

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 25/06/2021 9:35:13 AM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

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



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 25/06/2021 9:36:18 AM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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



NSD206 of 2021

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

Charles Christian Porter
Applicant

Australian Broadcasting Corporation and Anor
Respondents

RESPONDENTS' SUBMISSIONS IN RELATION TO CONSENT ORDER 3

1. These submissions are filed pursuant to orders made on 1 June 2021. Those orders permitted the parties, the intervening parties and Mr Dowling to file written submissions concerning consent order 3 of the minute of orders provided to the Court on 31 May 2021.
2. These submissions address three matters:
 - (A) they confirm the respondents' position in relation to consent order 3;
 - (B) they correct some factual matters in the applicant's submissions dated 15 June 2021 ("AS") concerning consent order 3 and they object to one paragraph of the affidavit filed with those submissions; and
 - (C) they briefly address the applicant's alternative application foreshadowed at AS [35] and [38] in respect of which no directions have been made. The applicant has submitted that if the Court is not persuaded to make order 3 by consent then he will move to rely upon the evidence and submissions he previously filed on his strike out application in seeking the order. In doing so, he seems to be seeking findings from the Court on his many (former) objections to the defence, and then, on the basis of any finding that any part of Schedules 1 to 3 of the defence are objectionable, that those parts be removed from the Court file. As that is a substantial application which was not contemplated by the orders made on 1 June 2021, these submissions briefly address the timing of the hearing of any such application and, if it is to be entertained, the need for directions in relation to it.

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Consent order 3

3. The respondents' position in relation to proposed consent order 3 is that they remain agreeable to the order being made on a consent basis. The respondents were bound to offer their consent to the proposed order by reason of the Deed of Settlement and Release (**Deed**)¹; they have offered that consent; and they do nothing in these submissions to withdraw that offer of consent.
4. While the consent of the parties provides a basis upon which the Court may make order 3, it does not, of course, exhaust the considerations which the Court may take into account in deciding whether to make the order.
5. The applicant has filed submissions addressing the reasons why he submits the Court should make the order by consent. Interested third parties have been permitted to file submissions to the contrary. The respondents do not seek to put any substantive submissions on that controversy joined between the applicant and the third parties.
6. Ordinarily, that would be the end of the substantive role of the respondents in respect to the making of proposed consent order 3.
7. However, by reason of the way that the applicant has put his submissions, the respondents need to correct some factual matters in the applicant's submissions and they also raise one objection to the affidavit filed with those submissions.
8. First, the applicant has submitted at AS [29] that:

In settling these proceedings, the first respondent has made a statement that the serious accusations made against the applicant in the article complained of could not be substantiated to the civil or criminal standard.
9. If the applicant is intending to convey by that submission that a reason for the Court to make the order by consent of the parties is that the respondents now accept that their truth defences (particularised in Schedules 2 and 3 of the defence) could not be substantiated, the factual premise on which it is based is incorrect. The respondents did not make a statement in the terms extracted above in paragraph [8] and have never stated that their truth defences could not be substantiated.
10. In accordance with the Deed, the respondents added an editor's note to the article that had been sued on.² The editor's note simply confirms that the article - which remains on the first respondent's website - was not intended to impute guilt against the applicant. It states that the first respondent did not intend to suggest in the article that the applicant had committed the criminal offences alleged in the letter to the Prime Minister or intend to suggest that they could be substantiated to the criminal

¹ Affidavit of Rebekah Giles sworn 15 June 2021 at exhibit RG-2 (pages 8-17).

² Exhibit RG-2 (pages 10, 16 and 22).

or civil standard. The note acknowledged that some readers had misinterpreted the article as an accusation of guilt.

11. The editor's note concerns the intended meaning of the article. It does not speak to the truth defences that the respondents were relying upon in the proceeding.
12. Secondly, at AS [10], the applicant submits that the making of the consent orders, with the agreed amendment that the Court proposed on 31 May 2021, will bring these proceedings to an end, with the filing of a notice of discontinuance.
13. If that submission is intended to be directed to consent orders 1 and 2, as amended, then it is accurate but not complete. By orders 1 and 2, as amended, the applicant consented to his proceeding being discontinued without adverse cost consequences. Accordingly, when a notice of discontinuance is filed following the making of those orders (which the Court has stated it will make), the proceeding will, formally, come to an end. Consent order 3 concerns a different and separate matter, namely the removal of the unredacted pleadings from the Court file.
14. The submission at AS [10] is incomplete in that, whilst the filing of a notice of discontinuance will, formally, end the proceeding, the applicant has already released and discharged the respondents from all claims in the proceeding with effect on and from the execution of the Deed.³ It is uncontroversial that the Deed was executed on 31 May 2021.⁴
15. Thirdly, the respondents object to paragraph 18 of Ms Giles' affidavit sworn 15 June 2021 and the letters referred to therein. They have no relevance at all to the applicant's submissions that order 3 should be made by consent.

Applicant's new alternative application

16. If order 3 is not made by consent, and if the applicant wishes to seek that order on the alternative basis set out in AS [35] and [38], that application will be opposed by the respondents.
17. The applicant would, effectively, be re-opening his substantial strike out application. That is evident from AS [38] in which the applicant seeks to rely upon the submissions and evidence he previously filed on that application.
18. The applicant's submissions do not identify any basis for the re-opening of that application in circumstances where the parties have consented to the discontinuance of the proceeding, the applicant has released and discharged the respondents from all claims in the proceeding, and the parties agreed that order 3 would be sought on

³ Exhibit RG-2 at page 10.

⁴ See affidavit of Rebekah Giles sworn 15 June 2021 at [13]. Exhibit RG-2 to the affidavit does not include the Deed as executed by the applicant. Whilst it is uncontroversial that he executed the Deed on 31 May 2021, a copy of the Deed as executed by all parties can be provided if required.

a consent basis. The issues between the parties in this proceeding have been resolved by agreement.

19. In the event that order 3 is not made by consent following argument on 9 July 2021, and if, at that time, the applicant wishes to seek the order on the alternative basis foreshadowed, then that would be the occasion on which directions would need to be made for the filing of material on that application by each party. It is not sufficient or appropriate for the applicant to simply say that he relies upon his previously filed strike out submissions and evidence.
20. If such an application is to be pursued at that time, a number of issues would arise. First, the respondents (and the Court) would be entitled to know, *inter alia*, the precise basis upon which the applicant contends that he is permitted to make the application having regard to the terms of the Deed. It is far from evident how such an application could be made without the applicant breaching or repudiating the Deed as he would be seeking to reopen allegations and issues which by the Deed he has agreed are at an end.
21. Second, as this proceeding was resolved by agreement prior to the hearing of the strike out application, the Court does not yet have the substantial submissions and evidence from the respondents which were prepared for the strike out application but not filed at the time the matter entered mediation talks. Orders would need to be made for the respondents to file such submissions and evidence.
22. Third, if the alternative application is to be pursued by the applicant, it is a substantial application. The strike out application was previously listed for hearing on an estimate of two days.

Conclusion on the scope of the 9 July hearing

23. The orders made by the Court on 1 June 2021 confine the argument listed for hearing on 9 July 2021 to whether order 3 should be made on the basis of the consent supplied by the parties. The respondents are agreeable to the consent order being made but they are not otherwise taking an active role in relation to the issue. The contradictors are the intervening parties and Mr Dowling (if granted leave).
24. The contingent application foreshadowed at AS [35] and [38] is not before the Court on 9 July 2021. Directions for its preparation and listing for hearing should not be made until after it is known that there is to be such an application, i.e. after the argument listed for hearing on 9 July 2021.
25. The applicant is invited to take the following steps:
 - (A) confirm that he does not seek to make the new alternative application on 9 July 2021;

(B) confirm that he does not rely on paragraphs [35] and [38] of his submissions on 9 July 2021; and

(C) confirm that he does not tender or seek to rely in any way on 9 July upon the submissions or evidence that he had previously filed on the strike out application.

26. If these confirmations can be obtained, the matter can proceed on 9 July as currently programed. If however the applicant refuses to give these confirmations, it will be necessary to seek to have the matter listed for a case management hearing as soon as possible next week to clarify the scope of the 9 July hearing and the preparation for it.



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Dated: 25 June 2021