dowling also referred to the observations in ***D'Orta-Ekenaike*** *v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1 at [32] that:

> To adopt the language found in the cases considering Ch III of the *Constitution*, the central concern of the exercise of judicial power is the quelling of controversies. Judicial power is exercised as an element of the government of society and its aims are wider than, and more important than, the concerns of the particular parties to the controversy in question, be they private persons, corporations, polities, or the community as personified in the Crown or represented by a Director of Public

> Prosecutions. No doubt the immediate parties to a controversy are very interested in the way in which it is resolved. But the community at large has a vital interest in the final quelling of that controversy. And that is why reference to the "judicial branch of government" is more than a mere collocation of words designed to instil respect for the judiciary. It reflects a fundamental observation about the way in which this society is governed.

61 Mr Dowling submitted further that: (a) he is a journalist and news publisher, as demonstrated by his website, books and various proceedings in which he had been sued as a publisher, (b) he had paid the filing fee for his interlocutory application and thus had a sufficient interest in the proceeding on that basis, as well as his status as a journalist and news publisher and the fact Mr Porter had relied on Mr Dowling's website in his own filed documents, (c) as a news publisher, he regularly deals with the media divisions of the Federal and State police, amongst others, and (d) he should have been provided with the unredacted defence and unredacted reply for the purpose of making his submissions. Mr Dowling also complained that the parties had changed their position. There was to be a hearing about the making of suppression and non-publication orders, but now the proceeding had settled the parties sought to remove the unredacted defence and the unredacted reply from the Court's file which would have the effect of suppressing that material. As a journalist and news publisher he had a right to be heard about that proposal.

4. Discussion

4.1 Mr Dowling

62 It is convenient to deal with the position of Mr Dowling first.

63 Mr Dowling has not had access to Sch 1, 2 and 3 of the defence or the unredacted reply. This is because he was not granted leave to be heard in respect of Mr Porter's application for suppression and non-publication orders. There is no longer an application for suppression and non-publication orders. Accordingly, s 37AH(2) of the Court Act is not engaged. Mr Dowling is also not a person who should be granted leave to intervene in accordance with r 9.12 of the Court Rules. Rule 9.12 provides that:

> (1) A person may apply to the Court for leave to intervene in a proceeding with such rights, privileges and liabilities (including liabilities for costs) as may be determined by the Court.
>
> (2) The Court may have regard to:
>
> (a) whether the intervener's contribution will be useful and different from the contribution of the parties to the proceeding; and
>
> (b) whether the intervention might unreasonably interfere with the ability of

the parties to conduct the proceeding as the parties wish; and

(c) any other matter that the Court considers relevant.

[…]

64 Mr Dowling's contribution has not been useful (see below). On the evidence it could not be concluded that Mr Dowling is a "news publisher" either as defined in 37AA of the Court Act or otherwise. Section 37AA of the Court Act defines a "news publisher" as "a person engaged in the business of publishing news or a public or community broadcasting service engaged in the publishing of news through a public news medium". The Macquarie Dictionary online defines "news" as "1. a report of any recent event, situation, etc. 2. information, events, etc., considered as suitable for reporting: *it's very interesting, but it's not news...*" Mr Dowling is undoubtedly a publisher but, on the evidence, what he publishes is not "news". He does not, it seems, report on events. From his affidavit it appears that he publishes opinions and comments purporting to focus on "anti-corruption" in the government and the judiciary, much of which appears to consist of unfounded scandalous and scurrilous allegations.

65 The fact that Mr Porter, in documents filed in the Court, referred to the allegedly defamatory matter about which he sued having been re-published on Mr Dowling's website does not give Mr Dowling any interest in the proceeding greater than or different from any other member of the public. Mr Dowling, in fact, has no greater or different interest in this matter from any other member of the public. That he publishes material may be accepted. That he publishes "news" may not.

66 Mr Dowling's contentions, as noted, have not been of any assistance. The issue with which I must deal, whether or not to make proposed consent order 3, has nothing to do with the implied right of freedom of political communication. This may explain why no Attorney-General has sought to be heard in respect of Mr Dowling's interlocutory application which I required to be the subject of notice under s 78B of the Judiciary Act.

67 Mr Dowling attempted to run the same Constitutional argument in *Prothonotary of the Supreme Court of New South Wales v Shane Dowling* [2017] NSWSC 664. The Prothonotary had charged Mr Dowling with contempt of court. Amongst other things, he had made scandalous allegations about a Judge and a Registrar in open court and had published material subject to a suppression order. Mr Dowling contended that his communications were protected by the implied right of freedom of political communication as identified in *Lange* and the suppression orders were invalid as the infringed this right.

68 Justice Wilson rejected Mr Dowling's arguments, saying:

> 51 As the lack of interest in the argument by the Attorneys-General may suggest, the defendant's confidence in the availability of a constitutional defence is misplaced. The implied constitutional right of freedom of political speech to which he refers does not provide a defence to a charge of contempt of court relevant to conduct in the face of the court, and nor does it provide a defence to contempt based upon deliberate and intentional breaches of court orders. A defence of freedom of political speech has no application in the present context.
>
> 52 There is no doubt that the Constitution protects the freedom of "the people of the Commonwealth" to communicate with each other concerning those political and government matters that are relevant to the system of representative and responsible government provided for by the Constitution.
>
> 53 This implied freedom of political communication upon which the defendant relies operates as a constraint on legislative power and is required by ss 7, 24, and 128 of the Constitution: *Lange* at 557 and 560; *Hogan v Hinch* (2011) 243 CLR 506 at [92]; *Unions NSW v New South Wales* (2013) 252 CLR 530 at [36], [103] and [112]; *McCloy v New South Wales* (2015) 257 CLR 178 at [2] and [30].
>
> 54 The implied freedom is not, however, one which is at large and akin to a broad freedom of the nature of that guaranteed in the United States of America by the Fifth Amendment to the Constitution of that country. It is limited to what is necessary for the effective operation of the system of representative and responsible government provided for by the Constitution: *Lange* at 561.
>
> 55 As McHugh J observed in ***Levy*** *v Victoria* (1997) 189 CLR 579 at 622:
>
> > The freedom protected by the Constitution is not, however, a freedom to communicate. It is a freedom *from* laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution. Unlike the *Constitution of the United States*, our Constitution does not create rights of communication. It gives immunity from the operation of laws that inhibit a right or privilege to communicate political and government matters" (italicisation in original).

69 Mr Dowling's arguments in the present case are equally misconceived. In *Lange* at 561-562 the High Court explained that the freedom of communication which the Constitution protects (relating to communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves which are central to the system of representative government, as discussed at 560) is not absolute. Rather:

> It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution. The freedom of communication required by ss 7 and 24 and reinforced by the sections concerning responsible government and the amendment of the Constitution operates

> as a restriction on legislative power. However, the freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end.

70 Sections 37AF and 37AH(2) of the Court Act and rr 2.28 and 2.29 of the Court Rules concern another legitimate end, being the administration of justice in which the principle of open justice is fundamental but not absolute. That object is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and those laws are reasonably appropriate and adapted to achieving that legitimate object. As such, those laws do not impermissibly burden the implied right of political communication. That implied right, moreover, is not a personal right of Mr Dowling to communicate whatever he sees fit. As McHugh J explained in *Levy* (above) the freedom which is protected is not the freedom to communicate, but a freedom from laws which impermissibly inhibit a right to communicate political and government matters. None of this means Mr Dowling has a right to be heard about the making of proposed consent order 3.

71 Nor do the observations in *D'Orta-Ekenaike* at [32] speak to the current circumstances. The "interest" of the public to which the High Court was referring is not a personal interest of an individual wishing to see documents filed in a proceeding. It is the interest of the public at large in ensuring that justice has been done and has been seen to be done. In the present case, that interest is not secured by Mr Dowling being permitted to intervene in the proceeding. The public interest is secured by the fact that, because proposed consent order 3, on its face, raises an issue of the public interest in the proper administration of justice, I required the parties to justify their position in open court, giving persons who do have an interest in that issue over and above that of any other member of the public, the intervening parties, an opportunity to be heard. This raises a separate issue about the form of the proposed consent orders to which I will return below. The public interest is also secured by the fact that Mr Dowling has been heard, in open court, as to whether or not he has a right to be heard about proposed consent order 3 and these reasons have been given and will be published explaining why he has no such right.

72 The only other observation I will make relating to Mr Dowling is this. Because of the public interest in this matter and the rights of inspection given by r 2.32(2) of the Court Rules, the Court established an online file on its website so members of the public could access documents

they would be entitled to inspect under r 2.32(2) free of charge. Mr Dowling's affidavit and submissions will not be placed on the online file given they contain apparently scandalous and scurrilous material about third parties.

73 Further, the unsuitability of Mr Dowling to assist the Court as a contradictor to the parties seeking the making of proposed consent order 3 is confirmed by the fact that his affidavit and submissions filed in support of his position contain extraneous and apparently scandalous material.

74 For these reasons, I will dismiss Mr Dowling's interlocutory application filed 11 May 2021. While Mr Dowling submitted that his costs should be paid by the parties because they changed their position (from seeking a suppression and non-publication order to seeking removal of the unredacted defence and the unredacted reply from the Court's file), I disagree. Mr Dowling filed his interlocutory application and has been unsuccessful in obtaining any capacity to intervene. His proposed intervention, at all times, constituted the activity of an intermeddler. The parties should have an order for costs against Mr Dowling in respect of Mr Dowling's interlocutory application.

75 I turn now to the relevant issues.

4.2 Consent orders and orders in chambers

76 It is convenient here to say something about the form of the proposed consent orders. It is conventional for parties submitting proposed consent orders to frame the orders as the Court would ultimately make them. This convention tends to mask the fact that the submission to a court of any consent order, in substance, is a request to the court to exercise judicial power. In so doing a court is bound to consider whether the orders are lawful, accord with any statutory or legal requirements, and should be made having regard to all relevant considerations (which may include the rights and interests of third parties). Orders, including orders by consent, are frequently made "in chambers". It will be recalled that s 17(2) of the Court Act permits orders to be made in chambers where, relevantly, such an order is authorised by the Court Rules. Rule 1.36 authorises any order to be made other than in open court. It is thus a matter for the judge to decide if any order is appropriate to be made in chambers or not.

77 Proposed consent order 3, in the circumstances of this case, is not appropriate to be made in chambers. This is because: (a) the order relates to a filed pleading which was subject to dispute between the parties, (b) the intervening parties had already been granted leave to be heard in

respect of the making of any suppression or non-publication order consequential on the outcome of a hearing about that dispute, (c) Mr Dowling had filed an application for leave to be heard in respect of the making of any suppression or non-publication order consequential on the outcome of a hearing about that dispute, (d) that dispute had been fixed for hearing on 9 July 2021, (e) there was legitimate and not merely prurient public interest in the resolution of that dispute because it involved an issue whether the respondents, as alleged by Mr Porter, had filed material constituting a form of abuse of process of the Court, and (f) the order was not sought in circumstances where, for example, Sch 1, 2 and 3 of the defence had been filed in error and were to be replaced by amended documents. Rather, the order sought is for permanent removal of Sch 1, 2 and 3 of the defence and the unredacted reply from the Court's file, and thus permanent exclusion of the public right to inspect a pleading under r 2.32(2)(c), subject only to a contrary grant of leave to inspect under r 2.32(4). As to the capacity to grant leave to inspect under r 2.32(4) it is difficult to imagine such leave being granted if the order for removal is made unless and until there is some material change of circumstance.

78 For these reasons, I consider that the request the parties made on 31 May 2021 that I make proposed consent order 3 in chambers, in the circumstances of this case, was misconceived. Proposed consent orders 1 and 2 are different from proposed consent order 3. The discontinuance of proceedings on the basis there be no order as to costs does not involve the potential rights of third parties. They involve truly inter partes arrangements only. Had the proposed consent orders been confined to orders 1 and 2 then, subject to the necessary amendment to the terms of order 1, I would have made the orders in chambers. Proposed consent order 3, however, affects the rights of third parties and, as these reasons for judgment disclose, engages considerations about the proper administration of justice beyond the mere interests of the parties.

79 Because of the conventional form of proposed consent orders and the request that the proposed consent orders be made in chambers, the communication from the parties arguably conveyed the inaccurate and unfortunate impression that the parties expected that the Court would act as a "rubber stamp" approving whatever form of the order they agreed. In oral submissions in support of the making of proposed consent order 3, Mr Walker SC expressly and properly disavowed any such suggestion. He accepted that, in substance, the agreement of the parties was not that the Court **make** proposed consent order 3, but that they had agreed to **seek that the Court make** proposed consent order 3. This distinction is important, particularly in respect

of an order such as proposed consent order 3 which, if made, would impact on the rights of third parties (the public at large) granted by r 2.32(2) of the Court Rules.

80 For this reason also Mr Walker SC expressly and properly observed that when requested to make an order such as order 3, by consent of the parties, the Court may consider it appropriate to appoint an amicus curiae (a friend of the court) to act as a contradictor (that is, a person putting such opposing arguments as may be appropriate given the agreed position of the parties). In the present case, the appointment of an amicus curiae to act as a contradictor has not been necessary. I have received assistance from the intervening parties. The intervening parties have properly acted as the "eyes and ears of the general public" (*Attorney-General v Observer Ltd* [1990] 1 AC 109 at 183) in this matter.

81 These considerations would also apply to a party or parties seeking the making of a suppression or non-publication order. The fact of an agreement to the making of an order between the parties is a relevant but not a sufficient condition for the making of a suppression or non-publication order. In both cases, the making of an order for removal of a document from a Court file and the making of a suppression or non-publication order (other than an interim order under s 37AI of the Court Act), it will be necessary for the Court to consider whether the order can and should be made. Mere agreement between the parties will not be sufficient, of itself, to justify the making of an order. Other considerations will have to be taken into account and weighed by a judge contemplating making such an order (including, for a suppression and non-publication order, whether the judge is satisfied that the order is necessary as specified in s 37AG(1) of the Court Act).

82 Accordingly, when they submit proposed consent orders for removal of a document from a Court file or the making of a suppression or non-publication order (other than an interim order under s 37AI of the Court Act), parties should not expect that a judge will necessarily make the orders on the basis of nothing more than the consent of the parties. Nor should they expect that a judge will necessarily make the orders in chambers. They should expect that a judge may need to be provided with evidence and submissions as to why such an order can and should be made, that the application for the making of such orders may be required to be heard in open court, and that a "news publisher" within the meaning of s 37AA of the Court Act may apply to be heard in respect of the application either as of right under s 37AH(2) (for the making of a suppression or non-publication order) or by a grant of leave under r 9.12 of the Court Rules (for the making of an order for removal of a document from a Court file).

4.3 Some issues about the Court Rules

83 It is also appropriate to say something about the interactions of the various Court Rules and the Court Act. The Court Act is clear – a primary objective of the administration of justice is to safeguard the public interest in open justice: s 37AE. The fact that this is "a" not "the" primary objective of the administration of justice reflects the fact that there are other primary objectives, including those in s 37M of the Court Act to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

84 Sections 37AE-37AL of the Court Act recognise that in order to do justice it is sometimes necessary that information filed or given in a proceeding not be disclosed or published. This is because justice will be undermined if people are not free to seek the exercise of judicial power confident that, amongst other things, their safety and the safety of others will not be compromised, that national or international security will not be prejudiced, and that the administration of justice will not itself be prejudiced: s 37AG(1). The administration of justice may be prejudiced in a variety of ways. If, for example, people cannot come to a court confident that some kinds of information can be protected from disclosure if necessary (such as commercially confidential information valuable to a person or a third party, or sensitive information about a person's health, or personal information about parties or third parties of no more than prurient interest to others) then public confidence in and access to justice may itself be undermined.

85 The purpose of the principle of open justice has been said to be at least two-fold, to "enable public scrutiny of the way in which courts decide cases" and "to enable the public to understand how the justice system works and why decisions are taken": ***Dring*** *v Cape Intermediate Holdings Ltd* [2019] UKSC 38; [2020] AC 629 at [42]-[43]. That said, there are well-recognised cases in which the overall administration of justice requires the suppression of some information from the public, reflected in s 37AG(1) of the Court Act. In *Dring* at [46] these well-recognised categories were said to include "national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality".

86 While "mere embarrassment, inconvenience or annoyance will not suffice to ground an application for suppression or non-publication" (*Keyzer* at [29]) and the principle of open justice, that justice must not only be done but be seen to be done, is fundamental (*Scott v Scott* [1913] UKHL 2; [1913] AC 417), the principle has never been absolute. The principle has

always yielded to contrary necessity (an appropriately high bar specified in s 37AG(1), in contrast to the mere convenience or preference of parties). The requirement of "necessity" was explained in *Hogan v Australian Crime Commission* [2010] HCA 21; (2010) 240 CLR 651 at [31] by contrast to the notion that such an order would be "convenient, reasonable or sensible, or [would] serve some notion of the public interest, still less that, as the result of some 'balancing exercise', the order appears to have one or more of those characteristics". This approach may be contrasted with that in the United Kingdom where the person seeking access to documents must "show a good reason why [access] will advance the open justice principle": *Dring* at [47]. Rule 2.32(2) of the Court Rules, in contrast, assumes that the principle of open justice is advanced by public access to the nominated document, subject to contrary order as identified in r 2.32(3).

87 It appears to me that, recognising these matters, there are certain aspects of the Court Rules which may justify consideration of amendment.

88 First, unless a document has been filed by mistake and is intended to be replaced by a substitute document, I can see little difference between the effect of making a suppression or non-publication order under s 37AF of the Court Act and making an order for removal of a document from a Court file under rr 2.28 and 2.29 of the Court Rules which would otherwise be available for inspection by the public under r 2.32(2). Both orders have the effect of placing the document beyond the reach of the public. Yet a suppression or non-publication order may only be made on the grounds specified in s 37AG(1), must specify the grounds on which it is made under s 37AG(2), can only operate for as long as reasonably necessary under s 37AJ (and the period must be specified in the order), and the persons specified in s 37AH(2) are entitled to appear and be heard by the Court on an application for such an order.

89 By contrast, the Court Rules providing for removal of a document from a Court file do not expressly confine the grounds on which such an order may be made, do not require the order to specify the ground on which it was made, and do not specify persons entitled to appear and be heard by the Court on an application for such an order.

90 This appears to be anomalous. The anomaly may explain why the interlocutory application filed for Mr Porter on 5 May 2021 focused on removal of Sch 1, 2 and 3 of the defence from the Court file rather than the making of suppression and non-publication orders and, in the interim, marking Sch 1, 2 and 3 as "confidential" and thus prohibiting their inspection under r 2.32(2). Whatever the reason for the terms of the interlocutory application, the position I

consider sound in principle in the circumstances of this case is this: (a) the application to remove part of the defence from the Court file raises the same considerations as an application for a suppression or non-publication order in respect of that part of the document, (b) the intervening parties should be heard in respect of any such application, and (c) the only reason for making any such order is the conclusion that it is necessary to do so to prevent prejudice to the proper administration of justice. If a different approach is taken or a lower standard than this is applied, there will be inconsistency between two methods of achieving the same objective – preventing persons generally from seeing that part of the defence.

91 Second, r 2.32(3) prevents a person who is not a party from inspecting a document under r 2.32(2) if the Court has ordered that the document be "confidential" or "is forbidden from, or restricted from publication to, the person or a class of persons of which the person is a member" (that is, is subject to a suppression or non-publication order). While maintaining confidentiality of certain valuable or personal sensitive information may be a reason it is necessary to make a suppression and/or non-publication order under s 37AF, the Court Act does not contemplate two classes of suppressed information – confidential information (on the one hand) and information that is forbidden from publication to a person (on the other hand). There is only one relevant class of suppressed information, being information that is subject to a suppression and/or non-publication order. The option for the Court to order information to be "confidential" and thereby protect it from inspection under r 2.32(2), without being subject to the regime for the making of suppression and non-publication orders, also appears anomalous. This may explain the view Rares J reached in *Llewellyn* at [11] that for a document to be ordered to be "confidential" under the previous version of r 2.32(3)(a), the required confidentiality was of the same kind which would enable a suppression or non-publication order to be made. For the reasons already given, I agree with this view.

92 The potential anomalies could be removed by deleting r 2.32(3)(a) and the reference to an order that the document "be confidential" and including provisions in respect of rr 2.28 and 2.29 qualifying the power to make an order for removal in terms similar to ss 37AG-37AH of the Court Act.

93 In *Valentine* Mortimer J explained why, in certain cases (and in that case), it was appropriate to make such an order, but the same considerations would have applied in the context of the making of a suppression and non-publication order. Justice Mortimer identified that:

(1) the proceeding had been resolved at an early stage (before the filing of pleadings) which is what the Court strives to achieve through the Court Act, the Court Rules and its case management procedures: at [13];

(2) "[c]onsistently with the purposes of the settlement privilege, the maintenance of confidentiality around not only the terms of any settlement but the negotiations leading to it, is an important and often critical aspect of a successful resolution. Within a confidential setting, parties with opposing and frequently conflicting interests feel able to exchange views, put propositions, and make and respond to allegations in ways they feel unable to do in an open and public setting. On all sides, concessions, apologies and admissions against interest may be made which would not be made in public. The freedom parties and their representatives feel to conduct negotiations in this way can be inhibited if the allegations which are the subject matter of the proceeding are fully in the public domain": at [14]. While the context of these observation was an anti-discrimination claim, they apply equally to many classes of litigation, including defamation proceedings; and

(3) while there will come a point in proceedings where the opportunity for a wholly confidential resolution may be lost (where, for example, pleadings have been filed which are ordinarily available for inspection), "[u]nless and until the point is reached where other case management objectives should prevail, it will often be appropriate for the Court to make orders in relation to inspection of documents which enhance the likelihood of early and successful resolution by preserving as much as possible some confidentiality about the subject matter of the proceeding. Once a proceeding is resolved, however, these considerations need to be addressed afresh if an application such as this is made": at [15]-[16].

94 Justice Mortimer in *Valentine* rightly rejected the proposition that the principle of open justice had not yet been engaged because the parties had not attended a case management hearing, saying at [22] that:

> The fact that the Court was prepared, on occasion, to adjourn directions hearings at the parties' request, and that one consequence may have been there was less media reporting than the parties might otherwise have had to face, should not be seen as an acceptance by the Court that this proceeding should be conducted otherwise than in accordance with the principles of open justice. One of the reasons for a full hearing on the parties' interlocutory application was to ensure the principles of open justice were observed.

95 In other words, consistently with the views I have expressed, Mortimer J considered it necessary that the application for the order that the documents be identified as "confidential" should be heard in open court and not merely acceded to because the parties agreed the order should be made.

96 The third potential anomaly in the Court Rules is r 2.32 itself. Rule 2.32(2)(a) and (c) permits inspection of an originating application and a pleading. Proceedings are started by the filing of an originating application: r 8.01(1). Frequently, an originating application must be accompanied by a statement of claim: r 8.05. When an originating application is filed it has endorsed on it a "return date". This is the date the matter will come before the Court for the first time. Under r 8.06 an applicant must as soon as practicable and at least five days before the return date fixed in an originating application, serve the originating application and accompanying documents on the other parties.

97 It can be expected that an applicant will take care to protect their own confidential and personally sensitive information in an originating application and statement of claim. However, an applicant will not necessarily have the same incentive (or knowledge) to protect confidential and personally sensitive information about the other parties or third parties in their originating application or statement of claim. While inclusion of such information in a document filed in a court for some collateral purpose would involve an abuse of process, the more likely prospect is that the information is relevant but the applicant has not known or appreciated (or, perhaps, cared sufficiently) that the other parties or third parties might have a legitimate basis to apply for suppression and non-publication orders over that information. The anomaly is one of timing. If a member of the public becomes aware that an originating application and statement of claim has been filed they may be able to exercise their right of inspection under r 2.32(2) before the other parties to the proceeding and the third parties who may be mentioned in the filed documents are aware of the existence of the proceeding. As a result, the right of those parties to seek suppression and non-publication orders would be undermined. This potential for injustice could be ameliorated by amending r 2.32(2) to permit inspection as of right only after the first return date of the proceeding; applications to inspect before the first return date in the proceeding would require leave.

4.4 Removal from the Court file?

98 Against this background the question whether it is necessary to prevent prejudice to the proper administration of justice for the unredacted defence and the unredacted reply to be removed from the Court's file can be answered.

99 As noted, under s 37M of the Court Act the function of the Court is to "**facilitate** the just resolution of disputes". A court can perform that facilitation function in multiple ways, not confined to a judicial decision quelling the dispute. An important function of a court is also to facilitate the settlement of disputes by parties on terms agreed between the parties. Provided the terms are lawful and the agreement does not affect the rights or interests of third parties, it would be rare for a court to refuse to give effect to a settlement agreed between the parties. As explained in *Reynolds* at [30]:

> There is a very significant public interest in the settlement of litigation. This is reflected in the existence at common law of the privilege that attaches to without prejudice communications for the purpose of negotiating for a settlement of a dispute. In addition, that privilege is also reflected in s 131 of the *Evidence Act 1995* (Cth) which excludes such communications from being admissible except in certain limited circumstances.

100 In the present case the parties settled all aspects of the proceeding. Their compromise related not only to Mr Porter's substantive allegations that he had been defamed, but also his allegations that Sch 1, 2 and 3 of the respondents' defence were liable to be struck out under r 16.21(1)(a), (b), (c) and (f) of the Court Rules and should be removed from the Court's file under r 16.21(2) of the Court Rules. The compromise the parties reached was that there should be no judicial determination of any of those allegations. Rather, they agreed to file consent orders by which, on the basis that there be no order as to costs, Mr Porter would discontinue his proceeding, the unredacted defence and unredacted reply would be removed from the Court's file, and the ABC would publish a statement and attach an editorial note to the allegedly defamatory article. As discussed, while the consent orders reflected the Court in fact making the orders sought, the effect of this agreement was to require only the filing (not the making) of the consent orders. In other words, in substance, the parties could not agree that the Court make orders; they could only agree to apply to the Court, by consent, for the Court to make orders. This is the true effect of cl 3.1 of the deed. Understanding this reinforces the points made above: (a) the parties are applying to the Court for the making of orders, and (b) in the circumstances of this case proposed consent order 3 should not be made in chambers merely

because the parties consented to it – the parties have to persuade the Court the order should be made.

101 It is true that, as the intervening parties submitted, the releases in the deed are not conditional on the making of the consent orders. The releases operated on execution of the deed as specified in cl 4.1. As such, the settlement will not fail if proposed consent order 3 is not made. But this does not mean that the public interest in facilitating the settlement of proceedings by parties is any less acute in this case than any other. Mr Porter compromised the whole of his case and gave releases to the respondents, agreeing the releases acted as a bar to any future claim, on the basis of all of the provisions of the deed including, but not limited to, the ABC and Ms Milligan agreeing to proposed consent order 3. Consistent with their contractual obligations, the ABC and Ms Milligan consented to the making of all of the proposed consent orders including order 3. They did so in circumstances where Mr Porter had applied in good faith for Sch 1, 2 and 3 to the defence to be struck out as a form of abuse of process and removed from the file. The compromise the parties reached was a lawful compromise of the whole of the proceeding, including Mr Porter's undetermined application to strike out and remove from the file Sch 1, 2 and 3 of the defence.

102 The intervening parties are right that parties cannot dictate to a court the orders it should make. They are also right that, in the ordinary course, filed documents remain on the Court file after settlement. But this does not mean that a party applying for removal of a document from a Court file is seeking (or obtaining) "special treatment". The Court Rules permit such an application to be made and to be granted. As submitted by Mr Walker SC, just as parties may compromise a substantive claim or the entirety of a proceeding, so too parties may compromise an interlocutory application, in this case Mr Porter's application for Sch 1, 2 and 3 of the defence to be struck out and removed from the Court's file (and the respondents' response that if Sch 1, 2 and 3 of the defence are struck out and removed from the Court's file, para's 2(ll) to (pp) and 8 of the reply to the defence should also be struck out and removed from the Court's file). For the Court to refuse to make proposed consent order 3, in these circumstances, would be to undermine the lawful contractual bargain which the parties struck to compromise all of their claims.

103 The undermining of that lawful contractual bargain would operate at two levels.

104 First, as between the parties, the Court would be re-writing the contract of the parties. The Court would be doing so in circumstances where it does not know, one way or another, whether

the bargain would have been reached without proposed consent order 3. It is true that the parties could have drafted the deed so that the release would be conditional on the making of the consent orders and did not do so. However, this reinforces the fact that if proposed consent order 3 is not made the Court would be re-writing the contract of the parties by which they would still be bound. Provided a contract is lawful and the parties are competent, freedom to contract is one of the foundational pillars of the common law. Further, it is the duty of the Court under s 37M(3) of the Court Act, in exercising its powers in civil proceedings under the Court Rules, to do so in the way that best promotes the overarching purpose of facilitating the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. Between themselves the parties have determined a lawful way in which to resolve all disputes between them and that resolution, accordingly, reflects the just resolution of the disputes between them as quickly, inexpensively and efficiently as possible. These considerations indicate that it may be necessary in the proper administration of justice to give effect to the contractual bargain of the parties.

105 Second, in terms of the interests of justice overall, these considerations as between the parties remain in play. In addition, refusing to make proposed consent order 3 may involve prejudice to the proper administration of justice by potentially discouraging parties from settling all elements of their dispute. For example, in the present case, if the parties assumed that the Court would not make proposed consent order 3 they would have had three choices: (a) to not settle the proceeding at all, (b) to settle the proceeding regardless, or (c) to settle the substantive proceeding but conditional on Mr Porter succeeding in respect of his interlocutory application to strike out Sch 1, 2 and 3 of the defence and remove those parts of the document from the Court's file. Options (a) and (c) are contrary to the duty imposed on the parties and their representatives to comply with the overarching principle in s 37M of the Court Act. Yet option (b) may be contrary to the true objectives of one or both of the parties, driving them to adopt options (a) or (c). Options (a) and (c), however, conflict with the overarching purpose in s 37M and thus undermine the proper administration of justice.

106 This does not mean that the Court is bound to accede to any proposed consent order providing for the removal of a document from a Court file (nor an order to that effect sought unilaterally). To the contrary, the principle of open justice, although not absolute, is also a foundational principle of the common law. There may be no circumstances other than the agreement of the parties which justify the removal of the document; in that event, it may be impossible for the Court to conclude that removal is necessary to prevent prejudice to the proper administration

of justice. In the present case, however, there are other circumstances which lead me to conclude that it necessary to make proposed consent order 3 to prevent prejudice to the proper administration of justice. Those circumstances are: (a) before the settlement was reached, Mr Porter had filed an interlocutory application in good faith seeking to strike out Sch 1, 2 and 3 of the defence and for those parts of the defence to be removed from the Court file, (b) before the settlement was reached, the respondents had indicated to the Court their position that if Sch 1, 2 and 3 of the defence were struck out and removed from the Court's file then para's 2(ll) to (pp) and 8 of the reply to the defence should also be struck out and removed from the Court's file, (c) Mr Porter's interlocutory application had not been determined at the time the settlement was reached, (d) the parties settled the whole of the proceeding, including Mr Porter's interlocutory application for strike out and removal, on terms which included the filing of the proposed consent orders, (e) the terms of those consent orders included proposed order 3 meaning order 3 is a part of the contractual bargain for settlement which the parties struck, (f) by reason of the settlement there has not been and will never be a judicial determination of Mr Porter's interlocutory application, and (g) nor has there been and nor will there ever be a judicial determination of any of the issues raised in the respondents' defence. It is these particular circumstances of the present case which cause me to conclude that it is necessary to make proposed consent order 3 to prevent prejudice to the proper administration of justice. Had any one of these circumstances not been present, I may well have concluded to the contrary.

107 The effect of making proposed consent order 3 will be to prevent the public from inspecting those unredacted documents under r 2.32(2) of the Court Rules (subject only to the grant of leave under r 2.32(4) which I have acknowledged would not be likely unless circumstances change). This consequence engages the principle of open justice. As discussed above, however, this principle, while fundamental, is not absolute.

108 It is relevant that Mr Porter was the Attorney-General for the Commonwealth and is a Minister of the Crown and that the ABC is a publicly funded broadcaster. This means that there is a legitimate public interest in their conduct generally (including their conduct of the litigation). The principle of equality before the law, invoked for Mr Porter, does not change this fact. This reinforces that the relevant test for the making of proposed consent order 3 is not merely whether the parties have consented to it, but whether the making of proposed consent order 3 is necessary to prevent prejudice to the proper administration of justice. The principle of equality before the law is given effect by recognising that these parties were as entitled as any

other party to compromise the proceeding on such lawful terms as they saw fit and to seek that the Court make orders to give effect to the compromise.

109 It is also relevant that the infringement on the principle of open justice is limited in scope in the present case. Schedules 1, 2 and 3 are particulars to the defence. The defence excluding Sch 1, 2 and 3 remains available for public inspection. The redacted reply (excluding para's 2(ll) to (pp) and 8, which deal with Sch 1, 2 and 3) also remains available for public inspection. Further, if circumstances do change in any material way, an application may be made for leave to inspect the unredacted defence and unredacted reply under r 2.32(4) of the Court Rules.

110 While "[o]rdinary members of the public are well aware of the difference between allegations made in courts and findings made by courts" (*Llewellyn* at [23]), as noted, the matters in Sch 1, 2 and 3 of the defence remain allegations which will never be the subject of judicial determination given the settlement of the proceeding. Mr Porter's allegations that those Schedules are a form of abuse of process will also never be the subject of judicial determination. In these circumstances, and given the full compromise of all aspects of the dispute reached between the parties, I am satisfied it is necessary to give effect to proposed consent order 3 as an important aspect of that compromise and, to that extent, the principle of open justice must yield.

111 This conclusion has nothing to do with the fact that the parties may warrant the description of "powerful litigants" (see *John Fairfax* quoted above). The parties are not obtaining "special treatment" or extracting from the Court any protection greater than "ordinary parties". It is open to any party to apply for the same kind of relief as the parties sought in the present case if the circumstances arguably justify the making of such an order. Any such application will be evaluated by reference to all of the circumstances and, in my view, should be tested against the question whether the order is necessary to prevent prejudice to the proper administration of justice.

112 Two other arguments of the intervening parties need to be resolved.

113 One, I do not accept their argument based on an alleged lack of utility. It is not to the point that some or even most of the information in Sch 1, 2 and 3 of the defence may be otherwise disclosed in information released by Thawley J consequential upon *Dyer*. That does not change the fact of the compromise the parties reached in this case, including filing the proposed consent orders.

114 Two, I do not accept that before I may make proposed consent order 3 I need to have concluded that Sch 1, 2 and 3 of the defence constitute a form of abuse of process and should be struck out within the meaning of r 16.21(1)(a), (b), (c) of (f) of the Court Rules. The very purpose of the settlement reached by the parties included avoiding a judicial determination of any issue in the proceeding including in respect of Mr Porter's interlocutory application to strike out and remove from the Court file Sch 1, 2 and 3 of the defence. The essential purpose of that compromise would be lost if, in order to accede to the consent order, I had to find that Sch 1, 2 and 3 of the defence did involve a form of abuse of process.

115 My power to make proposed consent order 3 is not dependent on the making of such a finding. Under r 2.28(1)(a)(i) and (ii) and r 2.29(1)(a)(i) and (ii) of the Court Rules the Court may make such an order on its own initiative or on the application of a party under r 6.01 and r 16.21(2). In this case, there is an undetermined application for removal under r 16.21(2). The rules do not condition the power on the Court being satisfied that the document should be struck out. As I have said, in a case such as the present where the removal is a part of the agreed settlement of the proceeding, I consider the proper approach is to decide if the removal of the document from the Court file is necessary to prevent prejudice to the proper administration of justice, in common with the making of a non-publication or suppression order under s 37AF(1)(a) of the Court Act.

116 As between the parties and intervening parties on the issue of costs, my present view is that each party should pay their own costs of and in connection with the hearing on 9 July 2021 and the related case management hearings. The reason for this is that while I have been assisted by the submissions for the intervening parties I did not require their intervention and they have not succeeded. In these circumstances the intervening parties should not have any order for costs in their favour and the parties should not have any order for costs against the intervening parties given the assistance they provided to the Court. Further, the parties (in effect, Mr Porter) would have been required to file evidence and make submissions, including written submissions and oral submissions in open court, whether or not the intervening parties had opposed the making of proposed consent order 3. I would have required them to do so given the issues relating to the proper administration of justice to which proposed consent order 3 gives rise. If any party wishes to seek to vary this costs order they will be given an opportunity to do so.

117 I noted above that I did not propose to place the submissions or affidavit of Mr Dowling on the Court's online file because they contain scandalous material. I will otherwise make arrangements for the following documents to be placed on the Court's online file: (a) Mr Dowling's interlocutory application filed 11 May 2021, (b) Mr Porter's submissions in support of the proposed consent orders, (c) the ABC's submissions about the proposed consent orders, and (d) the intervening parties' submissions against the proposed consent orders.

118 The appropriate form of orders to be made, recognising that the redacted defence and redacted reply have already been filed and will remain on the Court file, is as follows:

THE COURT ORDERS THAT:

(1) The New South Wales District Registrar cause a copy of the unredacted defence filed 4 May 2021 and the unredacted reply filed 4 May 2021 to be placed into an envelope marked "NSD206/2021 Charles Christian Porter v Australian Broadcasting Corporation and Anor, Unredacted Defence and Unredacted Reply, removed from the Court file pursuant to orders made on 30 July 2021. Not to be opened or made available for inspection by the public other than by leave of the Court".

(2) The envelope referred to in order 1 be sealed and stored by the New South Wales District Registrar in the New South Wales District Registry in a manner and location as decided by the New South Wales District Registrar.

(3) The interim suppression and non-publication orders made on 10 May 2021 and subsequently amended on 21 May 2021, 25 May 2021 and 28 July 2021 be revoked.

(4) Order 3 be stayed for a period of 14 days.

(5) The interlocutory application filed by Shane Dowling on 11 May 2021 (the **Dowling interlocutory application**) be dismissed.

(6) Shane Dowling pay the costs of the parties of and in connection with the Dowling interlocutory application as agreed or taxed.

(7) The intervening parties and the parties each pay their own costs of and in connection with the hearing on 9 July 2021 and all related case management hearings.

(8) The intervening parties and the parties may seek to vary order 7 by filing and serving, within seven days, a written submission not exceeding two pages setting out the varied order sought and the reasons in support.

(9) If the intervening parties or parties file and serve any written submission under order 8, the other parties and/or intervening parties may file and serve, within seven days, a written submission in response not exceeding two pages.

AND THE COURT ORDERS BY CONSENT THAT:

(10) Leave be granted to the applicant to file a notice of discontinuance within seven days on the basis that there be no order as to costs.

(11) The unredacted defence and unredacted reply be removed from the Court file.

Note: order 11 is made on the ground that it is necessary to prevent prejudice to the proper administration of justice.

I certify that the preceding one hundred and eighteen (118) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jagot.

Associate:

Dated: 30 July 2021