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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: 27/08/2019 3:19:57 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 REPLY SUBMISSIONS FOR
INTERLOCUTORY HEARING ON 19 AUGUST 2019**

A. FORM OF AMENDED ORIGINATING APPLICATION

1. In its submissions filed on 9 August 2019 (at [17] and [20]–[26]), the applicant (**ABC**) outlined the arguments it intends to advance at the hearing in support of grounds 3, 6 and 7 in its proposed amended originating application (**AOA**).
2. In their submissions filed on 14 August 2019 (at [12] and [18]–[19]), the second and third respondents contend that various arguments referred to by the ABC in its submissions are not raised in its proposed AOA.
3. The ABC considers that the arguments referred to in its submissions are raised by grounds 3, 6 and 7 in its proposed AOA. In particular:
 - 3.1 the proposed AOA puts in issue the sufficiency of the material before the first respondent [AOA, [20(b)]]; and
 - 3.2 the ABC explained in its submissions filed on 30 July 2019 (at [30], [32]–[33]) and in its submissions filed on 14 August 2019 (at [22]–[23] and [34]) that one basis on which it will contend that the decisions of the respondents to seek and issue the search warrant were legally unreasonable was that the decision-makers failed to take into account relevant considerations.
4. It is undesirable that there be any confusion about the way in which the ABC puts its case. To put the matter beyond doubt, and to avoid unnecessary and arid argument at the final hearing, the ABC will seek leave to amend its originating application filed on

24 June 2019 by inserting new paragraphs 20A, 23A and 24A. The form of the amended AOA that the ABC will seek leave to file is attached to these submissions (new paragraphs highlighted in red text).

B. DISCOVERY CATEGORIES

5. In their submissions filed on 14 August 2019 (at [29]-[43]), the second and third respondents contend that discovery of the categories of documents sought by the ABC would be oppressive.
6. Having considered the matters raised in those submissions, the ABC proposes to narrow the scope of Categories 2 and 3 as follows:
 2. ~~For the period from 13 September 2018 to 5 June 2019, Any document recording, consisting of or capable of evidencing~~ constituting the decision of the Second and Third Respondents to apply to the First Respondent for the issue under section 3E of the *Crimes Act 1914* of the search warrant dated 3 June 2019 in respect of the Applicant's premises, or the reasons for that decision.
 3. ~~For the period from 13 September 2018 to 5 June 2019, Any document recording, consisting of or capable of evidencing~~ consideration by the Second and Third Respondents of:
 - (a) the implied freedom for reasonable political discussion of government and political matters under ss 7, 24 and 128 of the Constitution;
 - (b) the protection of journalists' sources, including but not limited to the protection in section 126K of the *Evidence Act 1995* (Cth);
 - (c) the public interest in investigative journalism; or
 - (d) the public interest in the subjects matter of the Afghan Files to which the evidentiary materials sought under the search warrant dated 3 June 2019 in respect of the Applicant's premises (the warrant) related,
in connection with the decision to apply to the First Respondent for the issue ~~of the warrant~~ under section 3E of the *Crimes Act 1914* of the search warrant dated 3 June 2019 in respect of the Applicant's premises.
7. Further, the ABC clarifies that the order for discovery is only sought against the second and third respondents, not the first respondent.

Date: 16 August 2019

MATTHEW COLLINS
 MARK POLDEN
 MARK HOSKING
 Counsel for the ABC

Amended originating application

No. NSD 989 of 2019

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

Australian Broadcasting Corporation

Applicant

Martin Kane and others identified in the Schedule

Respondents

To the Respondents

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place:

The Court ordered that the time for serving this application be abridged to

Date:

.....
Signed by an officer acting with the authority
of the District Registrar

.....
Filed on behalf of (name & role of party) Australian Broadcasting Corporation, the Applicant
Prepared by (name of person/lawyer) Michael Rippon
Law firm (if applicable) Australian Broadcasting Corporation, Legal Department
Tel (02) 8333 1696
Email rippon.michael@abc.net.au
Address for service ABC Ultimo Centre, 700 Harris Street, Ultimo NSW 2007
(include state and postcode)

[Form approved 01/08/2011]

Details of claim

The Applicant (**the ABC**) applies for the following relief pursuant to section 39B of the *Judiciary Act 1903* (Cth) and section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth):

1. A declaration that the search warrant (**the search warrant**) purportedly issued under section 3E(1) of the *Crimes Act 1914* (Cth) by the First Respondent (**Kane**) on 3 June 2019 and purporting to authorise the search of and seizure of materials from the ABC's premises at ABC Ultimo Centre, 700 Harris Street, Ultimo in the State of New South Wales (**ABC premises**) is invalid.
 - 1A. A declaration that section 73A(2) of the *Defence Act 1903* (Cth) is invalid.
2. A declaration that the search of and seizure of materials from the ABC premises by the Third Respondent (**Brumby**) and other servants or agents of the Second Respondent (**the Commissioner**) in purported execution of the search warrant on 5 June 2019 was unlawful.
3. A declaration that Brumby and the Commissioner, and all members, employees and agents of the Australian Federal Police (**AFP**), are not entitled to examine the materials seized from the ABC premises in purported execution of the search warrant on 5 June 2019 (**seized materials**).
4. An order that all seized materials and copies of seized materials, and any related lists or schedules, including any seized materials or copies of seized materials stored in any electronic storage medium, including USB, in the possession, custody or power of Brumby, the Commissioner or the AFP, be returned immediately to the ABC.
5. An injunction permanently restraining Brumby and the Commissioner, and all members, employees and agents of the AFP, from viewing, accessing, copying or disseminating or causing to be viewed, accessed, copied or disseminated any seized materials or copies of seized materials, and any related lists or schedules, including any seized materials or copies of seized materials stored in any electronic storage medium, including USB, in the possession, custody or power of any of Brumby, the Commissioner or the AFP.
6. Such further or other orders as the Court sees fit.
7. Costs.

Claim for interlocutory relief

The ABC also claims interlocutory relief, namely an interlocutory injunction restraining Brumby and the Commissioner, and all members, employees and agents of the AFP, until further order, from viewing, accessing, copying or disseminating or causing to be viewed, accessed, copied or disseminated any seized materials or copies of seized materials, and any related lists or schedules, including any seized materials or copies of seized materials stored in any electronic storage medium, including USB, in the possession, custody or power of any of Brumby, the Commissioner or the AFP.

Grounds of application

Background

1. The ABC is Australia's national public broadcaster and a news organisation. Among other things, it conducts investigative and public interest journalism, which involves journalists, in the course of their work, obtaining documents and information from informants, in circumstances where the journalist has promised the informant not to disclose the informant's identity.
2. The notorious ethical obligations of journalists relating to the protection of confidential sources, which are reflected in ABC policies and the like policies of other news organisations and associations of journalists, and the journalist's privilege in section 126K of the *Evidence Act 1995* (Cth) and cognate legislation, illustrate the importance of the protection of the identity of journalists' confidential sources (**protection of sources**).
3. Further, investigative journalism in the public interest that relies on information provided to journalists by confidential sources (**investigative journalism**) is fundamental to the maintenance of the Australian system of representative democracy which arises under sections 7, 24 and 128 of the Constitution of the Commonwealth of Australia (**Constitution**).
4. Without investigative journalism, among other matters, there is a high and unacceptable risk that:
 - a. public malfeasance and neglect will go undetected;
 - b. abuses of power and corruption by government and branches and agencies of government will flourish;

- c. government officers, employees and agents will not be held accountable adequately or at all for malfeasance, neglect, abuses of power or corruption; and
 - d. Australians will be deprived of information that is relevant to the decisions they must make in Commonwealth, State, Territory and other elections.
5. Daniel Michael Oakes (**Oakes**) is an investigative journalist employed by the ABC, based in Victoria.
6. Kane is a Registrar employed at the Local Court of New South Wales. Kane is not a judicial officer.
7. Brumby is a member, employee or agent, and the Commissioner is the Commissioner, of the AFP.
8. At some time before 7 March 2019, a member, employee or agent of the AFP charged David William McBride (**McBride**) with the following criminal offences (**the alleged McBride offences**):
 - a. unlawfully giving information as to defences, contrary to section 73A(1) of the *Defence Act 1903* (Cth);
 - b. theft contrary to section 131.1(1) of the Criminal Code (Cth); and
 - c. unlawfully disclosing a Commonwealth document contrary to section 70(1) of the *Crimes Act 1914* (Cth).
9. On various dates between about 7 March 2019 and 3 June 2019, McBride made public statements to the effect that he had admitted the substance of the allegations against him to the AFP, that he would not be contesting that he had committed the alleged McBride offences, and that he would only argue that he was justified in doing so.
10. On 30 May 2019, a Magistrate committed McBride to stand trial in the Supreme Court of the Australian Capital Territory on the alleged McBride offences.
11. On 3 June 2019, Brumby travelled from his place of work in Canberra in the ACT to Queanbeyan in New South Wales, where he applied to Kane for, and Kane issued, the search warrant, which purported to authorise Brumby to enter the ABC premises in order to search for things that might afford evidence as to:
 - a. the commission of the alleged McBride offences; and

- b. whether Oakes, who is based in Victoria, had committed the following offences:
 - i. unlawfully obtaining military information, contrary to section 73A(1)(2) of the *Defence Act 1903* (Cth); and
 - ii. dishonestly receiving stolen property from McBride, contrary to section 132.1 of the *Criminal Code Act 1995* (Cth) [sic].
12. On 5 June 2019, Brumby executed the search warrant on the ABC premises, and seized the seized materials.
13. The seized materials related primarily to a series of reports by Oakes and others which were broadcast and published by the ABC known as '**the Afghan Files**'.
14. The sources of information relied on in preparing the Afghan Files included information provided to Oakes by informants in circumstances where Oakes had promised the informants not to disclose the informants' identity. The Afghan Files stated that they were based upon information provided by such sources.
15. The Afghan Files were reports to the effect that, in summary:
 - a. between about 2009 and 2013, Australian elite special forces prosecuted a bloody and secretive war in Southern Afghanistan in the course of which they killed unarmed men and children;
 - b. by no later than 2014, the Australian Defence Force (**ADF**) had been warned of ingrained problems within Australia's special forces, including the emergence of a 'warrior' culture with officers turning a blind eye to poor behaviour;
 - c. at least two of the killings, both in September 2013, were being investigated by the Inspector General of the ADF as possible unlawful killings, being the killing of a man and his six-year old child during a raid on a house, and the killing of a detainee;
 - d. in 2013, sparked by an incident in 2012 when Australian troops had killed two unarmed Afghan men, the ADF had issued a series of directives and memos stressing the need to be certain that Afghans were 'directly participating in hostilities' before shooting them;

- e. by no later than 2013, Afghan authorities had become increasingly concerned that Australian special forces were killing unarmed civilians and had threatened to stop working with Australians;
 - f. Australian troops in Afghanistan had severed the hands of dead Taliban fighters;
 - g. tensions had developed between Australian special forces and the ADF Investigative Service (**ADFIS**), with the commanding officer of the SAS Regiment claiming to the head of ADFIS that ADFIS was seeking to charge SAS members in order to obscure its own culpability; and
 - h. relations within parts of the ADF were on a 'perilous knife edge' and 'in an extremely unhealthy state'.
16. The Afghan Files were reports in relation to government and political matters of the highest public importance, namely:
- a. historical conduct and alleged conduct, including alleged unlawful killings, carried out in Australia's name in Afghanistan;
 - b. whether that historical conduct and alleged conduct had been investigated adequately or at all, or covered up; and
 - c. gross dysfunction within the ADF,

(Subjects).

17. At the time of the execution of the search warrant on 5 June 2019:
- a. the ABC foreshadowed to Brumby and other officers, employees or agents of the AFP that it reserved the right to claim that the search warrant was invalid, and that the seized materials included documents which were beyond the scope of the search warrant and/or subject to claims of legal professional and/or journalist's privilege; and
 - b. Brumby, by his agent Detective Superintendent Andrew Smith, gave the ABC an undertaking that, without prejudice to the ABC's right to challenge the validity of the search warrant, *inter alia*:
 - i. if the ABC made certain claims, the AFP would not disclose or act upon any material over which such a claim was made until any such claim had been finally determined; and

- ii. agents of the AFP would take all necessary steps to isolate the seized materials so that they were not available, provided or disclosed to any other person including any other member of the AFP pending the final determination of any such claim.

17A. On 6 June 2019, Acting Commissioner Neil Gaughan (**Gaughan**) gave a press conference in relation to the execution of the search warrant on 5 June 2019, among other things. In the course of that press conference:

- a. Gaughan said words to the effect that '[t]he issue of whether or not the public has a right to know is not really an issue that comes into our investigation process';
- b. Gaughan said words to the effect that 'the issue of public interest is matter that we do consider ... [b]ut we considered that at various phases through the investigation';
- c. in response to a question about why the AFP executed the search warrant on 5 June 2019 given the matters referred to in [9] above, Gaughan said words to the effect that 'we still have to follow the evidence trail. We still need to ensure that just because someone says they did something, doesn't mean they actually did'.

18. By a letter dated 21 June 2019, solicitors on behalf of Brumby, the Commissioner and the AFP undertook that their clients would not access any of the seized materials prior to at least 9 July 2019, and would consider their position with respect to a further undertaking upon receipt of this Originating Application. They further undertook that if their clients refused to provide a further undertaking, their clients would not access the seized materials for a further 7 days from notifying the ABC to that effect in order to allow the ABC time to seek an injunction.

Grounds of review

18A. Kane's decision to issue the search warrant was *ultra vires*. On its proper construction, section 3E of the *Crimes Act 1914* (Cth) did not authorise Kane to issue the search warrant, having regard to:

- a. the very significant intrusion of privacy that the search warrant purported to authorise;
- b. the importance of the protection of sources, including for the reasons set out in [2] above;

- c. section 126K of the *Evidence Act 1995* (Cth);
 - d. the public interest in investigative journalism, including for the reasons set out in [3] above;
 - e. the implied Constitutional freedom for the reasonable discussion of government and political matters which arises under sections 7, 24 and 128 of the Constitution;
 - f. the content of the Afghan Files reports referred to in [15] above and the nature of the Subjects referred to in [16] above; and
 - g. the matters set out in [9] and [10] and [17A] above.
19. The three conditions of the search warrant issued by Kane did not provide a real and meaningful perimeter to the evidential matters the search warrant purportedly authorised to be searched for and seized. Accordingly:
- a. Kane failed to comply with the requirement in section 3E(5)(c) of the *Crimes Act 1914* (Cth) to state properly in the search warrant the kinds of evidential material that were to be searched for;
 - b. Kane failed to comply with section 3E(1) of the *Crimes Act 1914* (Cth), in that he could not have been satisfied that there were reasonable grounds for suspecting that there was or would be within the next 72 hours any evidential material at the ABC premises;
 - c. Kane failed to observe procedures that were required by law to be observed;
 - d. Kane exercised the power under section 3E(1) of the *Crimes Act 1914* (Cth) in such a way that the result of the exercise of the power is uncertain; and
 - e. Kane exercised the power under section 3E(1) of the *Crimes Act 1914* (Cth) in a way that constitutes an abuse of power.
20. The third condition of the search warrant referred to suspected breaches of sections 73A(1) and 73A(2) of the *Defence Act 1903* (Cth), sections 131.1(1) and 132.1(1) of the *Criminal Code Act 1995* (Cth) and section 70(1) of the *Crimes Act 1914* (Cth). Because of the conclusionary, vague and uncertain manner in which the suspected offences were expressed in the third condition of the search warrant:
- a. Kane failed to comply with the requirement in section 3E(5)(a) of the *Crimes Act 1914* (Cth) to state properly the offences to which the search warrant related;

- b. Kane failed to comply with section 3E(1) of the *Crimes Act 1914* (Cth), in that he could not have been satisfied that there were reasonable grounds for suspecting that there was or would be within the next 72 hours any evidential material at the ABC premises;
- c. Kane failed to observe procedures that were required by law to be observed;
- d. Kane exercised the power under section 3E(1) of the *Crimes Act 1914* (Cth) in such a way that the result of the exercise of the power is uncertain; and
- e. Kane exercised the power under section 3E(1) of the *Crimes Act 1914* (Cth) in a way that constitutes an abuse of power.

20A. The search permitted by the search warrant exceeded what was justified by the material before Kane.

21. Further, the search warrant purported to authorise the search and seizure of material that could not afford evidence as to the commission of the first and second of the suspected offences set out in the third condition of the search warrant, namely the offences in sections 73A(1) and (2) of the *Defence Act 1903* (Cth):
- a. Sections 73A(1) and (2) of the *Defence Act 1903* (Cth) proscribe giving or unlawfully obtaining any plan, document or information relating to any fort, battery, field work, fortification, or defence work, or air force aerodrome or establishment, or any of the defences of the Commonwealth, or any other naval, military or air force information.
 - b. By contrast, the first and second of the suspected offences set out in the third condition of the search warrant purported to authorise the search and seizure of evidential material relating to whether McBride gave Oakes, or Oakes unlawfully obtained from an unidentified person or persons, 'military information'.
 - c. The matters the intended subject of the search warrant, in so far as they are capable of being discerned from the manner in which the search warrant was executed and the subject matter of the seized materials, were the Afghan Files and matters related to the Afghan Files.
 - d. The Afghan Files did not relate to any fort, battery, field work, fortification, or defence work, or air force aerodrome or establishment, or any of the defences of the Commonwealth, or any other naval, military or air force information, within the meaning of sections 73A(1) and (2) of the *Defence Act 1903* (Cth).

22. In the premises of the matters stated in the previous paragraph:
- a. Kane failed to comply with the requirement in section 3E(5)(a) of the *Crimes Act 1914* (Cth) to state properly the offences to which the search warrant related;
 - b. Kane failed to comply with section 3E(1) of the *Crimes Act 1914* (Cth), in that he could not have been satisfied that there were reasonable grounds for suspecting that there was or would be within the next 72 hours any evidential material at the ABC premises;
 - c. Kane failed to observe procedures that were required by law to be observed;
 - d. Kane exercised the power under section 3E(1) of the *Crimes Act 1914* (Cth) in such a way that the result of the exercise of the power is uncertain; and
 - e. Kane exercised the power under section 3E(1) of the *Crimes Act 1914* (Cth) in a way that constitutes an abuse of power.
- 22A. Section 73A(2) of the *Defence Act 1903* (Cth) was invalid on the ground that it infringed the implied freedom of political communication, at least so far as it purported to apply to the conduct of Oakes referred to in [14] to [16] above.
23. Kane's decision to issue the search warrant was legally unreasonable, in that any reasonable person in the position of Kane would have declined to issue the search warrant having regard to:
- a. the failure to state properly in the search warrant the kinds of evidential material that were to be searched for;
 - b. the failure to state properly in the search warrant the offences to which the search warrant related;
 - c. the disparity between the terms in which the first and second of the suspected offences set out in the third condition of the search warrant were expressed and the terms of sections 73A(1) and (2) of the *Defence Act 1903* (Cth);
 - d. the very significant intrusion of privacy that the search warrant purported to authorise;
 - e. the importance of the protection of sources, including for the reasons set out in [2] above;

- f. section 126K of the *Evidence Act 1995* (Cth);
- g. the public interest in investigative journalism, including for the reasons set out in [3] above;
- h. the implied Constitutional freedom for the reasonable discussion of government and political matters which arises under sections 7, 24 and 128 of the Constitution;
- i. the content of the Afghan Files reports referred to in [15] above and the nature of the Subjects referred to in [16] above; and
- j. the matters set out in [9] and [10] and [17A] above.

23A. Kane's decision to issue the search warrant was affected by jurisdictional error, in that Kane failed to take into account the following relevant considerations:

- a. the very significant intrusion of privacy that the search warrant purported to authorise;
- b. the importance of the protection of sources, including for the reasons set out in [2] above;
- c. section 126K of the *Evidence Act 1995* (Cth);
- d. the public interest in investigative journalism, including for the reasons set out in [3] above;
- e. the implied Constitutional freedom for the reasonable discussion of government and political matters which arises under sections 7, 24 and 128 of the Constitution; and
- f. the public interest in reporting on matters such as the content of the Afghan Files reports referred to in [15] above and the Subjects referred to in [16] above.

24. Further, Brumby's and the Commissioner's decisions to seek and execute the search warrant were legally unreasonable, in that no reasonable person in the position of Brumby or the Commissioner would have sought or executed the search warrant having regard to:
- a. the failure to state properly in the search warrant the kinds of evidential material that were to be searched for;
 - b. the failure to state properly in the search warrant the offences to which the search warrant related;

- c. the disparity between the terms in which the first and second of the suspected offences set out in the third condition of the search warrant were expressed and the terms of sections 73A(1) and (2) of the *Defence Act 1903* (Cth);
- d. the very significant intrusion of privacy that the search warrant purported to authorise;
- e. the importance of the protection of sources, including for the reasons set out in [2] above;
- f. section 126K of the *Evidence Act 1995* (Cth);
- g. the public interest in investigative journalism, including for the reasons set out in [3] above;
- h. the implied Constitutional freedom for the reasonable discussion of government and political matters which arises under sections 7, 24 and 128 of the Constitution;
- i. the content of the Afghan Files reports referred to in [15] above and the nature of the Subjects referred to in [16] above; and
- j. the matters set out in [9] and [10] and [17A] above.

24A. Brumby's and the Commissioner's decisions to seek the search warrant were affected by jurisdictional error, in that Brumby and the Commissioner failed to take into account the following relevant considerations:

- a. the very significant intrusion of privacy that the search warrant purported to authorise;
- b. the importance of the protection of sources, including for the reasons set out in [2] above;
- c. section 126K of the *Evidence Act 1995* (Cth);
- d. the public interest in investigative journalism, including for the reasons set out in [3] above;
- e. the implied Constitutional freedom for the reasonable discussion of government and political matters which arises under sections 7, 24 and 128 of the Constitution; and

- f. the public interest in reporting on matters such as the content of the Afghan Files reports referred to in [15] above and the Subjects referred to in [16] above.

25. The ABC reserves the right to amend and/or supplement the above grounds after obtaining access to the information put before Kane by Brumby in support of the issue of the search warrant.

This Originating Application was prepared by M J Collins, ~~and~~ M Polden and M A Hosking of Counsel.

Applicant's address

The Applicant's address for service is:

Place: ABC Ultimo Centre
700 Harris Street
ULTIMO NSW 2007

Email: rippon.michael@abc.net.au

The Applicant's address is ABC Ultimo Centre, 700 Harris Street, ULTIMO NSW 2007.

Service on the Respondents

It is intended to serve this application on all Respondents.

Date: ~~24 June 2019~~ 9 August 2019 16 August 2019

Signed by Constance Bernadette Carnabuci
Lawyer for the Applicant

Schedule

No. NSD 989 of 2019

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

Respondents

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

Date: ~~24 June 2019~~ 9 August 2019 16 August 2019