

NOTICE OF FILING

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Details of Filing

Document Lodged:	Submissions
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, reading 'Warwick Soden'.

Dated: 30/07/2019 3:52:36 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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Federal Court of Australia
District Registry: New South Wales
Division: General

No. NSD 989 of 2019

BETWEEN:

AUSTRALIAN BROADCASTING CORPORATION
Applicant

MARTIN KANE and OTHERS
Respondents

**APPLICANT'S SUBMISSIONS FOR
CASE MANAGEMENT HEARING ON 2 AUGUST 2019**

A. APPLICATION FOR EXPEDITION

1. The second and third respondents contend that expedition in the hearing and determination of this proceeding is necessary to avoid prejudice to pending criminal proceedings against David McBride, and to ongoing investigations in relation to Mr McBride.
2. The ABC submits that expedition is not necessary for either of those reasons. On the material before the Court, the ABC submits that no basis has been disclosed to support the contention that the pending criminal proceedings or any ongoing investigations will be prejudiced if this hearing is heard and determined in the ordinary course. There is accordingly no reason why this proceeding should be given priority over the proceedings of other litigants awaiting a hearing. No basis as to why this proceeding should "jump the queue"¹ has been demonstrated.
3. *Ongoing investigations.* The second and third respondents submit that expedition is necessary to avoid prejudice to ongoing investigations in relation to Mr McBride because:²
 - 3.1 it is likely that the seized material contains information relevant to the offences that Mr McBride is alleged to have committed; and

¹ *Katke v Brosnan* [2014] FCA 1050, [18]. See also *British American Tobacco Australia Limited v Secretary, Department of Health and Ageing* [2011] FCA 718, [7].

² Affidavit of Kristy Alexander affirmed 22 July 2019 (**Alexander Affidavit**), [30.1], [30.2].

- 3.2 the seized material may give rise to further avenues of inquiry in relation to those offences.
4. However, the evidence in support of those submissions rises no higher than bare assertions by a solicitor, on the basis of information provided to her by other persons. Those assertions are incapable of being meaningfully scrutinised by either the ABC or the Court. Further, the evidence is wholly silent as to how any of the seized materials could be expected to be materially relevant, having regard to the advanced state of the investigation and prosecution and the public admissions that have been made by Mr McBride.
5. Before the seizure of materials from the ABC's premises on 5 June 2019:
- 5.1 the AFP had charged Mr McBride with offences against the Criminal Code (Cth), the *Defence Act 1903* (Cth) and the *Crimes Act 1914* (Cth);³
- 5.2 Mr McBride had made public statements to the effect that he had admitted the substance of the allegations against him to the AFP, that he would not be contesting that he had committed the alleged offences, and that he would only argue that he was justified in doing so;⁴ and
- 5.3 Mr McBride had been committed to stand trial in respect of the offences.⁵
6. In those circumstances, there is no basis before the Court for concluding that the seized material could be expected to be materially relevant either to the prosecution of Mr McBride or the AFP's ongoing investigations. In the absence of any cogent explanation, supported by direct evidence that is capable of being meaningfully scrutinised, the bare assertions in the evidence, such as it is, should be given no weight.
7. Further, nothing about the way the AFP's investigations have proceeded to date indicates that those investigations are attended by any particular urgency:
- 7.1 The AFP commenced its investigation in connection with "The Afghan Files" stories on 19 July 2017,⁶ more than two years ago.

³ Alexander Affidavit, [7], [9].

⁴ Affidavit of Michael Rippon affirmed 30 July 2019 (**Third Rippon Affidavit**), [5]–[13], Annexures MR-14 to MR-18.

⁵ Alexander Affidavit, [12].

⁶ Alexander Affidavit, [6].

- 7.2 The AFP first requested that three ABC employees—Daniel Oakes, Samuel Clark and Gaven Morris—participate in interviews or assist with investigations, almost 14 months later, on 13 September 2018.⁷ Mr Oakes, Mr Clark and Mr Morris declined those requests on 4 October 2018.
- 7.3 The AFP first contacted the ABC about the possibility of conducting a search of the ABC’s premises on 24 January 2019—more than 18 months after the investigation commenced, and more than three months after Mr Oakes, Mr Clark and Mr Morris declined the AFP’s requests to participate in interviews or assist in investigations.⁸
- 7.4 The AFP requested that Mr Oakes and Mr Clark provide copies of their finger and palm prints on 1 April 2019, almost six months after they declined the request to participate in interviews.⁹
- 7.5 The AFP conducted its search of the ABC’s offices on 5 June 2019—more than four months after first contacting the ABC about the possibility of conducting the search, and almost two years after the investigation commenced.
8. The length of time that the AFP has taken to conduct its investigation undermines the claim made by the second and third respondents that expedition of this proceeding is necessary to ensure that lines of enquiry do not disappear as a result of the effluxion of time.¹⁰ In any event, that claim is again one of mere assertion, in an affidavit relevantly affirmed on the basis of information and belief which is incapable of being meaningfully scrutinised by either the ABC or the Court and which ought be given no weight.
9. *Criminal proceedings.* The second and third respondents also submit that expedition is necessary to avoid prejudice to pending criminal proceedings against Mr McBride.
10. Again, the second and third respondents merely assert that the seized material may be relevant to Mr McBride’s defence or to the Crown case in those proceedings,¹¹ without explaining why or how that could be so. Taking into account the publicly available information about those proceedings referred to in paragraph 5 above—in particular, Mr McBride’s public statements referred to in paragraph 5.2 above, to which no

⁷ Third Rippon Affidavit, [15]–[17], Annexures MR-20 to MR-22.

⁸ Third Rippon Affidavit, [19]–[20], Annexure MR-24.

⁹ Third Rippon Affidavit, [22], Annexure MR-25.

¹⁰ Alexander Affidavit, [30.3.2].

¹¹ See Alexander Affidavit, [27].

reference has been made by the second or third respondents—it is not clear how the seized material could be likely to be materially relevant to the criminal proceedings.

11. Finally, subject to the matter referred to in paragraphs 12 to 14 below, the determination of this proceeding could be expected to conclude well before the trial of the criminal proceedings against Mr McBride, even in the absence of an order for expedition. The hearing and determination of this proceeding can be expected to be attended by the efficiency that characterises proceedings in this Court. By contrast, the criminal proceedings have not yet been set down for trial. The only indication that has been given as to the likely timing of that trial is that it “will in all likelihood be listed for some time next year”.¹² The criminal proceedings are plainly not being expedited. Nor is there anything to indicate that those proceedings are attended by any degree of urgency.
12. **High Court proceedings.** On 26 June 2019, Anika Smethurst and Nationwide News Pty Ltd commenced a proceeding in the High Court of Australia challenging the validity of the search and seizure of materials by the AFP from Ms Smethurst’s home on 4 June 2019.¹³ The High Court proceeding is highly likely to deal with matters relevant to the issues raised in this proceeding. In particular, it is highly likely to deal with the proper approach to be taken to the construction of criminal offence provisions that purport to prohibit the disclosure of information by public servants, in light of the implied Constitutional freedom of political communication.
13. The ABC is currently considering making an application for leave to intervene or to be heard as *amicus curiae* in the High Court proceeding. The ABC is also considering amending its application in this proceeding to raise grounds similar to those raised in the High Court proceeding—in particular, that some or all of the criminal offence provisions referred to in the search warrant issued by the first respondent were invalid on the ground that they infringed the implied freedom of political communication.
14. While it is not yet known when the High Court proceeding is likely to be heard, the ABC submits that it would be desirable for the determination of the issues in this proceeding to be informed by a recent and relevant judgment of the High Court. A date

¹² Alexander Affidavit, [16].

¹³ Third Rippon Affidavit, [25], Annexure MR-26.

for the hearing of this proceeding should not be fixed until further information is available in relation to the High Court proceeding.

15. ***Proposed timetable.*** For the reasons given above, the ABC submits that it would be in the interests of justice for the Court to set down a timetable for this proceeding in accordance with the first draft minute of orders annexed to these submissions.
16. Alternatively, if the Court is of the view that a timetable for this proceeding should be fixed now, the ABC proposes the timetables set out in second draft minute of orders annexed to these submissions.

B. APPLICATION TO SET ASIDE THE NOTICE TO PRODUCE

17. The second and third respondents contend that the notice to produce should be set aside because the originating application does not call into question the material sought, and because the disclosure of the material is unjustified in any event. The ABC submits that both of those contentions should be rejected.
18. The notice to produce calls for the production of the information sworn by the third respondent and provided to the first respondent in support of the application for issue of the warrant. It can be inferred from the face of the warrant that that information was the sole basis upon which the first respondent was purportedly satisfied that there were reasonable grounds for suspecting that there was evidential material located at the ABC's premises which met the criteria set out in all three conditions of the warrant.
19. ***The material is relevant to the grounds in the originating application.*** The ABC submits that the material is relevant to its claims that the decisions of the second and third respondents to seek the warrant, and of the first respondent to issue the warrant, were legally unreasonable [OA, [23], [24]].
20. The ABC contends that no reasonable decision-maker in the position of the second and third respondents would have decided to seek the warrant, and no reasonable decision-maker in the position of the first respondent would have decided to issue the warrant, having regard to the matters set out in those paragraphs, which include:
 - 20.1 the very significant intrusion of privacy that the search warrant purported to authorise;
 - 20.2 the importance of the protection of sources;

- 20.3 the public interest in investigative journalism; and
- 20.4 the implied freedom of political communication.
21. The information on oath sworn by the third respondent and provided to the first respondent in support of the application for issue of the warrant is relevant to these claims.
22. In the absence of any requirement for any of the respondents to provide reasons for the challenged decisions, any conclusion that those decisions were legally unreasonable must be an inference “drawn from the facts and from the matters falling for consideration in the exercise of the statutory power”.¹⁴ As in the case of any administrative decision, the relevant facts include the material that was before the decision-maker (from which the matters that the decision-maker took into account can be inferred),¹⁵ and the decision that was in fact made.
23. Here, the information on oath will demonstrate what matters were taken into account by the first respondent in deciding to issue the search warrant, and what matters were regarded as relevant by the second and third respondents in deciding to seek the warrant. Those matters are directly relevant to whether the decisions made by the respondents were legally unreasonable. The second and third respondents’ submission that the information on oath is irrelevant to the grounds raised by the ABC is untenable. There is a real issue between the parties, the proof of which would be assisted by production of the information on oath.¹⁶
24. The ABC claims that the decisions of the respondents were legally unreasonable for a further reason: namely, because of the disparity between the terms in which the first and second of the suspected offences set out in the third condition of the warrant were expressed and the terms of sections 73A(1) and (2) of the *Defence Act 1903* (Cth) [OA, [23(c)], [24(c)]].
25. Again, the ABC’s claim cannot be dismissed as speculative. There is a gulf between the manner in which the relevant suspected offences are expressed in the warrant (“military information”) and the terms of the offences themselves (“any plan, document or information relating to any fort, battery, field work, fortification, or defence work, or

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

¹⁵ See generally *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 23 FCR 536, 539–40; *Chandra v Webber* (2010) 187 FCR 31, 43 [40]–[41].

¹⁶ See *Jilani v Wilhelm* (2005) 148 FCR 255, 273–274 [112].

air force aerodrome or establishment, or any of the defences of the Commonwealth, or any other naval, military or air force information”).

26. There is a proper basis for the ABC’s contention that no reasonable decision-maker would have sought, or issued, a warrant containing such a disparity. The proof of that claim would be assisted by production of the information on oath.¹⁷
27. ***The disclosure of the material is justified.*** Subject to the matters discussed in paragraphs 28 to 29 below, the ABC accepts that the principles applicable to determining whether production of the information on oath should be ordered are those summarised by Merkel J in *Carmody v MacKellar*, namely that:¹⁸
- 27.1 the Court has a discretionary power to order discovery in proceedings for the review of an administrative decision;
- 27.2 the proper exercise of the power depends on the nature of the case and the stage of the proceedings at which discovery is sought;
- 27.3 if a proceeding or claims in it are essentially speculative in nature the Court will not order discovery in order to assist the applicant in a fishing exercise;
- 27.4 the evidence or material which will be required to establish that the proceeding or particular claims in it are not essentially speculative will vary with the nature and circumstances of the particular case; and
- 27.5 if there is not the slightest evidence or there is no other material to support the bare allegations made in the proceeding, then as a general rule, an order for discovery ought not to be made.
28. The second and third respondents seek to extrapolate from those principles a “general rule against discovery” in cases such as the present [RS [29]]. However, no such general rule has been recognised by the courts. The position is to the contrary. As Merkel J observed in *Carmody*:¹⁹

It would be an odd result if the practical difficulties ... in reviewing [decisions to issue search warrants] by reason of their secrecy, were fortified by the imposition of unrealistic criteria for discovery, which for practical purposes, further immunised the decisions from review. Such an outcome would tend to render nugatory the statutory entitlement to review such decisions conferred under the ADJR Act or under s 39B. The Federal Court’s authority has been

¹⁷ Ibid.

¹⁸ (1996) 68 FCR 265, 280.

¹⁹ (1996) 68 FCR 265, 280–1. See also *Jilani v Wilhelm* (2005) 148 FCR 255, 273 [109].

interposed between State and citizen under those provisions *inter alia* to ensure that any intrusions into fundamental rights, including those of privacy, are only those which are lawful and authorised by statute.

29. Having regard the nature of the ABC’s case and the circumstances in which it is advanced, that case cannot be said to be essentially speculative, or to consist of bare allegations for which there is not the slightest evidence or other material in support. This is not a case like *SMEC Holdings Pty Ltd v Commissioner, Australian Federal Police*, where an application for discovery was made based on bare assertions of invalidity of the warrant,²⁰ and of innocence of the offences referred to in the warrant.²¹
30. There are many reasons why an administrative decision may be legally unreasonable, including where the decision involves “disregard of public policy”, or involves “oppressive or gratuitous interference with the rights of those subject to [it]”, or “fail[s] to take into account relevant considerations”.²² As noted above, whether a decision is legally unreasonable must be an inference “drawn from the facts and from the matters falling for consideration in the exercise of the statutory power”.²³
31. On the basis of the known facts, there is a proper basis for the ABC’s contention that, in deciding to issue the search warrant, the first respondent made a decision that was legally unreasonable. Those facts relevantly include that:²⁴
- 31.1 the warrant was directed to a public broadcaster;
 - 31.2 the warrant sought evidence of communications between a putative source and journalists;
 - 31.3 the two journalists (who are identified in condition 2 of the warrant) are identified as the authors of the articles and a 7.30 story listed under condition 2 of the warrant;
 - 31.4 the articles themselves disclosed on their face that they were based on confidential sources; and
 - 31.5 the articles on their face concerned government and political matters of the highest public importance, namely historical conduct and alleged conduct,

²⁰ [2018] FCA 609, [29].

²¹ [2018] FCA 609, [36]–[41].

²² *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 365 [69]–[71] (Hayne, Kiefel and Bell JJ).

²³ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 367 [76] (Hayne, Kiefel and Bell JJ).

²⁴ OA, [1]–[4], [13]–[16]; Affidavit of Michael Rippon affirmed 24 June 2019, Annexure MR-1.

including alleged unlawful killings carried out in Australia's name in Afghanistan; whether that historical conduct and alleged conduct had been investigated adequately or at all, or covered up; and gross dysfunction within the Australian Defence Force.

32. There is nothing in the available materials to indicate that, in deciding to issue the warrant, the first respondent had regard to:
- 32.1 the very significant intrusion on privacy that the warrant purported to authorise;
 - 32.2 the strong public policy interests in protecting confidential communications between journalists and their sources, and protecting the identity of those sources; or
 - 32.3 the implied freedom of political communication which arises under sections 7, 24 and 128 of the Constitution, or whether issuing a warrant in the circumstances described above would be consistent with that freedom.
33. Rather, the known facts give rise to an inference that the first respondent has purported to authorise very significant intrusions into fundamental rights without any or any proper regard to any of these public policy interests.
34. For similar reasons, there is a proper basis for the ABC's contention that, in deciding to seek the search warrant, the second and third respondents acted in a way that was legally unreasonable. There is nothing in the available materials to indicate that, in deciding to seek the warrant, the second or third respondents had regard to any of the matters referred to above.
35. There is, accordingly, a proper basis for the ABC's claim that the decisions to seek the warrant, and to issue the warrant, were legally unreasonable. That claim cannot be dismissed as speculative. The ABC's contention is soundly based, even though—as is usually the case in relation to the judicial review of administrative decisions—many of the documents that the ABC needs to prove it are within the respondents' exclusive possession or power.²⁵ By its notice to produce, the ABC properly seeks to improve the

²⁵ See *Murphy v Victoria* (2014) 45 VR 119, 129 [35].

evidence in support of its claim,²⁶ not to conduct a fishing expedition designed to ascertain whether any case exists.

36. By way of contrast, the Commissioner seeks to do precisely what Merkel J warned against in *Carmody*—to impose unrealistic criteria for discovery, and thereby immunise the decisions to seek the warrant, and to issue the warrant, from judicial review. This Court should firmly reject the Commissioner’s attempt to do so.

Date: 30 July 2019

MATTHEW COLLINS
MARK POLDEN
MARK HOSKING
Counsel for the ABC

²⁶ *SMEC Holdings Pty Ltd v Commissioner, Australian Federal Police* [2018] FCA 609, [25].

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

FIRST DRAFT MINUTE OF ORDERS

OTHER MATTERS: The Second and Third Respondents, by their Counsel, undertake to the Court that, until 14 days after the determination of this proceeding or further order, they and the Australian Federal Police will not directly or indirectly access, disclose or act upon the material seized on 5 June 2019 from the Applicant's offices at the ABC Ultimo Centre, 700 Harris Street, Ultimo.

THE COURT ORDERS THAT:

1. On or before 9 August 2019, the Applicant file and serve:
 - 1.1 any application seeking leave to amend its originating application dated 24 June 2019; and
 - 1.2 any application for discovery.
2. There be a further case management conference on [a convenient date to be allocated by the Court].
3. There be liberty to apply.
4. Costs be reserved.

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

SECOND DRAFT MINUTE OF ORDERS

OTHER MATTERS: The Second and Third Respondents, by their Counsel, undertake to the Court that, until 14 days after the determination of this proceeding or further order, they and the Australian Federal Police will not directly or indirectly access, disclose or act upon the material seized on 5 June 2019 from the Applicant's offices at the ABC Ultimo Centre, 700 Harris Street, Ultimo.

THE COURT ORDERS THAT:

1. On or before 9 August 2019, the Applicant file and serve:
 - 1.1 any application seeking leave to amend its originating application dated 24 June 2019; and
 - 1.2 any application for discovery.

Discovery

2. The Respondents give discovery in accordance with r 20.16 on or before 21 August 2019.
3. On or before 23 August 2019, the Respondents file:
 - 3.1 a notice in accordance with r 20.31(2); and
 - 3.2 any affidavits and other material upon which they intend to rely in support of any objection to production.
4. The Applicant file any affidavits and other material upon which it intends to rely in response to any objection to production on or before 30 August 2019.
5. Any objection to production be listed for hearing on or before 6 September 2019.

Evidence

6. The Applicant file any further affidavits and other material upon which it intends to rely on or before 20 September 2019.
7. The Respondents file any affidavits and other material upon which they intend to rely on or before 4 October 2019.
8. The parties notify each other as to whether any witness is required for cross-examination on or before 9 October 2019.
9. The parties notify each other as to any objections to evidence on or before 11 October 2019.

Court Book

10. The Applicant serve a proposed Court Book index on or before 9 October 2019.
11. The Respondents serve an updated index identifying any alterations it proposes should be made to the Court Book on or before 11 October 2019.
12. On or before 15 October 2019, the Applicant is to prepare and provide:
 - 12.1 one hard copy and one electronic copy of the Court Book to each of the Respondents; and
 - 12.2 two hard copies and one electronic copy of the Court Book to the chambers of Abraham J.

Submissions

13. The Applicant file and serve an outline of opening submissions not exceeding 15 pages on or before 23 October 2019.
14. The Respondents file and serve an outline of opening submissions not exceeding 15 pages on or before 6 November 2019.
15. The Applicant file and serve an outline of opening submissions in reply not exceeding 5 pages by no later than 13 November 2019.
16. The parties prepare a joint bundle of authorities and provide two hard copies of that bundle to the Chambers of Abraham J on or before 15 November 2019.
17. There be a further case management conference on [a convenient date to be allocated by the Court].
18. There be liberty to apply.

19. Costs be reserved.