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Details of Filing

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File Title:	AUSTRALIAN BROADCASTING CORPORATION v MARTIN KANE & ORS
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A handwritten signature in blue ink, reading 'Warwick Soden'.

Dated: 9/08/2019 5:21:46 PM AEST

Registrar

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

No. NSD 989 of 2019

BETWEEN:

AUSTRALIAN BROADCASTING CORPORATION
Applicant

MARTIN KANE and OTHERS
Respondents

**APPLICANT'S SUBMISSIONS FOR
INTERLOCUTORY HEARING ON 19 AUGUST 2019**

A. APPLICATION FOR LEAVE TO AMEND

1. The applicant (**ABC**) seeks leave under r 8.21(1) of the *Federal Court Rules 2011* (Cth) to amend its originating application filed on 24 June 2019 in the manner set out in its proposed amended originating application (**AOA**) dated 9 August 2019.
2. Consideration of whether to grant leave to amend must be undertaken in accordance with the overarching purpose set out in s 37M(1) of the *Federal Court of Australia Act 1976* (Cth).¹ Matters relevant to the grant of leave include:²
 - 2.1 the nature and importance of the amendment to the party applying for it;
 - 2.2 the extent of the delay and the costs associated with the amendment;
 - 2.3 the prejudice that might be assumed to follow from the amendment, and that which is shown;
 - 2.4 the explanation for any delay in applying for that leave; and
 - 2.5 the parties' choices to date in the litigation and the consequences of those choices;
 - 2.6 the detriment to other litigants in the Court; and

¹ *Tamaya Resources Limited (in liq) v Deloitte Touche Tohmatsu (A Firm), in the matter of Tamaya Resources Limited (in liq)* [2015] FCA 1098, [125]; *Tameeka Group Pty Ltd v Landan Pty Ltd (No 2)* [2016] FCA 480, [14].

² *Tamaya* [2015] FCA 1098, [127]; *Tameeka* [2016] FCA 480, [15]; *Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu (A Firm)* [2016] FCAFC 2, [125]. See also *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; *Luck v Chief Executive Officer of Centrelink* [2015] FCAFC 75.

- 2.7 potential loss of public confidence in the legal system which can arise where a court is seen to accede to applications made without adequate explanation or justification.
3. The ABC submits that those considerations support the grant of leave sought by the ABC.
4. The amendments that the ABC seeks to make would:
- 4.1 clarify the factual basis on which the ABC puts its argument that the search purportedly permitted by the search warrant exceeded what was justified by the material before the first respondent;
- 4.2 add a new ground concerning the construction of s 3E of the *Crimes Act 1914* (Cth) in light of the implied Constitutional freedom of political communication; and
- 4.3 add a new ground and claim for relief concerning the validity of s 73A(2) of the *Defence Act 1903* (Cth), introduced following the commencement of a similar proceeding in relation to s 79(3) of the *Crimes Act 1914* (Cth).³
5. The ABC gave notice of its intention to make those amendments at the earliest opportunity—before the first case management hearing in this proceeding. At such an early stage, it cannot be said that there has been any delay in seeking leave to make the amendments, or that the amendments would cause detriment to other litigants in the Court or a potential loss of public confidence in the legal system that might be occasioned by amendments made close to, or during, the trial of a proceeding.
6. The amendments that the ABC seeks to make will not occasion delay or costs—the issues raised by the new grounds are issues of statutory construction and constitutional interpretation, which will not require significant additional evidence to resolve. Further, the proposed amendments do not give rise to any evident prejudice to any of the respondents.
7. By contrast, if leave were refused, there would be evident prejudice to the ABC. The proposed amendments raise questions of public importance about the limits on the power of the state to authorise significant intrusions into privacy in circumstances that

³ See Affidavit of Michael Rippon affirmed 30 July 2019 (**Third Rippon Affidavit**), [25]–[26], Annexure MR26.

put at risk the confidentiality of journalists' sources. The ABC should be entitled to make the arguments raised by those grounds.

B. APPLICATION FOR DISCOVERY

8. The ABC seeks an order under r 20.13 of the *Federal Court Rules 2011* (Cth) requiring the second and third respondents to give discovery of documents falling within the categories set out in the Schedule to the interlocutory application filed on 9 August 2019.

9. In summary, the ABC submits that an order for discovery of those categories of documents would facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible because:

9.1 the categories of documents that the ABC seeks are not extensive;

9.2 discovery of those categories of documents will assist in the determination of issues in the proceeding; and

9.3 the claims in relation to which the ABC seeks discovery cannot be dismissed as being "entirely speculative".

10. ***Relevant principles.*** The relevant principles were summarised by Merkel J in *Carmody v MacKellar* as follows:⁴

10.1 the Court has a discretionary power to order discovery in proceedings for the review of an administrative decision;

10.2 the proper exercise of the power depends on the nature of the case and the stage of the proceedings at which discovery is sought;

10.3 if a proceeding or claims in it are essentially speculative in nature the Court will not order discovery in order to assist the applicant in a fishing exercise;

10.4 the evidence or material which will be required to establish that the proceeding or particular claims in it are not essentially speculative will vary with the nature and circumstances of the particular case; and

⁴ (1996) 68 FCR 265, 280.

- 10.5 if there is not the slightest evidence or there is no other material to support the bare allegations made in the proceeding, then as a general rule, an order for discovery ought not to be made.
11. More generally, the Court will not order discovery unless the making of the order will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible,⁵ and discovery is necessary for the determination of an issue in the proceeding.⁶ Discovery will *prima facie* be necessary for the determination of an issue in the proceeding where one party and not the other is likely to have documents relating to that issue.⁷
12. Before making an order for discovery, there must be something from which the Court can see there is a real issue the proof of which would be assisted by discovery.⁸ However, in determining whether there is a real issue, the Court must be cautious not to impose criteria for discovery that have the effect of immunising administrative decisions from judicial review—a matter of particular importance in cases challenging a decision to seek or to issue a search warrant. As Merkel J observed in *Carmody*:⁹
- It would be an odd result if the practical difficulties ... in reviewing [decisions to issue search warrants] by reason of their secrecy, were fortified by the imposition of unrealistic criteria for discovery, which for practical purposes, further immunised the decisions from review. Such an outcome would tend to render nugatory the statutory entitlement to review such decisions conferred under the ADJR Act or under s 39B. The Federal Court’s authority has been interposed between State and citizen under those provisions *inter alia* to ensure that any intrusions into fundamental rights, including those of privacy, are only those which are lawful and authorised by statute.
13. In order to ensure that the entitlement to seek judicial review of administrative decisions—particularly those decisions that purport to authorise significant intrusions into fundamental rights—is not rendered nugatory, the bar for an applicant to demonstrate that there is a real issue is not set high. It is only where there is “not the slightest evidence” and “no other material” to support “bare allegations” that an application for discovery can properly be characterised as a fishing exercise.¹⁰

⁵ See *Federal Court Rules 2011* (Cth), r 20.11. See also *Alanco Australia Pty Ltd v Higgins (No 2)* [2011] FCA 1063, [7]; *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd (No 4)* [2013] FCA 1044, [33]; *Lynch v Cash Converters Personal Finance Pty Ltd* [2016] FCA 266, [3].

⁶ See *Alliance Craton* [2013] FCA 1044, [33]; *Construction, Forestry, Mining & Energy Union v Rio Tinto Coal Australia Pty Ltd* [2014] FCA 462, [94].

⁷ See *ACCC v Cornerstone Investment Aust Pty Ltd (No 2)* [2017] FCA 393, [3]–[4]. See also *Trade Practices Commission v CC (New South Wales) Pty Ltd (No 4)* (1995) 58 FCR 426, 436–437.

⁸ See *Nestle Australia Ltd v Commissioner of Taxation* (1986) 10 FCR 78, 83; *Jilani v Wilhelm* (2005) 148 FCR 255, 273–274 [108]–[112]. See also *Murchison v Keating* (1984) 1 FCR 341, 344.

⁹ (1996) 68 FCR 265, 280–1. See also *Jilani v Wilhelm* (2005) 148 FCR 255, 273 [109].

¹⁰ *Carmody* (1996) 68 FCR 265, 280–281.

14. It would be “absurd” to require that the applicant demonstrate a *prima facie* case of legal error in order to be entitled to discovery.¹¹
15. ***The proposed categories.*** The categories of discovery that the ABC seeks are as follows:
- 15.1 **Category 1.** Any document given by the second or third respondent or another officer of the AFP to the first respondent in connection with the application for the issue of the search warrant.
- 15.2 **Category 2.** Any document recording the decision of the second and third respondents to apply for the search warrant, or the reasons for that decision.
- 15.3 **Category 3.** Any document recording consideration by the second and third respondents of:
- (i) the implied freedom of political communication;
 - (ii) the protection of journalists’ sources, including but not limited to the protection in s 126K of the *Evidence Act 1995* (Cth);
 - (iii) the public interest in investigative journalism; or
 - (iv) the public interest in the reporting of the matters referred to in [16] of the AOA.
16. The ABC does not seek an order for standard discovery. The categories of discovery that the ABC seeks are not extensive. As explained below, they are limited to the documents necessary for the determination of issues in the proceeding. Any documents in those categories are in the possession of the second and third respondents, and are not in the possession of (or otherwise available to) the ABC.
17. ***The issues the proof of which would be assisted by discovery.*** By its AOA, the ABC seeks to advance the following grounds:
- 17.1 **Ground 1.** That, on its proper construction, s 3E of the *Crimes Act 1914* (Cth) did not authorise the first respondent to issue the search warrant.
- 17.2 **Ground 2.** That the three conditions of the search warrant did not provide a real and meaningful perimeter to the evidential matters the search warrant purportedly authorised to be searched for and seized.

¹¹ *Nestle* (1986) 10 FCR 78, 83.

- 17.3 **Ground 3.** That, because of the conclusionary, vague and uncertain manner in which the suspected offences were expressed in the third condition of the search warrant:
- (i) the first respondent failed to comply with the requirement in s 3E(5)(a) of the *Crimes Act 1914* (Cth) to state properly the offences to which the search warrant related; and
 - (ii) the search permitted by the search warrants exceeded what was justified by the material before the first respondent.
- 17.4 **Ground 4.** That the search warrant purported to authorise the search and seizure of material that could not afford evidence as to the commission of offences against s 73A(1) and (2) of the *Defence Act 1903* (Cth).
- 17.5 **Ground 5.** That s 73A(2) of the *Defence Act 1903* (Cth) is invalid on the ground that it infringes the implied freedom of political communication.
- 17.6 **Ground 6.** That the first respondent's decision to issue the search warrant was legally unreasonable.
- 17.7 **Ground 7.** That the second and third respondents' decisions to seek the search warrant were legally unreasonable.
18. The ABC does not seek an order for discovery in relation to all of those grounds. Some of the grounds will depend largely on questions of statutory construction, constitutional interpretation, and matters appearing on the face of the warrant.
19. However, other grounds will depend (at least in part) on matters evidenced by documents in the possession of the second and third respondents and not the ABC. The grounds in relation to which the ABC seeks an order for discovery, and the reasons why the categories of documents sought would assist the determination of issues arising from those grounds, are explained below.
20. **Ground 3.** To the extent that it alleges that the search permitted by the warrant exceeded what was justified by the material before the first respondent, the material that was in fact before the first respondent (including the information on oath) (Category 1) is plainly relevant. Only by having regard to that material can the Court

assess whether it was sufficient to justify the full scope of the search permitted by the warrant.

21. **Grounds 6 and 7.** These grounds allege that the first respondent's decision to issue, and the second and third respondents' decisions to seek, the warrant were legally unreasonable.
22. There are many reasons why an administrative decision may be legally unreasonable, including where the decision involves "disregard of public policy", or involves "oppressive or gratuitous interference with the rights of those subject to [it]", or "fail[s] to take into account relevant considerations".¹² Whether a decision is legally unreasonable must be an inference "drawn from the facts and from the matters falling for consideration in the exercise of the statutory power".¹³
23. Part of the ABC's case is that, in making the decisions to seek and to issue the warrant, the respondents failed to take into account considerations that they were required to take into account, including:
 - 23.1 the strong public policy interests in protecting confidential communications between journalists and their sources, and protecting the identity of those sources;
 - 23.2 the public interest in the reporting of the matters referred to in [16] of the AOA;
 - 23.3 the implied freedom of political communication, and whether issuing the warrant sought by the second and third respondents in the circumstances of this case would be consistent with that freedom;
 - 23.4 the fact that the three conditions of the search warrant did not provide a real and meaningful perimeter to the scope of the search;
 - 23.5 the disparity between the terms in which the first and second of the suspected offences set out in the third condition of the warrant were expressed and the terms of s 73A(1) and (2) of the *Defence Act 1903* (Cth) [AOA, [23(c)], [24(c)]]; and
 - 23.6 the fact that Mr McBride had been charged with offences, made public statements to the effect that he had admitted the substance of the allegations

¹² *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 365 [69]–[71] (Hayne, Kiefel and Bell JJ).

¹³ *Li* (2013) 249 CLR 332, 367 [76] (Hayne, Kiefel and Bell JJ).

against him to the AFP, and been committed to stand trial on those offences [AOA, [8]–[10]]; and

- 23.7 the fact that the Acting Commissioner of the AFP made public statements to the effect that a purpose of the search warrant was, in effect, to confirm Mr McBride’s admissions [AOA, [17A(c)]].
24. The material that was before the first respondent (including the information on oath) (Category 1) is relevant to ground 6. That material will demonstrate the matters that the first respondent took into account in making his decision.
25. Documents recording the decisions of the second and third respondents to seek the search warrant (Category 2) are relevant to ground 7. Those documents will demonstrate the matters that the second and third respondents took into account in making their decisions.
26. Similarly, documents evidencing consideration by the second and third respondents of the matters referred to above in connection with their decisions to seek the search warrant (Category 3) are relevant to ground 7. Those documents will demonstrate whether, and if so how, those considerations were taken into account. Those documents will demonstrate the reasons why the second and third respondents sought a search warrant in such broad terms, and enable this Court to assess whether, in the circumstances, there was an “evident and intelligible justification” for their decisions.¹⁴
27. ***The issues identified above are “real” issues.*** Having regard to the nature of the ABC’s case and the circumstances in which it is advanced, that case cannot be said to be “essentially speculative”, or to consist of “bare allegations” for which there is “not the slightest evidence” or other material in support. This is not a case like *SMEC Holdings Pty Ltd v Commissioner, Australian Federal Police*, where an application for discovery was made based on bare assertions of invalidity of the warrant,¹⁵ and of innocence of the offences referred to in the warrant.¹⁶
28. The evidence available to the ABC affords a basis to suspect¹⁷ that the search permitted by the warrant exceeded what was justified on the material before the first respondent, and exceeded what was necessary to achieve the purpose of the second and third

¹⁴ *Li* (2013) 249 CLR 332, 367 [76] (Hayne, Kiefel and Bell JJ).

¹⁵ [2018] FCA 609, [29].

¹⁶ [2018] FCA 609, [36]–[41].

¹⁷ See *Nestle* (1986) 10 FCR 78, 83.

respondents in seeking the warrant. The available evidence demonstrates that the issues above are real issues, and not “entirely speculative”. The relevant evidence includes the following.

28.1 On 5 September 2018, Mr McBride was charged with theft contrary to s 131.1 of the Criminal Code (Cth).¹⁸

28.2 On 13 September 2018, the AFP notified two ABC journalists, Mr Oakes and Mr Clark, that they were suspects in relation to the alleged offences of:¹⁹

- (i) receiving prescribed information contrary to s 79(6) of the *Crimes Act 1914* (Cth); and
- (ii) unlawfully receiving information as to defences, contrary to s 73A(2) of the *Defence Act 1903* (Cth).

28.3 On 7 March 2019, Mr McBride was further charged with:²⁰

- (i) unlawfully giving information as to defences, contrary to s 73A(1) of the *Defence Act 1903* (Cth); and
- (ii) unlawfully disclosing a Commonwealth document contrary to s 70(1) of the *Crimes Act 1914* (Cth);

28.4 In March and May 2019, Mr McBride made public statements to the effect that he had admitted the substance of the allegations against him to the AFP, that he would not be contesting that he had committed the alleged offences, and that he would only argue that he was justified in doing so.²¹

28.5 On 1 April 2019, the AFP notified Mr Oakes and Mr Clark that they were also suspects in relation to the alleged offence of receiving contrary to s 132.1 of the Criminal Code (Cth), and requested their consent to a forensic procedure, being the copying of finger and palm prints.²² Their consent was sought because the AFP said it held forensic material relevant to the suspected offences. It can be inferred that the AFP wished the finger and palm prints in order to compare

¹⁸ Affidavit of Kristy Alexander affirmed on 22 July 2019 (**Alexander Affidavit**), [7].

¹⁹ Affidavit of Michael Rippon affirmed 30 July 2019 (**Third Rippon Affidavit**), [15]–[16], Annexures MR20 and MR21.

²⁰ Alexander Affidavit, [9].

²¹ Third Rippon Affidavit, [5]–[7], Annexures MR14 to MR16.

²² Third Rippon Affidavit, [22], Annexure MR25.

them to forensic evidence drawn from materials in the AFP's possession, namely materials allegedly received by Mr Oakes and Mr Clark.

28.6 On 30 May 2019, Mr McBride was committed to stand trial in respect of the alleged offences.²³

28.7 On 3 June 2019, the first respondent purported to issue the search warrant for the ABC's premises in Sydney.²⁴ On 5 June 2019, the AFP purported to execute the search warrant at those premises.

28.8 On 6 June 2019, the Acting Commissioner of the AFP gave a press conference concerning the execution of the search warrant:²⁵

(i) The Acting Commissioner was asked: "Given Mr McBride has sort of openly [admitted] that he has handed documents to the ABC journalists named on the warrant yesterday, why did the AFP feel it necessary to go into the ABC and do that? What sort of link are you establishing there, where the accused person who has been committed to trial says yep, there is a link, it was me?"

(ii) The Acting Commissioner responded: "I think in relation to that one, we still have to follow the evidence trail. We still need to ensure that just because someone says they did something, doesn't mean they actually did, so there's still a fair way—".

29. Several points emerge from the evidence referred to above. *First*, the offences that the journalists were told they were suspected of committing—receiving prescribed information, receiving information as to defences, and receiving stolen property—were each the flip side of offences with which Mr McBride has been charged—disclosing a Commonwealth document, giving information as to defences, and theft. Thus, it may be inferred that the same documents or information that was the subject of the charges against Mr McBride were also the subject of the investigation into the journalists. That inference is supported by the fact that the AFP requested the finger and palm prints of the two journalists—that request implies that the AFP has in its possession documents that it believes the two journalists may have touched.

²³ Alexander Affidavit, [12].

²⁴ Affidavit of Michael Rippon affirmed 24 June 2019 (**First Rippon Affidavit**), Annexure MR1.

²⁵ Third Rippon Affidavit, [9], Annexure MR17.

30. *Second*, it may be inferred that, by April 2019 at the latest, the AFP had identified with particularity the documents or information that Mr McBride is alleged to have given to the journalists. That inference is supported by the fact that the AFP felt it had sufficient evidence to charge Mr McBride, together with Mr McBride's public statements to the effect that he had admitted the substance of the allegations against him to the AFP. It is also supported by the fact that the AFP requested the finger and palm prints of the two journalists—again implying that the AFP has in its possession documents that it believes the two journalists may have touched. And it is supported by the fact that Mr McBride was committed to stand trial for the offences with which he was charged.
31. *Third*, it may be inferred that the information on oath identified with particularity the documents or information that Mr McBride is alleged to have given to the journalists. That inference is supported by the fact that, by the time the information on oath was sworn, the AFP had itself identified those documents or information with particularity (see paragraph 30 above). It is also supported by the Acting Commissioner's public statements on 6 June 2019, which indicated that a purpose of seeking and executing the search warrant was to confirm Mr McBride's admissions. All of the evidence available to the ABC indicates that, by the time the information on oath was sworn, the AFP knew precisely what documents or information was the subject of the alleged offences. That gives rise to an inference that the matters set out in the information on oath were limited to that information.
32. In those circumstances, it is striking that the three conditions in the search warrant are expressed in such vague, general and conclusory terms. There is a basis to suspect that the search permitted by the warrant exceeded what was justified on the material before the first respondent, and exceeded what was necessary to achieve the purpose of seeking the warrant. This case is thus far removed from the "bare assertions" considered in *SMEC Holdings*.
33. In *Jilani v Wilhelm*, the Full Court of this Court observed that "[t]he true rule appears to be that if an issue is raised, that is to say properly put forward in an application, as to the sufficiency of the information on oath placed before the issuing officer, the applicant will be permitted to have access to it, subject to any proper claim for public interest immunity".²⁶ Here, the ABC has properly raised an issue as to the sufficiency of the information on oath. Subject to any proper claim for public interest immunity, it should be entitled to have access to it.

²⁶ (2005) 148 FCR 255, 267 [60].

34. The evidence available to the ABC also affords a basis to suspect that neither the first respondent, nor the second or third respondents, took into account the considerations referred to in paragraphs 23.1 to 23.3 above. Alternatively, it affords a basis to suspect that, despite having taken those considerations into account, the first respondent, or the second and third respondents, made a decision that no reasonable decision-maker in the same position would have made. The relevant evidence includes the following:
- 34.1 the search warrant purported to authorise a search of the premises of a public broadcaster;²⁷
 - 34.2 the search warrant sought evidence of communications between a putative source and journalists;²⁸
 - 34.3 the two journalists (who are identified in condition 2 of the warrant) are identified as the authors of the articles and a 7.30 story listed under condition 2 of the warrant;²⁹
 - 34.4 the articles themselves disclosed on their face that they were based on confidential sources;³⁰
 - 34.5 the articles on their face concerned government and political matters of the highest public importance, namely historical conduct and alleged conduct, including alleged unlawful killings carried out in Australia's name in Afghanistan; whether that historical conduct and alleged conduct had been investigated adequately or at all, or covered up; and gross dysfunction within the Australian Defence Force;³¹ and
 - 34.6 the fact that, at the press conference held on 6 June 2019, the Acting Commissioner of the AFP³² was asked: "What's the alleged harm to national security in these cases and why doesn't the Australian public have a right to know about plans to increase spying or alleged unlawful killing?"; and he responded (relevantly): "What we're investigating is the fact that code worded and top secret and secret information was disclosed to the Australian community. The substance of that ... to our investigation process is somewhat

²⁷ First Rippon Affidavit, Annexure MR1.
²⁸ First Rippon Affidavit, Annexure MR1.
²⁹ First Rippon Affidavit, Annexure MR1.
³⁰ Third Rippon Affidavit, Annexure MR19.
³¹ Third Rippon Affidavit, Annexure MR19.
³² Third Rippon Affidavit, [9], Annexure MR17.

irrelevant. The issue of whether or not the public has a right to know is really not an issue that comes into our investigation process”; and

- 34.7 the matters referred to in paragraphs 28.1, 28.3, 28.4 and 28.6 above.
35. In the face of these matters, the fact that the second and third respondents decided to seek, and the first respondent decided to issue, a search warrant in such vague, general and conclusory terms, authorising such a broad search of the ABC’s premises, gives rise to an inference that, in making those decisions, none of the respondents had regard to:
- 35.1 the strong public policy interests in protecting confidential communications between journalists and their sources, and protecting the identity of those sources;
- 35.2 the public interest in the reporting of the matters referred to in [16] of the AOA; or
- 35.3 the implied Constitutional freedom of political communication.
36. A majority of the High Court has recently confirmed that, in the context of certain statutory powers, the implied freedom of political communication may be a mandatory relevant consideration.³³ The ABC will submit at the hearing of this matter that s 3E of the *Crimes Act 1914* (Cth) is an example of such a power.
37. The inference referred to above is supported by the public statements of the Acting Commissioner. The Acting Commissioner confirmed that the public interest in the reporting of the matters referred to in [16] of the AOA was “somewhat irrelevant” to the investigation process. It may be inferred from that statement that the matters referred to in paragraphs 35.1, 35.2 and 35.3 above had no place in the information on oath or other material provided to the first respondent in connection with the decision to issue the warrant.
38. Further, the failure of the respondents to consider the matters referred to in paragraphs 35.1, 35.2 and 35.3 above must be assessed in light of the matters referred to in paragraphs 28.1, 28.3, 28.4 and 28.6 above. By the time the second and third respondents decided to apply for, and the first respondent decided to issue, the search

³³ See *Comcare v Banerji* [2019] HCA 23, [45] (Kiefel CJ, Keane, Bell and Nettle JJ).

warrant, Mr McBride had been charged with the offences referred to in the third condition of the warrant, had made public statements to the effect that he admitted the substance of those offences, and had been committed to stand trial on those offences. In those circumstances, it is open to the ABC to argue that no reasonable decision-maker would have decided to seek, or to issue, the search warrant, having regard to the matters referred to in paragraph 34 above, and the considerations identified in paragraphs 35.1, 35.2 and 35.3 above.

39. There is, accordingly, a proper basis for the ABC's claim that the decisions to seek the warrant, and to issue the warrant, were legally unreasonable. That claim cannot be dismissed as speculative.

Date: 9 August 2019

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