

# Transparency? Judge upholds ABC-Porter deal that buries broadcaster's defence

Porter asked the court to invoke a rarely-used provision giving it the power to order that documents be physically removed from a court file, put in an envelope and marked "DO NOT OPEN". Literally.



(IMAGE: AAP/MICK TSIKAS)

The price the ABC was prepared to pay, to be rid of Christian Porter's defamation case in which he claimed that it had labelled him a "brutal anal rapist", had two controversial parts to it: a payment of \$100,000, described publicly as the cost of the mediation which had resulted in the settlement, and a consent order that the "redacted" 27 pages of its own defence be kept permanently suppressed.

Controversial, for different reasons. The money part was an agreed sleight of hand, given there was no way the mediation cost that much, and it would have held more integrity for the ABC to admit it was to some extent buying its way out of the litigation. Cheaply, at that, given what the case would have cost to run.

The ABC's concession to conceal most of its own defence was the more interesting move, given what it said about the public broadcaster's own commitment to transparency in the public interest. Assuming that it was confident that what it had filed with the court was appropriate and solidly backed by evidence — with a legal team headed by Justin Gleeson SC, that's a fair assumption — it was quite a radical step to then want to withdraw it and keep it from the public forever.

Porter's own interest in keeping the material suppressed is not difficult to understand, even without any clue as to what that material is. So it was that his counsel, Bret Walker SC, was the moving force in seeking to convince Justice Jayne Jagot that, so as to prevent prejudice to the proper administration

of justice, the redacted parts of the defence (and Porter's reply to the defence) should be removed from the court's file.

Jagot had expressed some disquiet when the parties first appeared before her on May 31, asking her to rubber stamp the terms of their settlement, asking some awkward questions about why exactly the defence, which had been the subject of an interim suppression order earlier made by her, should be kept secret. As she said, that was not a matter for the parties to agree, but for the court to decide, guided by the public interest. Key to that is the principle of open justice.

The fight, when it came, was between Porter and the other media, led by Nine and News, with a cameo appearance by the Kangaroo Court guy, Shane Dowling, claiming his rights as a news provider (he lost that point and has been ordered to pay the costs of his intervention which the judge said had been entirely unhelpful).

Porter did not seek a permanent suppression order over the secret material. Instead, he asked the court to invoke a rarely-used provision in its own rules, giving it the power to order that documents be physically removed from a court file, put in an envelope and marked "DO NOT OPEN". Literally. That's the order Jagot has made today.

Her Honour's reasoning is, centrally, this: "For the Court to refuse to make [the removal order], in these circumstances, would be to undermine the lawful contractual bargain which the parties struck to compromise all of their claims."

That is, Porter and the ABC had agreed on an all-in settlement, with him discontinuing his case, the ABC paying some money and the controversial parts of the pleadings in the court file — which Porter had applied to have struck out by the court — to be buried forever. There was nothing wrong with their striking such a deal. Part of the court's function, in the public interest, is to encourage and facilitate litigants to settle their disputes.

Jagot justified her decision on two bases: first, to refuse the order would in effect be "rewriting the contract of the parties." She said that "it may be necessary in the proper administration of justice to give effect to the contractual bargain of the parties."

Second, "refusing to make [the order] may involve prejudice to the proper administration of justice by potentially discouraging parties from settling all elements of their dispute". That is, if the removal order hadn't been possible, then the parties may not have settled the case at all, an outcome in "conflict with the overarching purpose" of the court's function to facilitate just resolution of disputes, "and thus undermine the proper administration of justice".

The judge was adamant that Porter and the ABC "are not obtaining 'special treatment' or extracting from the Court any protection greater than 'ordinary parties'".

Open justice "is also a foundational principle of the common law", Jagot commented, but in this case not strong enough to overcome what she concluded was an even more important principle: the court not getting in the way of a legitimate and sensible settlement between the parties.

It's a huge call (really huge), and you'd have to think the media intervenors will appeal. Ordinarily, you'd expect to see the ABC in that camp, on the side of transparency.

On this occasion, however, no. Expediency, for the ABC, appears to have held sway.

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