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## Details of Filing

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| File Title: | AUSTRALIAN BROADCASTING CORPORATION v MARTIN KANE & ORS |
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## Important Information

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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 REPLY SUBMISSIONS


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## A. THE SCOPE OF THE POWER TO ISSUE THE WARRANT

1. The alleged threshold difficulty in relation to the ABC's first ground [RS [18]] does not arise. The ABC does not submit that s 3E of the Crimes Act is wholly or necessarily invalid [AS [6]]. Its contention is that s 3E would be invalid, in some of its operations, if it were construed as being capable of authorising Kane's decision to issue the search warrant, and that it therefore cannot be construed in that way [AS [6]–[8]]. That submission relies on the passages in *Miller*, *Wotton* and *Wainohu* cited by the ABC [AS [fn 6]], and is consistent with the decision in *Comcare v Banerji*. In that case, the Court found that the burden on the implied freedom effected by provisions of the *Public Service Act 1999* (Cth) was justified across the full range of potential outcomes of the exercise of the discretion conferred by the provisions.[1] In this case, the ABC submits that the burden on the implied freedom effected by s 3E of the Crimes Act will *not* be justified across the whole range of potential outcomes of the exercise of the discretion in s 3E [AS [4]–[25]].

2. The respondents seek to test the ABC's first ground against a hypothetical scenario [RS [20]]. In doing so, they misstate the effect of the ABC's arguments. The ABC does not contend that s 3E must be construed so as to create an immunity of the kind hypothesised by the respondents [RS [20], [23]]. The ABC accepts, for example, that, where the identity of a source is known to, or reasonably suspected by, the AFP, s 3E may authorise the issue of an appropriately confined warrant directed to obtaining evidential material relevant to *that* source, provided that steps are taken to protect the identity of *other* confidential sources [AS [16], [20.2]]. Kane's decision went beyond what was authorised by s 3E on its proper construction because it purported to authorise a very broad search, without taking any steps to protect the identity of confidential sources *other than McBride* [AS [16], [20]], in circumstances where the Afghan Files Stories expressly stated that they were based on information from more than one confidential source [SAFI [64]].

3. The respondents accept that Kane's decision imposed a burden on the implied freedom [RS [21]], but dispute the nature and extent of that burden. While the burden may be indirect, it is nevertheless substantial [AS [14]]. The circumstances in which a journalist can be compelled to reveal the identity of a source in legal proceedings are limited. There is a presumption against compellability, which is only displaceable, by a court, on the application of a party, after consideration of "the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts"[2] — expressly recognising that the disclosure of the identity of a confidential source is likely to have a chilling effect on the willingness of other sources to come forward. If s 3E of the Crimes Act were construed as allowing the issue of a warrant authorising a broad-ranging search of the premises of a news

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1 (2019) 93 ALJR 900, 915–6 [42], [44] (Kiefel CJ, Bell, Keane and Nettle JJ), 925–6 [100]–[106] (Gageler J), 934–5 [156]–[161] (Gordon J).

2 Evidence Act, s 126K(2)(b).

organisation, with no conditions protecting the identity of confidential sources not known to, or reasonably suspected by, the AFP, that would go well beyond the current limited circumstances in which a journalist can be compelled to reveal the identity of a source.

4. The chilling effect on which the ABC relies is the risk of disclosure of sources whose identities are *not* in the public domain, not those whose are [cf RS [21]].

## B. INVALIDITY ON THE FACE OF THE WARRANT

5. ***No real and meaningful perimeter / conclusionary, vague and uncertain***. The respondents seek to establish that the warrant indicated the focus of the investigation by referring to specific aspects of the three conditions of the warrant, such as the web addresses in the second condition [RS [27]]. However, the question is not whether it is possible for the executing officer to identify the focus of the investigation, or what that investigation was "directed to" [RS [30]]. Rather, it is whether the warrant set bounds or a perimeter to the area of the search [AS [28]]. That question must be addressed by reference to the full scope of the search that the warrant, on its face, purported to authorise. It is not to the point that it may be possible to select particular combinations of items in the first, second and third conditions of the warrant which indicate the focus of the investigation [RS [34]]. That would be relevant if those were the only items in the three conditions, but they were not.

6. The respondents accept that the "military information" referred to in the third condition of the warrant was not particularised [RS [34]], but submit that the meaning of that term was limited because it "necessarily bears the same meaning as it does in its statutory context" [RS [32]]. That submission is contrary to authority. Terms used in a warrant do not of necessity bear the same meaning that they have in their context in legislation.[3] It cannot be assumed that those executing a warrant will engage in a process of statutory construction to understand the precise limits of what they can and cannot seize.[4] That is particularly so where, as here, the construction of s 73A has not been the subject of judicial determination. The problem is not that the warrant did not recite the whole of s 73A [cf RS [33]], but that it was drafted in such a way the meaning of the term "military information" was uncertain.

7. The respondents' reliance on the ABC's submission that the AFP "knew with particularity the documents that were the subject of the suspected offences" [RS [35]] is misplaced. This ground must be determined on the face of the warrant. What is relevant is that, even if the AFP had that knowledge (independently of the terms of the warrant), it was not reflected in the drafting of the warrant, which failed to set a perimeter to the area of the search.

8. ***Description of s 73A(1) and (2) of the Defence Act***. The respondents contend that, because s 73A of the Defence Act, and its heading, refer to "the defences of the Commonwealth", the provision must be construed as extending to intangible matters relevant to Australia's

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3 See *Dunesky v Elder* (1994) 54 FCR 540, 557.

4 See *Polley v Johnson* [2015] NSWCA 256, [47]–[51] (Simpson JA; Beazley P and McColl JA agreeing).

military [RS [11]–[13]]. They baldly assert that there is "no basis" for any contrary view [RS [12]]. Tellingly, the respondents do not engage with the arguments advanced by the ABC [AS [38]–[43]].

9. When read in its context, the word "defences" does not support the construction of s 73A for which the respondents contend. *First*, in its ordinary meaning, the word "defences" refers to physical infrastructure, rather than intangible matters such as military know-how.[5] *Second*, that meaning is made clear by the context in which those words have appeared in s 73A throughout its history. In 1903, those words appeared as part of the phrase "information relating to any fort battery fieldwork fortification or defence work or to any of the defences of the Commonwealth" [SAFI 543]. In 1917, the words "or to any factory, or any other naval or military information" were added after "the defences of the Commonwealth" [SAFI 547]. The addition of the word "factory" after "defences" reinforces that the Parliament conceived of "defences" as comprising physical infrastructure. And the general words "other naval or military information" were limited by the meaning of the more specific words in the list [AS [38]–[43]]. In 2001, the words "or air force aerodrome or establishment" were added after the word "factory", again reinforcing that both the word "defences", and s 73A as a whole, was concerned with physical infrastructure. For the same reasons, the word "defences" in the heading to s 73A does not extend the meaning of the provision. *Third*, the other extrinsic materials relied on by the respondents do not assist: the 2001 explanatory memorandum uses the word "defences", but does not give it any content [RS [fn 6]]. The 1917 second reading speeches make no specific reference to s 73A [AS [fn 38]]. *Fourth*, to the extent that the respondents rely on a purposive reading of s 73A [RS [12]], they fail to identify a purpose derived from "what the legislation says", instead of an "assumption about the desired or desirable reach or operation" of s 73A.[6] *Finally*, the respondents' argument by reference to the consequences of the ABC's construction is unconvincing, because the intangible matters to which the respondents refer are protected by other legislation [AS [fn 41]].

10. At best, the respondents' arguments demonstrate that, applying ordinary principles of statutory construction, the scope of the information covered by s 73A(1)(a) and (2)(a) is ambiguous. It is well established that any such ambiguity should be resolved in favour of a construction that does not extend the operation of the criminal law [AS [fn 40]].

11. ***Severance***. In relation to the ABC's second, third and fourth grounds, the respondents submit that any part of the warrant found to be invalid can be severed, with the result that

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5 See Oxford English Dictionary, online, "defence" (4th sense): "c. In *plural*. (a) Structures which defend or strengthen a place or position against attack; defensive works; fortifications"; Shorter Oxford English Dictionary, 6th ed, "defence" (4th sense): "*in pl.*, fortifications, defensive installations". See also Macquarie Dictionary, 7th ed, "defence" (2nd sense): "something that defends, especially a fortification".

6 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 390 [26] (French CJ and Hayne J), citing *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249, 262 [28] (McHugh, Gummow, Hayne and Heydon JJ); *Byrnes v Kendle* (2011) 243 CLR 253, 283 [97] (Heydon and Crennan JJ).

the warrant is otherwise valid [RS [39]–[40]]. Whether severance is possible depends on whether the invalid part of the warrant can be separated from the valid parts remaining.[7] That in turn depends on whether the invalid provisions form part of an inseparable context, or whether severance of those provisions would cause the remaining provisions to operate differently or produce a different result from that which was intended.[8]

12. The warrant would have operated differently if the two alleged offences against s 73A of the Defence Act were severed from the third condition. *First*, apart from the alleged offence against s 70(1) of the Crimes Act, the alleged offences against s 73A of the Defence Act were the only ones that related to the giving or receipt of "information", rather than "property". But the relevant time period for the alleged offence against s 70(1) of the Crimes Act was limited to a single day, as opposed to almost six months for the alleged offences against s 73A. Thus, if the alleged offences against s 73A of the Defence Act were severed, the warrant would no longer authorise the seizure of material that would afford evidence that "information", rather than "property", had been given or received — except in relation to a single day, 1 May 2016. That is a significant difference in the operation of the warrant, because there are many ways in which a person may give or receive information without giving or receiving property. *Second*, although there is some overlap between the alleged offence against s 73A(2) and the alleged offence against s 132.1 of the Criminal Code, the description of the alleged offence against s 132.1 included additional elements not appearing in the description of the alleged offence against s 73A(2), namely that the receipt was dishonest, and that Oakes knew or believed the property was stolen. Thus, the search authorised by the remaining portion of the warrant was narrower than that purportedly authorised by the invalid part.

13. Further, if the alleged offences against the Defence Act had not formed part of the warrant, or if the issuing officer had not proceeded on an incorrect understanding of s 73A of the Defence Act [AS [45]–[47]], there is a realistic possibility that the warrant would not have been issued at all.[9] The alleged offences against s 73A carried a significantly higher maximum penalty than the other alleged offences [RS [6]–[8]].

## C. LEGAL UNREASONABLENESS

14. Section 3E(1) of the Crimes Act confers on an issuing officer a discretion to issue a search warrant, if the issuing officer is satisfied of the matters set out in that provision [AS [7]].[10]

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7 *Parker v Churchill* (1986) 9 FCR 334, 350 (Jackson J; Bowen CJ and Lockhart J agreeing); *Caratti v Commissioner, AFP* (2017) 257 FCR 166, 185–6 [47].

8 *Peters v Attorney-General (NSW)* (1988) 16 NSWLR 24, 41 (McHugh J), citing *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 317 (Dixon J). See also *Malubel Pty Ltd v Elder [No 2]* (1998) 73 ALJR 269, 269 [2]; *R v Ng* (2002) 5 VR 257, 286–7 [57].

9 See *Hossain v Minister for Immigration and Border Protection* (2018) 92 ALJR 780, 788 [30] (Kiefel CJ, Gageler and Keane JJ).

10 See *Acts Interpretation Act 1901* (Cth), s 33(2A). Section 33(2A) was introduced by the *Statute Law (Miscellaneous Provisions) Act 1987* (Cth). Section 3E of the Crimes Act was introduced by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* (Cth). See also *Rogers v Moore* (1992) 39 FCR 201, 217; *Lord v Commissioner, AFP* (1997) 74 FCR 61, 86–7.

It is the exercise of that discretion that is the subject of the ABC's sixth ground [AS [50]–[52]]. Contrary to the respondents' submission [RS [41]], the relevant question is whether, having regard to all the circumstances, the exercise of the discretion had an "evident and intelligible justification", and "[fell] within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" [AS [52]].

15. Further, contrary to the respondents' submission [RS [44]], the ABC does not contend that the risk of disclosure of the identity of confidential sources is, on its own, decisive of the question of legal unreasonableness. It is one aspect of the "factual context presented",[11] by reference to which the Court must assess whether the decisions to seek and to issue the warrant — in its terms — were legally unreasonable.

## D. CLAIMS RELATING TO DOCUMENTS

16. ***Legal professional privilege***. On 18 October 2019, the ABC provided to the respondents particulars of its claims that particular documents (or parts of documents) are subject to legal professional privilege. The ABC no longer presses its claims in relation to the sixth and eighth documents identified in paragraph 7 of the affidavit of Michael Rippon affirmed on 24 September 2019. The claims in relation to the first to fifth, seventh and ninth documents are claims in relation only to the parts of the relevant documents identified in the particulars provided by the ABC.

17. ***Source protection***. The extended operation of s 126K of the Evidence Act for which the ABC contends [AS [60]–[61]] is the result of a process of statutory construction. *First*, in its terms, s 126K applies wherever a journalist or his or her employer may be compelled to "produce any document" (cf the equivalent provision in the NSW and Victorian Acts). A search warrant is a process by which the production of documents is compelled.[12] *Second*, that construction of s 126K is necessary to ensure that the provision achieves its purpose, and is not rendered nugatory.[13] *Third*, that construction of s 126K is consistent with the absence of any reference to search warrants in s 131A: s 131A applies only to court processes; its purpose is to allow for an application to be made under s 131A(1A) disapplying s 126K in certain circumstances.

Date: 24 October 2019

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11 *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, 446 [45]. See also *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 359-360 (Dixon J).

12 See ALRC Report 102, Recommendation 14-1, which expressly identified a search warrant as a "compulsory process for disclosure".

13 As to the relevance of the consequences of a construction, see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ); *R v Young* (1999) 46 NSWLR 681, 687–8 [15] (Spigelman CJ).