

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 31/07/2019 4:46:21 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: 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



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 31/07/2019 4:46:18 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.

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



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

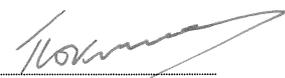
MARTIN KANE

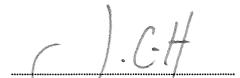
and others named in the Schedule
Respondents

Affidavit of: Tristan Lockwood
Address: Level 42, 19 Martin Place, Sydney
Occupation: Lawyer
Date sworn or affirmed: 31 July 2019

I, Tristan Lockwood of Level 42, 19 Martin Place, Sydney in the State of New South Wales, Lawyer, affirm:

1. I am an AGS lawyer within the meaning of s 55l of the *Judiciary Act 1903*. Together with Kristy Alexander, I have responsibility for the conduct of this matter for and on behalf of the Australian Government Solicitor (**AGS**), legal representative for the second and third respondents.
2. I make this affidavit in support of an interlocutory application by the second respondent dated 22 July 2019 (the **interlocutory application**).
3. On 22 July 2019, Ms Alexander deposed an affidavit in support of the interlocutory application. Since that affidavit was filed, the following correspondence has been exchanged between AGS and the applicant (the **ABC**).
 - 3.1. 'TL-1' is a letter from AGS to ABC dated 23 July 2019;
 - 3.2. 'TL-2' is a letter from ABC to AGS dated 25 July 2019;


Deponent


Witness

Filed on behalf of the Second and Third Respondents
Prepared by: Tristan Lockwood
AGS lawyer within the meaning of s 55l of the *Judiciary Act 1903*
Address for Service:
The Australian Government Solicitor,
Level 42, MLC Centre, 19 Martin Place, Sydney, NSW 2000
Tristan.Lockwood@ags.gov.au

File ref: 19004307
Telephone: 02 9581 7322
Lawyer's Email:
Tristan.Lockwood@ags.gov.au
Facsimile: 02 9581 7999
DX 444 Sydney

3.3. 'TL-3' is a letter from AGS to ABC dated 25 July 2019.

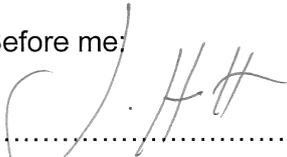
4. To my knowledge, at the time of deposing this affidavit, AGS has not received a response to the letter referred to at paragraph 3.3 above.

Affirmed by the deponent at Sydney in the
State of New South Wales on 31 July 2019



.....

Before me:



.....
Wongthon Charles Hutton

an AGS lawyer within the meaning of s 55I
of the *Judiciary Act 1903*

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: 31 July 2019

ANNEXURE TL-1

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL**

NO NSD 989 OF 2019

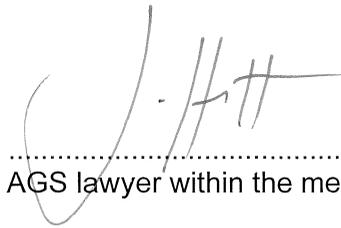
AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 5 pages is the annexure marked TL-1 referred to in the affidavit of Tristan Lockwood made 31 July 2019 before me:



.....

AGS lawyer within the meaning of s 55l of the *Judiciary Act 1903* (Cth)



Our ref. 19004307

23 July 2019

Connie Carnabuci & Michael Rippon
ABC Legal

By email to: carnabuci.connie@abc.net.au;
rippon.michael@abc.net.au

Australian Government Solicitor
Level 42, MLC Centre
19 Martin Place Sydney NSW 2000
GPO Box 2727 Sydney NSW 2001
T 02 9581 7777 F 02 9581 7778 DX 444 Sydney
www.ags.gov.au

Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

Dear Ms Carnabuci and Mr Rippon

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

1. We refer to the above proceeding and the listing on 2 August 2019.

INTERLOCUTORY APPLICATIONS

2. We enclose, by way of service, the following documents which were electronically filed in the Federal Court yesterday and which were sealed today:
 - a. Interlocutory application dated 22 July 2019
 - b. Affidavit of Kristy Lee Alexander affirmed 22 July 2019.
3. You will note that application is listed at 9.30 am on Friday 2 August 2019.
4. We attach a draft short minute of orders timetabling an exchange of submissions in respect of the interlocutory application. If you agree to the terms of the orders we would be grateful if you could return a signed copy to us and we will provide them to Justice Abraham's Associate for her Honour's consideration in chambers. If you are not agreeable to the proposed orders, we nevertheless intend to serve written submissions in respect of our client's application by 26 July 2019.

RESIDUAL CLAIMS

5. For the same reasons informing the expedition application, any residual claims the ABC may have over the seized documents (eg, legal professional privilege) should be resolved as soon as possible and by no later than the determination of the proceedings.
6. In our 4 July 2019 letter we sought an undertaking from the ABC to deal with any claims arising in respect of the seized material in accordance with a specified process and within particular time periods, similar to those outlined in the 5 June 2019 undertaking. No such undertaking has been proffered by the ABC in respect of the asserted claims nor have any particulars been provided by the ABC as to the basis for these claims.
7. We note that your client has not brought forward any claim in the proceeding alleging that documents seized are subject to legal professional privilege or

'journalist's privilege', or that documents seized fall outside the scope of the warrant. It is axiomatic that a party must bring forward all sufficiently connected claims in a single proceeding, and that a party will be estopped from subsequently bringing claims that should have been pursued in a former proceeding. We will therefore proceed on the basis that no such claims are to be pursued.

8. If this assumption is not correct, we have enclosed with this letter a proposed process in a draft undertaking to deal with these claims. Please advise whether the ABC is willing to provide this undertaking by 4 pm on 24 July 2019, in the event the claims are to be pursued.
9. If the claims are to be pursued, we are instructed that unless you provide an undertaking in substantially those terms, our client will not provide any further undertaking in respect of the seized material (noting the current undertaking expires on 9 August 2019).
10. In this connection, if you were not minded to provide the undertaking sought, we would suggest that it would be appropriate for you to press the claims for interlocutory relief set out in your 25 June 2019 Originating Application on 2 August 2019.

Yours sincerely



Kristy Alexander
Senior Executive Lawyer
T 02 9581 7640 F 02 9581 7732
kristy.alexander@ags.gov.au

ANNEXURE

I, *[insert name of person authorised to provide undertaking]*, on behalf of the Australian Broadcasting Corporation (**ABC**), undertake to the Commissioner of the Australian Federal Police (**AFP**) as follows:

1. Within 14 days from the date of this undertaking, the ABC will provide to the AFP a schedule identifying any and every basis upon which the ABC asserts the AFP should not be permitted to access information or documents contained in the seized material (the **schedule**).
2. In preparing that schedule, the ABC will provide sufficient particulars of each claim to enable the AFP and a court (in the event the matter requires judicial determination) to understand the scope of the claim, the nature of the document over which the claim is made, and the asserted basis for the claim.
3. Within 2 days from the date of receiving that schedule, the AFP will advise the ABC if it disputes any of the asserted claims (the **disputed claims**).
4. The ABC must initiate a court process seeking declaratory relief in respect of the disputed claims within 7 days. Unless the ABC initiates a court process seeking declaratory relief in respect of the disputed claims, the ABC will not take any steps to obtain relief on the basis of those claims.
5. The ABC will not take any steps to obtain relief in respect of any other information or documents that were not subject to a claim articulated in the schedule or the claims in its Originating Application filed 25 June 2019.

Date: *[insert]*

SHORT MINUTE OF ORDERS

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

1. The second respondent file and serve written submissions not exceeding 10 pages in relation to its interlocutory application dated 22 July 2019 by 4 pm on 26 July 2019.
2. The applicant file and serve written submissions not exceeding 10 pages in relation to the second respondent's interlocutory application dated 22 July 2019 by 4 pm on 31 July 2019.

.....
On behalf of the Applicant

.....
Kristy Alexander, AGS lawyer, for and
on behalf of the Australian Government
Solicitor, Solicitor for the Second
Respondent

Filed on behalf of the Second and Third Respondents
Prepared by: Kristy Alexander
AGS lawyer within the meaning of s 55I of the *Judiciary Act*
1903
Address for Service:
The Australian Government Solicitor,
Level 42, MLC Centre, 19 Martin Place, Sydney, NSW 2000
Kristy.Alexander@ags.gov.au

File ref: 19004307

Telephone: 02 9581 7640
Lawyer's Email:
Kristy.Alexander@ags.gov.au
Facsimile: 02 9581 7732

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: 23 July 2019

ANNEXURE TL-2

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL**

NO NSD 989 OF 2019

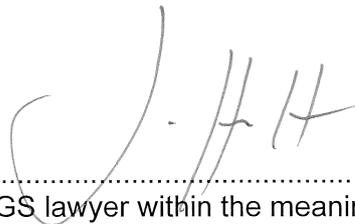
AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 2 pages is the annexure marked TL-2 referred to in the affidavit of Tristan Lockwood made 31 July 2019 before me:

A handwritten signature in black ink, appearing to be 'S. H. H.', written over a horizontal dotted line.

AGS lawyer within the meaning of s 55l of the *Judiciary Act 1903* (Cth)

Our Ref: 18435
Your Ref: 19004307

25 July 2019

Ms Kristy Alexander
Australian Government Solicitor
GPO Box 2727
SYDNEY NSW 2001

By email: Kristy.Alexander@ags.gov.au; Tristan.Lockwood@ags.gov.au

Dear Ms Alexander

NSD989/2019: Australian Broadcasting Corporation v Martin Kane & Ors

We refer to your letter dated 23 July 2019.

We wish to note the following:

1. Her Honour's Associate has advised the parties that her Honour would be grateful if the ABC could provide any response to your clients' Interlocutory Application by Monday 29 July 2019. That conflicts with your proposed orders. We ask that if you intend on serving submissions, you do so as soon as possible, to allow the ABC a reasonable opportunity to attempt to comply with the court's request.
2. In our view, paragraphs 6 and 7 of your letter mischaracterise the dealings between the parties. The statement at paragraph 7 of your letter that the ABC has not brought forward any claim in the proceeding that the documents seized are subject to legal professional privilege, source protection (including under s 126K of the Evidence Act (Cth)) or fall outside the terms of the warrant is inconsistent with the Originating Application filed by the ABC and with the correspondence between the parties to date.
3. The further statement at paragraph 7 that you will "therefore proceed on the basis that no such claims are to be pursued" is inconsistent with the terms of the undertaking given by your client the AFP, paragraph 5 of your own letter, the Originating Application and our existing correspondence, in which our position is made clear. We refer you to our letters dated 14 June 2019, 18 June 2019, 21 June 2019, 2 July 2019 and 8 July 2019.
4. In relation to paragraphs 8 and 9 of your letter, we do not agree to the draft undertaking you seek, under what appears (taken together with what you say in paragraph 7) to be a suggestion that unless that course is agreed to, your client the AFP may take it upon itself to access the seized material notwithstanding its original undertaking, from which it has not been released, and which was not expressed to be limited as to time.
5. In that regard, our position is as previously advised, and we refer you once again to the correspondence noted at point 3 above. We reiterate that it would be grossly inappropriate, and in bad faith, for your clients to access the seized material pending final determination of the

proceedings. To do so would also be at odds with what you say at paragraph 5 of your letter. If required, the ABC will press the claim for interlocutory relief included in its Application of 25 June 2019.

Yours sincerely



Michael Rippon
Senior Lawyer
ABC Legal
E: rippon.michael@abc.net.au

ANNEXURE TL-3

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL**

NO NSD 989 OF 2019

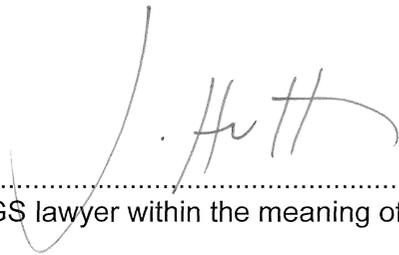
AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 1 page is the annexure marked TL-2 referred to in the affidavit of Tristan Lockwood made 31 July 2019 before me:



.....

AGS lawyer within the meaning of s 55l of the *Judiciary Act 1903* (Cth)



Our ref. 19004307

25 July 2019

Michael Rippon
ABC Legal

By email to rippon.michael@abc.net.au

Australian Government Solicitor
Level 42, MLC Centre
19 Martin Place Sydney NSW 2000
GPO Box 2727 Sydney NSW 2001
T 02 9581 7777 F 02 9581 7778 DX 444 Sydney
www.ags.gov.au

Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

Dear Mr Rippon

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

1. We refer to your letter of 25 July 2019.
2. We now enclose, by way of service, our client's submissions in respect of the first case management hearing on 2 August 2019.
3. We also enclose draft short minutes of order that our client intends to seek at the first case management hearing. In view of the position taken in your 25 July letter we have included an order that makes provision for the ABC to file evidence particularising any claim it asserts that any of the documents seized are subject to legal professional privilege, are subject to 'source protection' (including under s 126K of the *Evidence Act* (Cth)) or fall outside the terms of the warrant, accompanied by any application for leave to amend its Originating Application. It is not apparent to us that the claims identified in paragraph 2 of your 25 July letter arise in the proceeding as currently framed.
4. We intend to provide these draft orders to Justice Abraham's chambers by 4 pm tomorrow, together with a copy of our client's submissions. If the ABC consents to the terms of the draft orders, please let us know and we will advise her Honour's Associate.
5. Our client does not accept the assertions made in paragraph 5 of your letter, noting that at all times our client has given reasonable notice to the ABC to enable the ABC to press its claim for interlocutory relief, and that the ABC is currently protected by an undertaking voluntarily provided by our client that extends to 9 August 2019.

Yours sincerely

Kristy Alexander
Senior Executive Lawyer
T 02 9581 7640 F 02 9581 7732
kristy.alexander@ags.gov.au