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Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
File Number:	NSD989/2019
File Title:	AUSTRALIAN BROADCASTING CORPORATION v MARTIN KANE & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 30/09/2019 3:14:39 PM AEST Registrar

Important Information

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

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Form 59
Rule 29.02(1)

AFFIDAVIT

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL **NO NSD 989 OF 2019**

AUSTRALIAN BROADCASTING CORPORATION
Applicant

MARTIN KANE
and others named in the Schedule
Respondents

Affidavit of:	Gregory Charles Bilton AM CSC
Address:	Russell Offices, Constitution Avenue, Russell
Occupation:	Chief of Joint Operations, Australian Defence Force
Date sworn:	27 September 2019

I, Gregory Charles Bilton AM CSC of Russell Offices, Constitution Avenue, Russell in the Australian Capital Territory, Chief of Joint Operations, Australian Defence Force, say on oath:

ROLE AND RESPONSIBILITIES

1. On 1 July 2019, I was appointed to the position of Chief of Joint Operations. In this role, I report directly to the Chief of the Defence Force (CDF).

2. I am a Lieutenant General, the second-highest active rank in the Australian Army. It is the same rank that is held by the Chief of Army and the equivalent rank as the Vice Chief of the Defence Force.

3. As the Chief of Joint Operations, I am responsible for, amongst other things:

    3.1. Australian Defence Force (ADF) operations and joint exercises both domestically and internationally as directed by the CDF in order to achieve Australian Government strategic priorities

Deponent Witness

Filed on behalf of the Second and Third Respondents
File ref: 19004307

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The Australian Government Solicitor,
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3.2. exercising theatre command over ADF forces assigned to me for the conduct of operations, joint exercises and other activities

3.3. development and management of all joint force training (being integrated exercises between Army, Air force and Navy capabilities), and of the certification of forces for deployment

3.4. preserving the operational security of ADF capability and its people through the protection of sensitive information related to the ADF's operational activities.

4. I command ADF forces deployed in connection with all ADF operations, including Operation HIGHROAD, Australia's current mission in Afghanistan. As part of that command function, I direct planning and provide orders and directions for the conduct of all ADF operations, and receive back briefings from subordinate commanders to confirm that operations are being conducted in accordance with those orders and directions. I have a specific responsibility for overseeing the generation of rules of engagement (ROEs) – which I take to the CDF for approval and, once issued by the CDF, I provide to subordinate commanders as part of the orders for the conduct of ADF operations.

QUALIFICATIONS

Education and training

5. I entered the Royal Military College in 1983 and, upon graduation in 1986, was commissioned as an officer in the Royal Australian Artillery, a corps of the Australian Army.

6. I have completed the following education and training:

6.1. in 1983-1986, a Bachelor of Arts in Military Studies at Royal Military College Duntroon

6.2. in 1990-1991, the Long Gunnery Course at the United Kingdom School of Artillery

6.3. in 1998-1999, the United States Army Command and General Staff Course at United States Army Command and General Staff College, United States of America

6.4. in 1999, a Masters degrees in Military Art and Science and Strategic Studies at United States Army Command and General Staff College, United States of America

6.5. in 2009, a Masters degree in Strategic Studies at the Centre for Defence and Strategic Studies, Deakin University.

Deponent

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7. I have received the following academic honours:

7.1. in 1999, in the United States Army Command and General Staff Course, the Lieutenant General Hans Schlup (US) award for excellence in International Relations

7.2. in 2009, in the Defence Strategic Studies Course, the Blamey Award (Australia) for Leadership.

Experience

8. I have held regimental appointments in the Australian Army as a Lieutenant and Captain in the 1st and 4th Field Regiments, the 8th/12th Medium Regiment and the School of Artillery.

9. I have held the following command appointments:

9.1. from 1996-1997, Battery Commander 104th Field Battery within the Australian Army

9.2. from 2004-2005, Commanding Officer 4th Field Regiment within the Australian Army

9.3. from 2012-2014, Commander 7th Brigade within the Australian Army

9.4. from 2014-2017, Deputy Commanding General United States Army Pacific, as an embedded officer with the United States Army

9.5. from 2017-2018, Deputy Chief of Joint Operations within the Australian Defence Force

9.6. from 2018-2019, Commander, Forces Command within the Australian Army.

10. I have also served in the following staff appointments within the Australian Army:

10.1. in the Directorate of Officer Career Management

10.2. in the Directorate of Force Structure

10.3. as Director General Development and Plans.

11. In 2006, I was an instructor at the Australian Command and Staff College.

12. My deployments have included:

12.1. in 1993, Operation MAZURKA, which is the ADF's contribution to the Multinational Force and Observers (MFO) in Sinai, Egypt, at the MFO

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Headquarters. In that role, I worked as a staff officer undertaking duties associated with the organisation and management of personnel across the entirety of the MFO.

12.2. in 2008, Operation SLIPPER, which was the ADF's contribution to the International Security Assistance Force in Afghanistan (ISAF), as Deputy Chief of Staff for Security Sector Reform, Headquarters Regional Command South, Afghanistan, a senior staff appointment. In this role, I worked directly with the Afghan National Army's 205th Corps, providing advice and mentorship to the commander and staff offices of the Corps. I also had a personnel management role in overseeing ADF personnel deployed to Camp Baker, Kandahar Airport. Furthermore, I coordinated and directed ADF personnel and coalition forces tasked with providing mentorship and training to the Afghan National Army and Afghan Police in the Southern provinces of Afghanistan.

Expertise specific to this affidavit

13. I have extensive experience and familiarity with ROEs, including their role and significance in ADF and coalition operations, as a result of the training, study and experience (including command experience) referred to above.

14. I am familiar with Defence security policies, including the Protective Security Policy Framework and the Defence Security Principles Framework (formerly the Defence Security Manual). I hold a high level security clearance, which permits me to access security classified material. By reason of the experience referred to above, I have an understanding of the requirements and military significance of Defence security policies.

15. Since 1993, my roles have included significant liaison with allies, including the other 'Five Eyes' nations (Canada, New Zealand, the United Kingdom and the United States of America). By significant liaison, I mean that I have had a range of interactions with other military forces, including through key leader engagement (meeting leaders of my equivalent level), conducting operations and training activities, and participating in and presenting at military conferences, seminars, and lectures on operational matters in Australia and overseas. Through these activities, I have developed an understanding of the extent to which partner forces value the capability of the ADF to maintain the secrecy of military information and the impact that the compromise of such information may have on relationships with those allies.

Military Honours

16. I have received the following honours:

16.1. in 1994, Force Commanders Commendation for my work on Operation MAZURKA in the Sinai

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16.2. in 2004, Conspicuous Service Cross for my force structure work at Army Headquarters

16.3. in 2010, Canadian Meritorious Service Medal for my work in Afghanistan in connection with Operation SLIPPER

16.4. in 2017, United States Legion of Merit and the Japanese Defence Cooperation Medal for my work at United States Army Pacific.

17. I was appointed a Member of the Order of Australia in 2014 in recognition of my work as Director General Development and Plans at Army Headquarters and as Commander 7th Brigade.

INSTRUCTIONS

18. On 24 September 2019, Australian Government Solicitor (AGS) wrote to me requesting that I provide evidence in this proceeding. '**Annexure GB-1**' to this affidavit is a copy of the AGS's letter dated 24 September 2019.

19. Enclosed with AGS's letter of 24 September 2019 was a copy of the Expert Evidence Practice Note and the Harmonised Expert Witness Code of Conduct. I have read the Practice Note and the Code. In relation to the reference to impartiality at [2] of the Code, I am not in a position that is entirely independent from the parties and issues in the proceeding. To the extent I express opinions in this affidavit, they are opinions which I honestly hold and which I have formed on the basis of my education, training and experience outlined above, without influence by anyone in the ADF, the Department of Defence, or the Australian Government more broadly. Subject to these matters I have complied with and agree to be bound by the Practice Note and the Code.

20. Where I state matters of fact, those matters are stated accurately to the best of my knowledge and belief.

21. On 25 September 2019, AGS wrote to me providing instructions for the preparation of this affidavit. '**Annexure GB-2**' to this affidavit is a copy of AGS's letter dated 25 September 2019.

22. That letter asked me to assume the facts stated in the statement of agreed facts and issues dated 24 September 2019 to be true, but if any statement relevant to my answers was incorrect or needed qualification, to say so. I have read the statement of agreed facts and issues and I do not need to state any relevant qualification or correction. However, in this affidavit I have elaborated on some of the matters dealt with in the statement of agreed facts and issues. '**Exhibit GB-3**' to this affidavit is a copy of the statement of agreed facts and issues dated 23 September 2019.

23. AGS provided me with the following assistance:

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23.1. inputting the 'Role and Responsibilities', 'Qualifications' and 'Instructions' sections of this affidavit

23.2. inputting the formal requirements for compliance with the Practice Note and Code of Conduct into this affidavit

23.3. inputting my answers to questions of fact and my opinions into this affidavit

23.4. inputting my changes to two drafts of this affidavit.

RULES OF ENGAGEMENT

24. In this part of my affidavit, I outline my answers to questions 1-5 in AGS's letter of 25 September 2019.

Q1 Without disclosing the content of any particular rule of engagement, what are rules of engagement (ROEs)?

25. ROEs are directions founded in the laws of armed conflict, which also contain operational components. They give clear guidance to soldiers, sailors and airmen/women about the constraints and freedoms that exist in taking action during the conduct of an operation, including when responding to enemy action. ROEs set clear directions about how soldiers, sailors and airmen/women can apply aspects of lethal force and the circumstances in which they can do so, including their rights in terms of self defence.

26. ROEs are a package consisting of a body, annexures and directives. The body consists of directions issued by the CDF. In addition to this, there are directives, annexes and orders that are created by me and other subordinate commanders, for the purposes of dissemination to the force, in order to distil, explain and amplify the ROEs. All of these form part of the ROE package.

27. The ADF formulates and uses distinct ROEs in each of its named operations. There is a spectrum of ADF operations, ranging from humanitarian/disaster relief through to peace keeping through to armed conflict. Two types of armed conflict operations are warfighting (an example of which was Operation SLIPPER) and stability operations (an example of which is Operation HIGHROAD). As just mentioned, there are ROEs for each of these operations.

28. The ADF also prepares ROEs for contingencies. Where the ADF pre-prepares ROEs for contingencies, they are later refined in response to the specific circumstances of the contingency event (when it arises) in order to ensure that ROEs are adapted to adequately deal with the specific threat.

29. ROEs are prepared for and used in training to ingrain an understanding in soldiers, sailors and airmen/women of the constraints and freedoms of actions they can undertake during operations. The objective is that in an operational setting the

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response from soldiers, sailors and airmen/women should be almost automatic. By way of example, when a soldier, sailor or airman/woman is making a decision about the use of lethal force in a pressured situation, they have to be highly trained to ensure that they act lawfully.

30. ROEs are in a sense evolutionary and the detail contained in them is highly refined. New ROEs are developed having regard to the content of past and current ROEs, and the ADF's operational experience. Where a past conflict is similar to that of a new conflict (eg, in terms of operational circumstances, geography and the threat, etc), there will be consistency and similarity between the ROE for the previous conflict and the new conflict, although the precise extent of that consistency and similarity is a matter of military sensitivity.

31. ROEs are also tested and developed through training. In particular, training is undertaken to ensure that the application of ROEs in an operational context is sound and consistent with the laws of armed conflict. In training, the ADF seeks to run through all possible scenarios, from those that the ADF has experienced in the past through to those which might be thought to be highly unusual, in order to ensure that ROEs are well adapted to all possible situations.

32. I have been asked for my opinion about current and non-current ROEs. Current ROEs are ROEs that apply to a current operation. Non-current ROEs are ROEs for concluded operations and ROEs pre-prepared for contingencies.

33. In addition to those categories of ROEs, the ADF also prepares ROEs for use in training exercises.

Q2 What is the purpose of ROEs?

34. ROEs serve two important and related purposes.

35. Firstly, ROEs operate to ensure force protection (the self-protection of soldiers, sailors and airmen/women and the ability of the ADF to continue to conduct its operation) and the protection of allies and non-combatants.

36. Secondly, ROEs operate to ensure the actions of the ADF remain lawful and consistent with the mandate of the Australian Government. The conduct of ADF operations within this framework is critical to the legitimacy of those actions and the manner in which they are perceived by the Australian and international community.

Q3 How do ROEs interact with and relate to other limits on the use of force?

37. ROE are the primary limitation on the use of force in an operational context.

38. Australian and international law relevant to armed conflicts is one of the bases of the ROEs construct. There are a number of other considerations, such as government policy and operational matters, which go to the development of ROEs. By way of

example, ROEs take into account Australia's obligations under the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines.

39. All of these considerations are taken into account when formulating the ROEs.

40. The operational component of an ROE (describing tactics, techniques and procedures (TTPs)) is an aspect that overlaps with, but is distinct from, the limits on the use of force arising from the laws of armed conflict. Depending on the nature of the operation, ROEs may be less permissive than those laws on the question of when lethal force can be used.

Q4 Are ROEs made publicly available or is their circulation restricted?

41. The ADF ROEs are not made publicly available. They are security classified and their circulation is restricted.

Q5 If ROEs have a restricted circulation, what level of security classification is normally assigned to ROEs? If the security classification of ROEs varies, please explain this variation.

42. With one exception, ADF ROEs are classified at no less than SECRET consistent with Defence policy. Although depending upon the nature of the operation, their classification may be higher (eg, where the existence of the operation is itself highly sensitive). The exception is that one particular subordinate set of simplified instructions is classified at the PROTECTED level to enable dissemination the lowest levels of the force.

43. When I say that ROEs are classified at no less than SECRET, I am talking about all current ROEs in relation to named operations, contingency ROEs and ROEs in relation to past operations (since the 1990s, which is when the current ROE framework and terminology was introduced).

44. I understand that the other 'Five Eyes' nations (Canada, New Zealand, the United Kingdom and the United States of America) classify their ROEs at an equivalent level to the ADF.

CONSEQUENCES OF CURRENT ROE DISCLOSURE

45. In this part of my affidavit, I outline my answers to questions 6-9 in AGS's letter of 25 September 2019.

Q6 If all or *part* of a *current* ROE were acquired by adversaries what would be the possible consequences (if any) for:

(a) the effectiveness of the Australian Defence Force in that conflict;

(b) the effectiveness of the Australian Defence Force in other conflicts;

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(c) the safety of Australian military personnel; and

(d) Australia's relationships with allies and military partner countries?

In your response, please explain how those consequences might occur.

In your response, please explain whether and how those consequences might differ depending on the nature of the ROE information that was disclosed.

46. In my opinion, based on my experience outlined above, if **all** of a **current** ROE were acquired by adversaries, the possible consequences would be as follows:

(a) If the adversary was able to acquire all of an ROE for a current conflict, they would garner a clear understanding of the restrictions placed on ADF personnel and the ADF's TTPs for that conflict. As a consequence, the adversary could identify vulnerabilities in the TTPs through the ROEs, including limitations on the circumstances in which the ADF will use force. The adversary could apply its own TTPs to undermine the effectiveness of the ADF in that conflict.

(b) Where the nature of the conflicts are similar, adversaries in another theatre in which the ADF is engaged are likely to assume a significant commonality in the content of the ROEs and would be able to test the extent of commonality by applying their own TTPs. As a consequence, the adversary could identify vulnerabilities in the TTPs through the ROEs, including limitations on the circumstances in which the ADF will use force. The adversary in that other conflict could apply its own TTPs to undermine the effectiveness of the ADF in that conflict. For this reason, the precise extent of commonality as between ADF ROEs (both across time and between different conflicts) is a matter of military sensitivity (see paragraph 26, above).

(c) A key purpose of the ROEs relates to force protection – the preservation of our force and our people. If an adversary understood the limitations imposed on soldiers, sailors and airmen/women, then they would have the ability to exploit the TTPs of the ADF and gain an operational advantage. This operational advantage may result in soldiers, sailors and airmen/women being seriously harmed or killed.

(d) If an adversary in a conflict acquired a complete ROE, for the reasons outlined in (a)-(c), above, this would make the ADF a vulnerable partner in any coalition force (eg, in Operation HIGHROAD in Afghanistan), which would undermine the effectiveness of coalition operations. Further, it may undermine the confidence of allies in the capability of the ADF to maintain the secrecy of military information, which may in turn harm the ADF's relations with those allies and/or affect coalition cohesion. Further, the ADF takes steps to build commonality between its ROEs and the ROEs of partner forces in order to enable the ADF to undertake cohesive operations as part of that coalition force. An enemy might therefore assume a level of commonality between the ROEs of the ADF and coalition

partners and, in the same way as I described at (b), above, undermine the effectiveness of coalition partner forces in that conflict. The precise extent of commonality as between ADF and coalition partner ROEs is a matter of military sensitivity.

47. Whether the release of a **part** of **current** ROEs would have the same effect as I describe above depends on what part of the ROEs is acquired. Release of any operational components of ROEs would be likely to have those adverse effects, particularly parts revealing limitations on the ADF's use of force or its TTPs.

48. Also, seemingly innocuous fragments of the ROEs might be put together by an adversary through a mosaic analysis. By this, I mean that an adversary may acquire one part of the ROEs through one source, and then another part from another source, and in this way piece together a picture of the ROEs that leads to the same consequences that I have described above. Further, once an adversary has part of the ROEs, they may deploy their own TTPs on the battlefield to test bits of acquired knowledge and draw other conclusions about the ADF's ROEs from its observations of the ADF's behavior. In my command roles, I have experience of adversaries testing their knowledge of ADF tactics on the battlefield and adapting accordingly. For these reasons, partial disclosure may have the same consequences outlined in paragraph 46, above.

49. Many adversaries have an intelligence gathering function, which they use to understand, analyse and form a clear articulation about how Australia and its allies will operate. I know from my experience outlined above that adversaries do proactively seek to aggregate bits of information in order to build an understanding of TTPs.

Q7 How likely are the consequences, if any, identified in your response to question 6 above?

50. It is difficult to describe the likelihood of the consequences identified in paragraphs 46-48, above, but the likelihood is real. Any assessment of likelihood turns on the extent to which you accept that you are dealing with a competent adversary. In an operational context, it is necessary to assume you are dealing with someone who will try and take advantage of any force weakness in the conduct of their own operations. The competence of an adversary will of course depend on the specific operational context – but on an assumption that the adversary is agile, in my opinion based on my experience outlined above, these consequences would be realised quite quickly.

51. In Operation HIGHROAD in Afghanistan, the current adversaries are agile and adaptive, and have a demonstrated ability to take advantage of force weakness in the conduct of their own operations. This is evident from the continual evolution of the way in which those adversaries have detonated improvised explosive devices (IEDs): progressing from detonation using ropes or cables to remote detonation devices, such as mobile phones and garage door remotes.

Deponent

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Q8 How serious are the consequences, if any, identified in your response to question 6 above?

52. The consequences described at paragraphs 46-48, above, are very significant for the ADF's ability to carry out its functions. They might include the ADF being undermined in its ability to undertake an operation, including to the extent that the operation is unsuccessful, as well as soldiers, sailors and airmen/women being injured and killed, which I regard as a serious consequence.

Q9 Would your responses to question 6 above differ if some of the ROE information was already known to adversaries, or to the commanders of enemy forces?

53. The answer to this question depends on the same considerations outlined at paragraph 47-49, above.

CONSEQUENCES OF NON-CURRENT ROE DISCLOSURE

54. In this part of my affidavit, I outline my answers to questions 10-13 in AGS's letter of 25 September 2019.

Q10 If all or part of a non-current ROE were acquired by adversaries what would be the possible consequences (if any) for:

(a) the effectiveness of the Australian Defence Force in that conflict;

(b) the effectiveness of the Australian Defence Force in other conflicts;

(c) the safety of Australian military personnel; and

(d) Australia's relationships with allies and military partner countries?

In your response, please explain how those consequences might occur.

In your response, please explain whether and how those consequences might differ depending on the nature of the ROE information that was disclosed. In particular, what is the relevance, if any, of the length of time that has passed since the ROE was current?

55. In my opinion, based on my experience outlined above, if **all** or **part** of a **non-current** ROE were acquired by adversaries, the possible consequences are the same as I describe at paragraphs 46-47, above. In particular, an adversary might assume a level of commonality between non-current ROEs and current ROEs, particularly where there are commonalities in the operational context (eg, the nature of the conflict or the environment in which it is being fought). The length of time that has passed since the ROE was current will typically bear on the extent of any commonality with current ROEs because ROEs are refined over time. However, as I have noted at paragraph 30, above, for various reasons some current ROEs derive from non-current ROEs.

Deponent

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56. In relation to ROEs for contingencies (as described at paragraph 28, above), I consider that acquisition of that information by an adversary before the ADF enacted the ROE would likely result in even graver consequences to those I describe at paragraphs 46-49, above, because our adversary would be able to formulate and put in place its TTPs even before the ADF's operation is underway.

Q11 How likely are the consequences identified in your response to question 10 above?

57. My answer is the same as at paragraph 50, above, subject to my comments at paragraphs 55-56, above.

Q12 How serious are the consequences identified in your response to question 10 above?

58. My answer is the same as at paragraph 52, above, subject to my comments at paragraphs 55-56, above.

Q13 Would your responses to question 10 above differ if some of the ROE information was already known to adversaries, or to the commanders of enemy forces?

59. My answer is the same as at paragraph 53, above, subject to my comments at paragraphs 55-56, above.

DECLARATIONS

60. I have made all the inquiries that I believe are desirable and appropriate. Specifically, I have not considered it necessary to make any inquiries as I have relied upon my knowledge and experience to give my answers to AGS's questions.

61. Consistently with AGS's instructions to me, I have not disclosed any confidential or classified information. Where I have withheld information of this kind, I have noted it in my affidavit. Subject to that, no matters of significance which I regard as relevant have, to my knowledge, been withheld from the Court.

62. The opinions I express in this affidavit are based wholly or substantially on specialised knowledge arising from my training, study or experience described above.

Sworn by the deponent at Russell in the Australian Capital Territory on 27 September 2019

.....

Before me:

.....

Tristan Lockwood, an AGS lawyer within the meaning of s 55I of the *Judiciary Act 1903* (Cth)

Schedule

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
Division: General **No NSD 989 of 2019**

Respondents

Second Respondent	Commissioner of the Australian Federal Police
Third Respondent	Agent Ian Brumby of the Australian Federal Police

Date: 27 September 2019

ANNEXURE GB-1

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL **NO NSD 989 OF 2019**

AUSTRALIAN BROADCASTING CORPORATION
Applicant

MARTIN KANE
and others named in the Schedule
Respondents

The following 15 pages is the annexure marked GB-1 referred to in the affidavit of Gregory Charles Bilton AM CSC made 27 September 2019 before me:

.....
Tristan Lockwood, an AGS lawyer within
the meaning of s 55I of the *Judiciary Act 1903* (Cth)

Filed on behalf of the Second and Third Respondents File ref: 19004307

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Schedule

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
Division: General **No NSD 989 of 2019**

Respondents

Second Respondent	Commissioner of the Australian Federal Police
Third Respondent	Agent Ian Brumby of the Australian Federal Police

Date: 27 September 2019

GB-1

Our ref. 19004307

24 September 2019

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Lieutenant General Gregory Charles Bilton AM CSC
Chief of Joint Operations
Australian Defence Force

By email

Dear Lieutenant General Bilton

Australian Broadcasting Corporation v Kane & Ors (NSD989/2019)

1. We act for the Commissioner of the Australian Federal Police and Federal Agent Ian Brumby, the second and third respondents, in the above Federal Court proceeding.

2. We are instructed to obtain expert evidence from you for use in the proceeding. The specific questions on which you will be requested to provide your opinion will separately be provided to you.

3. Your evidence is to be prepared by 27 September 2019.

4. We enclose a practice note issued by the Federal Court of Australia on 25 October 2016, which is titled 'Expert Evidence Practice Note (GPN-EXPT)' (**Practice Note**). It includes the Harmonised Expert Witness Code of Conduct (**Code**).

5. Please read the Practice Note carefully. Although you are a serving officer of the Australian Defence Force, you are nevertheless required to comply with the Practice Note – importantly, in providing evidence, your primary duty is to the Court, and not to our clients or to the Australian Defence Force. If you have any queries or concerns about what this means for the preparation of your evidence, please let us know.

6. The Code sets out certain procedures for expert evidence in the Federal Court. Amongst other matters, your evidence should include the following elements specified in the Code:

   a. your name and address;

   b. an acknowledgement that you have read the code and agree to be bound by it;

   c. your qualifications to provide expert evidence;

   d. the assumptions and material facts on which each opinion you express is based;

   e. the reasons for and any literature or other materials utilised in support of such opinion;

f. whether a particular question, issue or matter falls outside your field of expertise;

g. any examinations, tests or other investigations on which you have relied, identifying the person who carried them out and that person's qualifications;

h. to the extent your opinion involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;

i. a declaration that you have made all the inquiries which you believe are desirable and appropriate (save for any matters identified explicitly in your evidence) and that no matters of significance which you regard as relevant have, to your knowledge, been withheld from the Court;

j. any qualification of an opinion expressed in your evidence without which your evidence is or may be incomplete or inaccurate; and

k. whether any opinion expressed in your evidence is not a concluded opinion because of insufficient research or insufficient data or for any other reason.

7. Please ensure that all information related to this matter is treated as confidential and subject to legal professional privilege. Given that your involvement in this matter is confidential we request that you keep a separate file in relation to this matter and keep all documents provided to or created by you separate from your other files.

8. We look forward to speaking with you in conference at 11 am today. We are content for you to bring a legal representative to that conference, but ask that no one else attend. Further, we ask that you do not seek information or obtain briefings in relation to this matter – we are concerned to obtain your opinions alone.

9. Please contact my colleague Tristan Lockwood (02 9581 7322) with any queries.

Yours sincerely

Kristy Alexander
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FEDERAL COURT OF AUSTRALIA

EXPERT EVIDENCE PRACTICE NOTE (GPN-EXPT)

General Practice Note

1. INTRODUCTION

1.1 This practice note, including the *Harmonised Expert Witness Code of Conduct* ("**Code**") (see Annexure A) and the *Concurrent Expert Evidence Guidelines* ("**Concurrent Evidence Guidelines**") (see Annexure B), applies to any proceeding involving the use of expert evidence and must be read together with:

(a) the Central Practice Note (CPN-1), which sets out the fundamental principles concerning the National Court Framework ("**NCF**") of the Federal Court and key principles of case management procedure;

(b) the Federal Court of Australia Act 1976 (Cth) ("**Federal Court Act**");

(c) the *Evidence Act 1995* (Cth) ("**Evidence Act**"), including Part 3.3 of the Evidence Act;

(d) Part 23 of the *Federal Court Rules 2011* (Cth) ("**Federal Court Rules**"); and

(e) where applicable, the Survey Evidence Practice Note (GPN-SURV).

1.2 This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

2. APPROACH TO EXPERT EVIDENCE

2.1 An expert witness may be retained to give opinion evidence in the proceeding, or, in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts. In some circumstances an expert may be appointed as an independent adviser to the Court.

2.2 The purpose of the use of expert evidence in proceedings, often in relation to complex subject matter, is for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge (based on training, study or experience - see generally s 79 of the Evidence Act).

2.3 However, the use or admissibility of expert evidence remains subject to the overriding requirements that:

(a) to be admissible in a proceeding, any such evidence must be relevant (s 56 of the Evidence Act); and

(b) even if relevant, any such evidence, may be refused to be admitted by the Court if its probative value is outweighed by other considerations such as the evidence

being unfairly prejudicial, misleading or will result in an undue waste of time (s 135 of the Evidence Act).

2.4 An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given.

2.5 The Court will ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and any legal representatives acting on their behalf, when dealing with expert witnesses and expert evidence, to at all times comply with their duties associated with the overarching purpose in the Federal Court Act (see ss 37M and 37N).

3. INTERACTION WITH EXPERT WITNESSES

3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.

3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.

3.3 Any witness retained by a party for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based in the specialised knowledge of the witness[1] should, at the earliest opportunity, be provided with:

(a) a copy of this practice note, including the Code (see Annexure A); and

(b) all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.

3.4 Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

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[1] Such a witness includes a "Court expert" as defined in r 23.01 of the Federal Court Rules. For the definition of "expert", "expert evidence" and "expert report" see the Dictionary, in Schedule 1 of the Federal Court Rules.

4. ROLE AND DUTIES OF THE EXPERT WITNESS

4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.

4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.

4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

Harmonised Expert Witness Code of Conduct

4.4 Every expert witness giving evidence in this Court must read the *Harmonised Expert Witness Code of Conduct* (attached in Annexure A) and agree to be bound by it.

4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

5. CONTENTS OF AN EXPERT'S REPORT AND RELATED MATERIAL

5.1 The contents of an expert's report must conform with the requirements set out in the Code (including clauses 3 to 5 of the Code).

5.2 In addition, the contents of such a report must also comply with r 23.13 of the Federal Court Rules. Given that the requirements of that rule significantly overlap with the requirements in the Code, an expert, unless otherwise directed by the Court, will be taken to have complied with the requirements of r 23.13 if that expert has complied with the requirements in the Code and has complied with the additional following requirements. The expert shall:

(a) acknowledge in the report that:

(i) the expert has read and complied with this practice note and agrees to be bound by it; and

(ii) the expert's opinions are based wholly or substantially on specialised knowledge arising from the expert's training, study or experience;

(b) identify in the report the questions that the expert was asked to address;

(c) sign the report and attach or exhibit to it copies of:

(i) documents that record any instructions given to the expert; and

(ii) documents and other materials that the expert has been instructed to consider.

5.3 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the other parties at the same time as the expert's report.

6. CASE MANAGEMENT CONSIDERATIONS

6.1 Parties intending to rely on expert evidence at trial are expected to consider between them and inform the Court at the earliest opportunity of their views on the following:

(a) whether a party should adduce evidence from more than one expert in any single discipline;

(b) whether a common expert is appropriate for all or any part of the evidence;

(c) the nature and extent of expert reports, including any in reply;

(d) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;

(e) the issues that it is proposed each expert will address;

(f) the arrangements for a conference of experts to prepare a joint-report (see Part 7 of this practice note);

(g) whether the evidence is to be given concurrently and, if so, how (see Part 8 of this practice note); and

(h) whether any of the evidence in chief can be given orally.

6.2 It will often be desirable, before any expert is retained, for the parties to attempt to agree on the question or questions proposed to be the subject of expert evidence as well as the relevant facts and assumptions. The Court may make orders to that effect where it considers it appropriate to do so.

7. CONFERENCE OF EXPERTS AND JOINT-REPORT

7.1 Parties, their legal representatives and experts should be familiar with aspects of the Code relating to conferences of experts and joint-reports (see clauses 6 and 7 of the Code attached in Annexure A).

7.2 In order to facilitate the proper understanding of issues arising in expert evidence and to manage expert evidence in accordance with the overarching purpose, the Court may require experts who are to give evidence or who have produced reports to meet for the purpose of identifying and addressing the issues not agreed between them with a view to reaching agreement where this is possible ("**conference of experts**"). In an appropriate case, the Court may appoint a registrar of the Court or some other suitably qualified person ("**Conference Facilitator**") to act as a facilitator at the conference of experts.

7.3 It is expected that where expert evidence may be relied on in any proceeding, at the earliest opportunity, parties will discuss and then inform the Court whether a conference of experts and/or a joint-report by the experts may be desirable to assist with or simplify the giving of expert evidence in the proceeding. The parties should discuss the necessary arrangements for any conference and/or joint-report. The arrangements discussed between the parties should address:

(a) who should prepare any joint-report;

(b) whether a list of issues is needed to assist the experts in the conference and, if so, whether the Court, the parties o r the experts should assist in preparing such a list;

(c) the agenda for the conference of experts; and

(d) arrangements for the provision, to the parties and the Court, of any joint-report or any other report as to the outcomes of the conference ("**conference report**").

Conference of Experts

7.4 The purpose of the conference of experts is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying matters and issues in a proceeding about which the experts agree, partly agree or disagree and why. For this reason the conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.

7.5 The Court may order that a conference of experts occur in a variety of circumstances, depending on the views of the judge and the parties and the needs of the case, including:

(a) while a case is in mediation. When this occurs the Court may also order that the outcome of the conference or any document disclosing or summarising the experts' opinions be confidential to the parties while the mediation is occurring;

(b) before the experts have reached a final opinion on a relevant question or the facts involved in a case. When this occurs the Court may order that the parties exchange draft expert reports and that a conference report be prepared for the use of the experts in finalising their reports;

(c) after the experts' reports have been provided to the Court but before the hearing of the experts' evidence. When this occurs the Court may also order that a conference report be prepared (jointly or otherwise) to ensure the efficient hearing of the experts' evidence.

7.6 Subject to any other order or direction of the Court, the parties and their lawyers must not involve themselves in the conference of experts process. In particular, they must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the outcome of the conference of experts. The experts should raise any queries they may have in relation to the process with the Conference Facilitator (if one has been appointed) or in

accordance with a protocol agreed between the lawyers prior to the conference of experts taking place (if no Conference Facilitator has been appointed).

7.7 Any list of issues prepared for the consideration of the experts as part of the conference of experts process should be prepared using non-tendentious language.

7.8 The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable. The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).

7.9 Experts should prepare for a conference of experts by ensuring that they are familiar with all of the material upon which they base their opinions. Where expert reports in draft or final form have been exchanged prior to the conference, experts should attend the conference familiar with the reports of the other experts. Prior to the conference, experts should also consider where they believe the differences of opinion lie between them and what processes and discussions may assist to identify and refine those areas of difference.

Joint-report

7.10 At the conclusion of the conference of experts, unless the Court considers it unnecessary to do so, it is expected that the experts will have narrowed the issues in respect of which they agree, partly agree or disagree in a joint-report. The joint-report should be clear, plain and concise and should summarise the views of the experts on the identified issues, including a succinct explanation for any differences of opinion, and otherwise be structured in the manner requested by the judge or registrar.

7.11 In some cases (and most particularly in some native title cases), depending on the nature, volume and complexity of the expert evidence a judge may direct a registrar to draft part, or all, of a conference report. If so, the registrar will usually provide the draft conference report to the relevant experts and seek their confirmation that the conference report accurately reflects the opinions of the experts expressed at the conference. Once that confirmation has been received the registrar will finalise the conference report and provide it to the intended recipient(s).

8. CONCURRENT EXPERT EVIDENCE

8.1 The Court may determine that it is appropriate, depending on the nature of the expert evidence and the proceeding generally, for experts to give some or all of their evidence concurrently at the final (or other) hearing.

8.2 Parties should familiarise themselves with the *Concurrent Expert Evidence Guidelines* (attached in Annexure B). The Concurrent Evidence Guidelines are not intended to be exhaustive but indicate the circumstances when the Court might consider it appropriate for

concurrent expert evidence to take place, outline how that process may be undertaken, and assist experts to understand in general terms what the Court expects of them.

8.3 If an order is made for concurrent expert evidence to be given at a hearing, any expert to give such evidence should be provided with the Concurrent Evidence Guidelines well in advance of the hearing and should be familiar with those guidelines before giving evidence.

9. FURTHER PRACTICE INFORMATION AND RESOURCES

9.1 Further information regarding Expert Evidence and Expert Witnesses is available on the Court's website.

9.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP
Chief Justice
25 October 2016

Annexure A

HARMONISED EXPERT WITNESS CODE OF CONDUCT[2]

APPLICATION OF CODE

1. This Code of Conduct applies to any expert witness engaged or appointed:

   (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or

   (b) to give opinion evidence in proceedings or proposed proceedings.

GENERAL DUTIES TO THE COURT

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

CONTENT OF REPORT

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:

   (a) the name and address of the expert;

   (b) an acknowledgment that the expert has read this code and agrees to be bound by it;

   (c) the qualifications of the expert to prepare the report;

   (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];

   (e) the reasons for and any literature or other materials utilised in support of such opinion;

   (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;

   (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;

   (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;

   (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the

[2] Approved by the Council of Chief Justices' Rules Harmonisation Committee

knowledge of the expert, been withheld from the Court;

(j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;

(k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and

(l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION

4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.

5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

DUTY TO COMPLY WITH THE COURT'S DIRECTIONS

6. If directed to do so by the Court, an expert witness shall:

(a) confer with any other expert witness;

(b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and

(c) abide in a timely way by any direction of the Court.

CONFERENCE OF EXPERTS

7. Each expert witness shall:

(a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and

(b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

ANNEXURE B

CONCURRENT EXPERT EVIDENCE GUIDELINES

APPLICATION OF THE COURT'S GUIDELINES

1. The Court's Concurrent Expert Evidence Guidelines ("**Concurrent Evidence Guidelines**") are intended to inform parties, practitioners and experts of the Court's general approach to concurrent expert evidence, the circumstances in which the Court might consider expert witnesses giving evidence concurrently and, if so, the procedures by which their evidence may be taken.

OBJECTIVES OF CONCURRENT EXPERT EVIDENCE TECHNIQUE

2. The use of concurrent evidence for the giving of expert evidence at hearings as a case management technique[3] will be utilised by the Court in appropriate circumstances (see r 23.15 of the *Federal Court Rules 2011* (Cth)). Not all cases will suit the process. For instance, in some patent cases, where the entire case revolves around conflicts within fields of expertise, concurrent evidence may not assist a judge. However, patent cases should not be excluded from concurrent expert evidence processes.

3. In many cases the use of concurrent expert evidence is a technique that can reduce the partisan or confrontational nature of conventional hearing processes and minimises the risk that experts become "opposing experts" rather than independent experts assisting the Court. It can elicit more precise and accurate expert evidence with greater input and assistance from the experts themselves.

4. When properly and flexibly applied, with efficiency and discipline during the hearing process, the technique may also allow the experts to more effectively focus on the critical points of disagreement between them, identify or resolve those issues more quickly, and narrow the issues in dispute. This can also allow for the key evidence to be given at the same time (rather than being spread across many days of hearing); permit the judge to assess an expert more readily, whilst allowing each party a genuine opportunity to put and test expert evidence. This can reduce the chance of the experts, lawyers and the judge misunderstanding the opinions being expressed by the experts.

5. It is essential that such a process has the full cooperation and support of all of the individuals involved, including the experts and counsel involved in the questioning process. Without that cooperation and support the process may fail in its objectives and even hinder the case management process.

[3] Also known as the "hot tub" or as "expert panels".

CASE MANAGEMENT

6. Parties should expect that, the Court will give careful consideration to whether concurrent evidence is appropriate in circumstances where there is more than one expert witness having the same expertise who is to give evidence on the same or related topics. Whether experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.

7. Although this consideration may take place at any time, including the commencement of the hearing, if not raised earlier, parties should raise the issue of concurrent evidence at the first appropriate case management hearing, and no later than any pre-trial case management hearing, so that orders can be made in advance, if necessary. To that end, prior to the hearing at which expert evidence may be given concurrently, parties and their lawyers should confer and give general consideration as to:

   (a) the agenda;

   (b) the order and manner in which questions will be asked; and

   (c) whether cross-examination will take place within the context of the concurrent evidence or after its conclusion.

8. At the same time, and before any hearing date is fixed, the identity of all experts proposed to be called and their areas of expertise is to be notified to the Court by all parties.

9. The lack of any concurrent evidence orders does not mean that the Court will not consider using concurrent evidence without prior notice to the parties, if appropriate.

CONFERENCE OF EXPERTS & JOINT-REPORT OR LIST OF ISSUES

10. The process of giving concurrent evidence at hearings may be assisted by the preparation of a joint-report or list of issues prepared as part of a conference of experts.

11. Parties should expect that, where concurrent evidence is appropriate, the Court may make orders requiring a conference of experts to take place or for documents such as a joint-report to be prepared to facilitate the concurrent expert evidence process at a hearing (see Part 7 of the Expert Evidence Practice Note).

PROCEDURE AT HEARING

12. Concurrent expert evidence may be taken at any convenient time during the hearing, although it will often occur at the conclusion of both parties' lay evidence.

13. At the hearing itself, the way in which concurrent expert evidence is taken must be applied flexibly and having regard to the characteristics of the case and the nature of the evidence to be given.

14. Without intending to be prescriptive of the procedure, parties should expect that, when evidence is given by experts in concurrent session:

(a) the judge will explain to the experts the procedure that will be followed and that the nature of the process may be different to their previous experiences of giving expert evidence;

(b) the experts will be grouped and called to give evidence together in their respective fields of expertise;

(c) the experts will take the oath or affirmation together, as appropriate;

(d) the experts will sit together with convenient access to their materials for their ease of reference, either in the witness box or in some other location in the courtroom, including (if necessary) at the bar table;

(e) each expert may be given the opportunity to provide a summary overview of their current opinions and explain what they consider to be the principal issues of disagreement between the experts, as they see them, in their own words;

(f) the judge will guide the process by which evidence is given, including, where appropriate:

(i) using any joint-report or list of issues as a guide for all the experts to be asked questions by the judge and counsel, about each issue on an issue-by-issue basis;

(ii) ensuring that each expert is given an adequate opportunity to deal with each issue and the exposition given by other experts including, where considered appropriate, each expert asking questions of other experts or supplementing the evidence given by other experts;

(iii) inviting legal representatives to identify the topics upon which they will cross-examine;

(iv) ensuring that legal representatives have an adequate opportunity to ask all experts questions about each issue. Legal representatives may also seek responses or contributions from one or more experts in response to the evidence given by a different expert; and

(v) allowing the experts an opportunity to summarise their views at the end of the process where opinions may have been changed or clarifications are needed.

15. The fact that the experts may have been provided with a list of issues for consideration does not confine the scope of any cross-examination of any expert. The process of cross-examination remains subject to the overall control of the judge.

16. The concurrent session should allow for a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer. Where appropriate, the judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.

17. Where any issue involves only one expert, the party wishing to ask questions about that issue should let the judge know in advance so that consideration can be given to whether

arrangements should be made for that issue to be dealt with after the completion of the concurrent session. Otherwise, as far as practicable, questions (including in the form of cross-examination) will usually be dealt with in the concurrent session.

18. Throughout the concurrent evidence process the judge will ensure that the process is fair and effective (for the parties and the experts), balanced (including not permitting one expert to overwhelm or overshadow any other expert), and does not become a protracted or inefficient process.

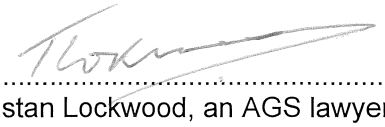
ANNEXURE GB-2

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL **NO NSD 989 OF 2019**

AUSTRALIAN BROADCASTING CORPORATION
Applicant

MARTIN KANE
and others named in the Schedule
Respondents

The following 4 pages is the annexure marked GB-2 referred to in the affidavit of Gregory Charles Bilton AM CSC made 27 September 2019 before me:



.....
Tristan Lockwood, an AGS lawyer within
the meaning of s 55I of the *Judiciary Act 1903* (Cth)

Filed on behalf of the Second and Third Respondents File ref: 19004307

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Schedule

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
Division: General

No NSD 989 of 2019

Respondents

Second Respondent	Commissioner of the Australian Federal Police
Third Respondent	Agent Ian Brumby of the Australian Federal Police

Date: 27 September 2019

GB-2

Our ref. 19004307

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25 September 2019

Lieutenant General Gregory Charles Bilton AM CSC
Chief of Joint Operations
Australian Defence Force

Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

By email

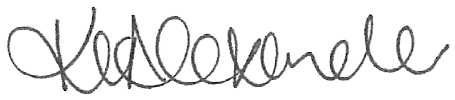
Dear Lieutenant General Bilton

Australian Broadcasting Corporation v Kane & Ors (NSD989/2019)

1. We refer to our letter of 24 September 2019 and to our conference later that day.
2. In that conference, we sought your answers to various questions, which we have outlined in the annexure to this letter. Questions 1-5 request answers from you concerning various factual matters. Questions 6-13 seek your opinions.
3. We will draw up a draft affidavit setting out the answers you gave to those questions in conference, for your review and development.
4. In preparing your affidavit, we ask that you:
   a. have regard to the Federal Court's 'Expert Evidence Practice Note' (GPN-EXPT), including the Harmonised Expert Witness Code of Conduct, which was provided to you under cover of our letter dated 24 September 2019
   b. do not disclose any confidential or classified information. We understand this may limit your ability to give full and frank answers to some questions. Where it does so, you should acknowledge that limitation on the scope of your answer
   c. answer by reference to Australia and the Australian Defence Force
   d. ensure that you accurately state factual matters to the best of your knowledge and belief
   e. ensure that the opinions you express and your reasons for them:
      – are yours alone, and are not based on consultation with or deference to the opinions of others within or outside the Australian Defence Force, and
      – are based on the knowledge you have gained from your training, study or experience.

5. In conference, we provided you with a statement of agreed facts and issues dated 24 September 2019. Please assume the facts stated therein to be true. If any statement in the agreed facts that is relevant to your answers is incorrect or needs qualification, you should say so.

Yours sincerely



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Annexure - Questions

1. Without disclosing the content of any particular rule of engagement, what are rules of engagement (ROEs)?
2. What is the purpose of ROEs?
3. How do ROEs interact with and relate to other limits on the use of force?
4. Are ROEs made publicly available or is their circulation restricted?
5. If ROEs have a restricted circulation, what level of security classification is normally assigned to ROEs? If the security classification of ROEs varies, please explain this variation.
6. If all or *part* of a *current* ROE were acquired by adversaries what would be the possible consequences (if any) for:
    a. the effectiveness of the Australian Defence Force in that conflict;
    b. the effectiveness of the Australian Defence Force in other conflicts;
    c. the safety of Australian military personnel; and
    d. Australia's relationships with allies and military partner countries?

    In your response, please explain how those consequences might occur.

    In your response, please explain whether and how those consequences might differ depending on the nature of the ROE information that was disclosed.
7. How likely are the consequences, if any, identified in your response to question 6 above?
8. How serious are the consequences, if any, identified in your response to question 6 above?
9. Would your responses to question 6 above differ if some of the ROE information was already known to adversaries, or to the commanders of enemy forces?
10. If all or *part* of a *non-current* ROE were acquired by adversaries what would be the possible consequences (if any) for:
    a. the effectiveness of the Australian Defence Force in that conflict;
    b. the effectiveness of the Australian Defence Force in other conflicts;
    c. the safety of Australian military personnel; and
    d. Australia's relationships with allies and military partner countries?

    In your response, please explain how those consequences might occur.

    In your response, please explain whether and how those consequences might differ depending on the nature of the ROE information that was disclosed. In particular, what is the relevance, if any, of the length of time that has passed since the ROE was current?

11. How likely are the consequences identified in your response to question 10 above?
12. How serious are the consequences identified in your response to question 10 above?
13. Would your responses to question 10 above differ if some of the ROE information was already known to adversaries, or to the commanders of enemy forces?