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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

Dated: 18/10/2019 12:18:18 PM AEDT Registrar

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

NSD989/2019

Australian Broadcasting Corporation
Applicant

Martin Kane
First Respondent

Commissioner of the Australian Federal Police
Second Respondent

Agent Ian Brumby of the Australian Federal Police
Third Respondent

SECOND AND THIRD RESPONDENTS' OPENING SUBMISSIONS

Filed on behalf of the Second and Third Respondents

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Introduction

1. By its Originating Application dated 24 June 2019 and amended by leave granted on 20 August 2019 (**AOA**), the applicant (**ABC**) challenges a warrant issued to the third respondent (**the warrant**). The warrant, issued under s 3E of the *Crimes Act 1914* (Cth) (**Crimes Act**), was drawn in the "three condition" format which has been widely used since the decision in *Beneficial Finance*.[1] The third condition specified five indictable offences: suspected contraventions by David William McBride (**McBride**) of s 73A(1) of the *Defence Act 1903* (Cth) (**Defence Act**), s 131.1(1) of the Commonwealth *Criminal Code* (**Criminal Code**) and s 70(1) of the Crimes Act, and by Daniel Michael Oakes (**Oakes**) of s 73A(2) of the Defence Act and s 132.1 of the Criminal Code.

2. The ABC seeks declarations and injunctions respecting the issue of the warrant and the search and seizure thereunder. It advances nine grounds in support of the relief it seeks, though Ground 5 (AOA[22A]) is no longer pressed, and nor is the portion of Ground 7 (AOA[23]-[24]) relating to execution. The second and third respondents (in this document, **the respondents**) do not oppose the ABC receiving leave to advance Grounds 8 and 9 (FAOA[24A]-[24B]), contained in the ABC's 24 September 2019 interlocutory application.

3. The evidence consists of a Statement of Agreed Facts and Issues (**SOAFI**), and three statements. Some issues arise as to the terms on which particular annexures to the SOAFI should be admitted. The ABC will read the affidavit of Michael Antony Rippon affirmed on 24 September 2019, and the expert report of Matthew David Ricketson dated 24 September 2019, as to each of which there are objections. In accordance with the Court's directions, the respondents gave notice on 3 October 2019 requiring each of those witnesses for cross-examination. The respondents will read the affidavit of Lt-General Gregory Charles Bilton sworn on 27 September 2019. The ABC takes a relevance objection to Lt-General Bilton's affidavit. Lt-General Bilton has not been required for cross-examination.

4. Each of the ABC's grounds of review should be dismissed. Before explaining why, it is convenient to set out some legal background concerning s 3E of the Crimes Act and each of the suspected offences specified in the warrant. Their proper construction bears on several of the ABC's grounds.

Legal background

5. ***Section 3E of the Crimes Act:*** Section 3E(1) authorises an "issuing officer" to issue a warrant to search premises if the officer is satisfied, by information on oath or affirmation, that there are reasonable grounds for suspecting that there is, or will be in the next 72 hours, any "evidential

[1] *Beneficial Finance Corporation & Ors v Commissioner of Australian Federal Police & Ors* (1991) 31 FCR 523.

material" at the premises. Relevantly here, "evidential material" means a "thing relevant to an indictable offence" (s 3C(1)), which is further defined (in summary) as anything with respect to which an indictable offence has been or is suspected on reasonable grounds to have been committed; or as to which there are reasonable grounds for suspecting that it will afford evidence as to the commission of, or is intended to be used for the purposes of committing, any such offence (s 3(1)).

6. ***Sections 131.1(1) and 132.1 of the Criminal Code:*** Section 131.1(1) proscribes "theft", an offence consisting of the dishonest appropriation of property belonging to a Commonwealth entity with the intention of permanently depriving the owner of that property. Section 132.1 creates the offence of "receiving", which a person commits by dishonestly receiving stolen property knowing or believing the property to be stolen. By force of the definition of "stolen property" in s 132.1(3), the provision only applies where the relevant property is (or was when previously received) property belonging to a Commonwealth entity, or proceeds of sale or property exchanged for such property.[2] Both offences are punishable by imprisonment for 10 years (ss 131.1(1), 132.1(1)).

7. ***Section 70(1) of the Crimes Act:*** Section 70(1) provides that a Commonwealth officer is guilty of an offence if he or she publishes or communicates, except to some person to whom he or she is authorised to publish or communicate it, any fact or document coming into his or her knowledge or possession by virtue of being a Commonwealth officer and which it is his or her duty not to disclose. The offence is punishable by imprisonment for 2 years (s 70(2)). The provision was repealed in 2018 by the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) (Sch 2 item 5), but that repeal only has effect for conduct occurring on or after the commencement of that amending legislation (Sch 2 item 7).

8. ***Sections 73A(1)-(2) of the Defence Act:*** Section 73A of the Defence Act proscribes the communicating (s 73A(1)) or the obtaining (s 73A(2)) of "any plan, document, or information relating to any fort, battery, field work, fortification, or defence work, or to any defences of the Commonwealth, or to any factory, or air force aerodrome or establishment or any other naval, military or air force information". The "communicating" offence applies to a member of the Australian Defence Force (**ADF**) or person engaged under the *Public Service Act 1999* (Cth), but only where the communication is not in the course of that person's official duty. The "obtaining" offence applies to any person, but only where "that conduct" (ie the person's obtaining of information contrary to s 73A(2)(a)) is "unlawful"

[2] Sections 132.1(5) (definition of "original stolen property"), 132.1(5A) (definition of "previously received property"), 132.1(7) (definition of "tainted property").

(s 73A(2)(b)). Both offences can be prosecuted summarily or on indictment. If prosecuted on indictment, they are liable to a penalty of any imprisonment term and/or any fine (s 73F(2)(b)).

9. This case raises several issues concerning the interpretation of s 73A(1)-(2), particularly the words "any other naval, military or air force information" in ss 73A(1)(a) and (2)(a). The respondents advance the following propositions concerning the construction of those provisions.

10. *First*, ss 73A(1)-(2) protect information, sourced from within the ADF or the public service, of a kind that is confidential, in the sense of "deliberately kept from general knowledge". A prohibition on communicating or obtaining government information in an unauthorised or unlawful manner would make little sense if applied to information that is generally available by design of its government originator. If the information in the documentaries, newspapers and photos hypothesised at AS[33] was "generally available" in this sense, it would not be caught on a natural reading of these provisions.

11. *Second*, whilst ss 73A(1)(a) and (2)(a) contain several alternative and potentially overlapping limbs, the whole of s 73A should be read in light of the phrase "or to any of the defences of the Commonwealth"; the descriptor "information as to defences" in the heading to the section; [3] and the location of the offences within a statute that "provide[s] for the Naval and Military Defence and Protection of the Commonwealth and of the several States" (long title) and establishes the ADF, consisting of the Royal Australian Navy, Australian Army and Royal Australian Air Force (ss 17-20). The central and unifying concept of information relating to "defences" has formed part of the equivalent provisions ever since their introduction into the Commonwealth statute book in 1903,[4] and was reflected in their earlier colonial antecedents.[5] Properly construed, the section as a whole is concerned with limiting communication or obtaining of information that relates, in a meaningful, non-trivial way, to the "defences" of the Commonwealth and the States.[6]

12. *Third*, on a purposive reading of the provision, the "defences" of the Commonwealth and the States encompass both physical infrastructure (forts, batteries, etc) and intangible aspects of Australia's defence, including military know-how, troop numbers, capabilities and deployments. There is no basis in the text or context to restrict "defences" to *physical* defences, or information concerning "physical

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[3] Which is also part of the Act: *Acts Interpretation Act 1901* (Cth), s 13(1).

[4] Formerly ss 73(4) and (5) of the Defence Act: see SOAFI[88]-[89].

[5] See, eg, *Safety of Defences Act 1890* (Qld) s 6, *Safety of Defences Act 1890* (SA) s 5, *Safety of Defences Act 1891* (Tas) s 6, and *Safety of Defences Act 1892* (WA) s 5, each making it an offence for an officer/ member of the Defence Force or civil servant to communicate (amongst other things) information relating to forts, batteries etc "or to any other defences of the" colony or province: SOAFI[86].

[6] See also the Explanatory Memorandum to the Defence Legislation Amendment (Application of Criminal Code) Act 2001 (Cth), which introduced the current form of s 73A [SOAFI[90]], explaining (at p5) that "[n]ew section 73A relates to the unlawful communication or obtaining of information in relation to the defences of the Commonwealth".

buildings or installations" (cf AS[38]). It could hardly be said that (eg) providing insurgents with the numbers and real-time locations of all ADF soldiers stationed in Afghanistan falls outside the rubric of information as to "defences" simply because those soldiers are not buildings or defence infrastructure (cf AS[38]). However, putting aside the last phrase (see below), it is true that ss 73A(1)(a) and (2)(a) make no express mention of defensive capabilities or resources other than "forts", "batteries", "field work", "fortifications", "defence works", "factories", or "air force aerodromes or establishments".

13. *Fourth*, this leads to some specific conclusions about the meaning of the phrase "any other naval, military or air force information". That phrase extends s 73A to apply to any other information of that same character ("information as to defences"), both concerning the physical facilities listed in ss 73A(1)(a) and (2)(a) *and* concerning matters that are not expressly described elsewhere in the provision. It removes any doubt that the provision applies to information relating to the intangible aspects of Australia's defences; Australia's participation in conflicts that are geographically removed from the territory of the Commonwealth; and conflicts in which there is no direct threat to Commonwealth territory or involvement of fixed physical defence infrastructure such as forts or aerodromes. Whilst the other limbs of ss 73A(1)(a) and (2)(a), particularly "any defences of the Commonwealth", may also capture some or all of that information if they are given a breadth commensurate with the provision's purpose, on a narrower reading they may not. This kind of concern is reflected in the extrinsic material for the Bill introducing the phrase "any other naval or military information", which was enacted at the height of Australia's participation in WWI:[7] the Minister noted that the Defence Act was framed "before war conditions arose" and that the "practical experience of the war has shown the necessity for amendments in order to remove doubts concerning several of the provisions".[8] In any event, there is nothing in s 73A that suggests that the limbs within s 73A(1)(a) (and (2)(a)) must necessarily be mutually exclusive.

14. In summary, the words "any other naval, military or air force information" capture information, which is withheld from public availability, concerning the defences - including the capability, planning and execution thereof - of the Commonwealth and the States through naval, military or air force operations. It is not confined to "information about naval, military or air force buildings or installations" (cf AS[38]).

15. *Fifth*, as to s 73A(1): s 73A(1)(b) specifies that a member of the ADF or public servant will only commit an offence under s 73A(1) if the communication is "not in the course of" the person's official duty. In other words, it is necessary to establish that the individual was not acting within the scope of the

[7] *Defence Act 1917* (Cth), s 18, relevantly repealing s 73 and inserting s 73A.

[8] Second Reading Speech for the Defence Bill 1917, Commonwealth House of Representatives, *Hansard,* 18 September 1917, p1.

authority conferred by his or her position in making the disclosure. Relevantly for present purposes, this aligns with s 70(1) of the Crimes Act, an element of which is that it was the Commonwealth officer's "duty not to disclose" the particular information.

16. *Sixth*, as to s 73A(2): s 73A(2)(b) specifies that a person will only commit an offence against s 73A(2) if his or her conduct in obtaining the relevant information is also independently "unlawful". In practical terms, this significantly confines the section's scope of operation to the receipt of information in circumstances where the conduct of obtaining is already unlawful by operation of some other legal rule – which would include other criminal prohibitions.

Ground 1: Scope of the power to issue the warrant

17. Ground 1 as articulated turns entirely on the claim that the implied freedom of political communication rendered the decision to issue the warrant *ultra vires* s 3E of the Crimes Act (AS[4]-[25]).

18. ***A threshold difficulty:*** The ABC designedly does not challenge the constitutional validity of s 3E, either in whole or in the law's application to the facts of this case (AS[6]). Nor does it submit that s 3E *would be* constitutionally invalid in some of its operations *unless* it were brought within power through the construction exercise (by preferring a valid construction) or by reading down its terms. As such, it necessarily accepts that any burden on political communication effected by s 3E is justified (and thus valid) across the whole range of potential outcomes of the exercise of power under that provision. That position is correct: s 3E is wholly valid, in all of its operations. Importantly, then, there is no further work for the implied freedom to do in the ABC's judicial review claim. As Gageler J observed in *Banerji v Comcare*,[9] if there is "no occasion to consider whether the scope of the discretion might be read down in order to ensure that the law is within constitutional power", there is "no occasion to consider whether a particular outcome might fall within the scope of the discretion as so read down, *and there is accordingly no occasion to consider whether a particular outcome falls within the scope of the discretion having regard to the implied freedom*". By virtue of the validity (as accepted by all parties) of s 3E, the Court must assume that the statutory limits on the discretion are themselves sufficient, without any "implied freedom overlay", to keep any exercise of power under s 3E within constitutional limits. The ABC can, and does, invoke those statutory limits through its other grounds of review. AOA[18A], in the way it is now put, can add nothing to those challenges. It should be dismissed on that basis.

[9] (2019) 93 ALJR 900 at [96] (emphasis added); see also [44], [50], [208]-[209]; *Wotton v Queensland* (2012) 246 CLR 1 at [22]; *Brown v Tasmania* (2017) 261 CLR 328 at [356], [408].

19. ***The ABC's arguments:*** If the analysis set out at [18] above is not accepted, and the ABC is correct in assuming that an implied statutory limit on the discretion to issue a warrant under s 3E is necessary, the ABC's suggested limitation on the power to issue search warrants still cannot withstand scrutiny. Noting that the *Lange* framework as refined in *McCloy*, which is directed to a systemic constitutional limitation on *lawmaking* powers, must be adapted to respond to an *administrative law* challenge – the correct question is whether, if the statute were to authorise burdens on political communication of the nature and extent of that resulting from the exercise of power in question, that would be disproportionate to what can reasonably be justified in pursuit of the statutory purpose.

20. It is useful to articulate the real-world consequences of the ABC's arguments at AS[16], and to test them against a hypothetical: an ADF officer provides several journalists with secret plans of all of Australia's defence facilities and combat strategies for upcoming ADF operations in a conflict zone; and asks the journalists not to disclose the ADF officer's identity. Such conduct by the ADF officer would amount to a flagrant breach of (at least) s 131.1(1) of the Criminal Code, s 70(1) of the Crimes Act and s 73A(1) of the Defence Act – provisions that the ABC accepts are valid. On the ABC's view, s 3E would prohibit the AFP from obtaining a search warrant over a journalist's premises to investigate the suspected offences, and to determine whether a possible suspect, as opposed to some other person, was in fact the source of the leaked documents. Further, such a warrant could not be issued even if a source was clearly *not* "confidential" given his numerous statements to the press (here, McBride), but had disclosed material that may overlap with material provided by a "confidential source" such that the warrant may "risk" revealing the identity of that latter person. The effect of all of this is to create both a direct and a derivative immunity from investigation of very serious indictable offences against the nation's security. The implied freedom requires no such result.

21. *Burden:* The ABC contends that the issuing of warrants over the premises of news organisations, "seeking or relating to evidential material obtained from confidential sources", creates a burden on the implied freedom (AS[11]-[14]). Whilst that much can be accepted, the burden is small and indirect at the level of theory, and unreal in the circumstances of this case. *First*, the ABC's argument presumes that "promises" of confidentiality made by journalists guarantee the protection of those sources' anonymity and are understood by sources to do so. That is belied by the discretion conferred in s 126K(2) of the *Evidence Act 1995* (Cth) (**Evidence Act**). The prospect of disclosure compelled by a legal process reveals that any promise made by a journalist not to disclose the identity of a source must be hedged with qualifications. *Secondly,* any "chilling effect" that might theoretically result from the issuing of warrants over media outlets under s 3E is highly unlikely to result from decisions akin to that impugned here. Following the publication of media articles stating that McBride had publicly

admitted to leaking documents to ABC journalists (SOAFI[73]), the AFP sought and was issued a warrant seeking evidential material in respect of suspected offences by McBride and an ABC journalist. The suggestion that this sort of fact pattern would deter other existing and prospective "confidential sources" is unpersuasive.

22. *Purpose:* The ABC correctly identifies the important law enforcement objective underpinning s 3E (AS[15]) – a purpose that encompasses the effective detection, prevention and prosecution of criminal offences.[10] But in the context of its challenge to the warrant, the ABC's analysis is incomplete. The warrant sought to facilitate the investigation of a specific set of offences, and the purposes of those laws must be considered in assessing whether the warrant transgressed the statutory limits on s 3E arising from the implied freedom. The offences described in the third condition were serious indictable offences, punishable by lengthy imprisonment terms and directed towards preventing patently undesirable harms, including as to Australia's defences (SOAFI[111]-[113], [116]; Bilton evidence).

23. *Proportionality:* The legitimate, and compelling, purposes of s 3E and the provisions on which the warrant was based amply justify any burden on the implied freedom that would result from exercises of discretion to issue warrants akin to the warrant. The alternative means proffered by the ABC of effectuating the statutory purpose (AS[20]) are not valid alternatives in the *McCloy* sense. Both alternatives would create a wide immunity from search and seizure (see [20] above). Far from providing an "obvious and compelling, reasonably practicable alternative means" of investigating and prosecuting the serious indictable offences described in the warrant, they would radically undermine those law enforcement objectives (cf AS[20]).

24. Finally, it cannot be concluded that the benefits sought to be achieved by the issue of warrants of the kind issued in this case are "manifestly outweighed"[11] by, or "grossly disproportionate to",[12] their adverse effect on the implied freedom.

Grounds 2-3: "Real and meaningful perimeter"/ "conclusionary, vague and uncertain"

25. As the ABC has done at AS[27]-[35], it is convenient to deal with Grounds 2 and 3 together. Both fall to be determined on the face of the warrant.

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[10] See *A2 v Australian Crime Commission* (2006) 155 FCR 456 at [22]; *Hart v Commissioner Australian Federal Police* (2002) 124 FCR 384 at [65], [68].

[11] *Comcare v Banerji* (2019) 93 ALJR 900 at [38].

[12] *Brown v Tasmania* (2017) 261 CLR 328 at [290], cf AS[9.3], [23].

26. One purpose of a search warrant is to inform the subject or occupant, and the executors, as to the scope of the search it authorises. A warrant may be invalid if it fails to set "real and meaningful perimeters" to the area of search, or if some part of the warrant is too vague or uncertain.[13] That does not mean, however, that the scope must be precise or exactly drawn, given the low threshold of "suspicion" being met and the investigative purposes a warrant serves.[14] Instead, invalidity will arise if there is a "failure to focus the statutory suspicion and belief upon any particular crime".[15] In this case, the warrant clearly identified the scope of the search to be conducted, and the suspected crimes that were being investigated.

27. The warrant was drawn in the "three condition" format. The respondents accept that the first and second conditions of the warrant are widely drawn, but reject the submission at AS[28]-[30] that they, or the warrant as a whole, placed no meaningful limit on the scope of the authorised search. The warrant clearly indicates an investigation focused on offences concerning the provision (by McBride) and receipt (by Oakes) of information and documents that led to the ABC's reporting of the Afghan Files Stories (the titles of which are revealed in the web addresses specified in the second condition). That is apparent from the clear terms of the offences outlined in the third condition of the warrant, particularly when read in the context of the first and second conditions of the warrant.

28. Contrary to AS[29], it is unhelpful to critique individual terms from the first and second condition of the warrant divorced from the context and further limit provided by the third condition. That said, the ABC's assertion that the first and second condition provided no "meaningful limit" is overstated. For example, though "related to" are words of wide ambit, the ABC is simply wrong to submit that every document on the ABC's premises "related to" the ABC. The item "ABC" in the second condition is a meaningful limitation that could connect with, for example, "[p]lanning logs" or "[b]roadcast and online schedules" in the first condition, if they provide potential evidence of the unlawful obtaining of military information within the meaning of the third condition (eg by revealing when material was obtained and assimilated into programming). By contrast, Defence "documents classified as 'secret'" in the first condition are most unlikely to "relate to" the ABC.

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[13] *Zhang v Commissioner of Australian Federal Police* (2009) 77 ATR 713 at [13].

[14] *Caratti v Commissioner of the Australian Federal Police & Anor* (2017) 257 FCR 166 at [34], [37].

[15] *Beneficial Finance Corporation & Ors v Commissioner of Australian Federal Police & Ors* (1991) 31 FCR 523 at 533. See also *Caratti v Commissioner of the Australian Federal Police & Anor* (2017) 257 FCR 166 at [114].

29. While the breadth of the first and second conditions may "[place] a heavier burden on the third condition",[16] the third condition in this case was sufficiently clear and precise to meet any such burden.

30. The third condition identified five suspected offences. Each suspected offence also specified a time period, and the person suspected of committing the offence. The discussion at AS[32]-[35] proceeds without any acknowledgment of these additional limitations. Each suspected offence must be read as a whole, and the specification of timeframes and names served more narrowly to confine the authorised search (cf AS[33]). The descriptions collectively made it clear that the warrant was directed to the exchange of documents that occurred between McBride and Oakes. At the 19 August 2019 directions hearing, senior counsel for the ABC indicated this understanding of the suspected offences when he stated that "[t]hey are the flipside of the same coin. There's not an allegation that Oakes had information, documents or property other than as provided by McBride."[17]

31. The ABC's submissions make no complaint about the manner in which the warrant expressed the suspected offences against ss 131.1(1) and 132.1 of the Criminal Code or s 70(1) of the Crimes Act. Instead, the ABC has confined its complaint to the use of the term "military information" in the two suspected offences contravening s 73A of the Defence Act. That phrase is said to introduce "such a degree of ambiguity and uncertainty" as to invalidate the entire warrant.

32. A warrant may be valid even if the suspected offences have been misdescribed, provided the error is not material.[18] But in this case, there was no misdescription. The term "military information" is taken directly from the final words of ss 73A(1)(a) and (2)(a), and necessarily bears the same meaning as it does in its statutory context (see further [13]-[14] above and [37] below). The assertions at AS[32]-[33] based on the full gamut of possible meanings of "information" and "military" are divorced from the statute. At the time the warrant was issued and executed in June 2019, there is no reason to think, or evidence supporting the suggestion, that the respondents, Kane or the ABC understood "military information" to mean anything other than "military information within the meaning of s 73A". Contrary to AS[34], that is what the context of the words within the suspected offence required.

33. It is entirely orthodox for a warrant, and indeed an indictment, to specify only the parts of a statutory offence that is alleged or suspected to have been contravened. It is not usual to recite the entire offence provision. Indeed, where a provision provides for the commission of multiple offences, a failure

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[16] *Caratti v Commissioner of the Australian Federal Police & Anor* (2017) 257 FCR 166 at [41].

[17] Transcript of hearing on 19 August 2019, T-8.21.

[18] *Caratti v Commissioner of the Australian Federal Police & Anor* (2017) 257 FCR 166 at [34].

to identify the particular part of the offence provision grounding the suspicion can lead to invalidity.[19] And the sufficiency of an offence description in a search warrant does not turn on the application of a verbal formula or on "overzealous technicality".[20]

34. It is true that the specific "military information" alleged to have been obtained by Oakes in the second suspected offence is not particularised. But the nature of that information is clearly apparent when the third condition is read in the context of the warrant as a whole. That context includes the last category of things identified in the first condition of the warrant, being things which are originals or copies of "documents classified as 'Secret'", and the items in the second condition of the warrant, including the Afghan Files Stories written by Oakes. It also includes the immediately preceding suspected offence which specifies Oakes as the recipient.

35. In this context, the offences specified in the third condition sufficiently indicated the area of the search to be conducted. It was possible in practice to decide whether any given document came within the terms of the warrant.[21] The truth of that proposition is underscored by the confidence with which the ABC asserts that the AFP "knew with particularity the documents that were the subject of the suspected offences described in the third condition of the warrant" (AS[55]).

36. Even if the ABC's complaints about the warrant's description of the s 73A offences are upheld, as explained at [39]-[40] below, those elements of the warrant are severable. The ABC's submissions on these two grounds make no complaint about the other three suspected offences in the warrant.

Ground 4: Description of ss 73A(1) and (2) offences

37. As already explained, the third condition of the warrant clearly describes the suspected offences under ss 73A(1) and (2): the giving and obtaining of "military information", noting that "military … information" is a category of information protected by ss 73A(1)(a) and (2)(a) respectively. There is nothing misleading about including a description in the warrant of only the parts of s 73A that McBride and Oakes were suspected of having contravened (cf AS[44]). The warrant is an instrument that must be read and construed subject to its enabling legislation, and so as not to exceed the power of the issuing officer: *Acts Interpretation Act 1901* (Cth), s 46. In those circumstances, the reference to "military information" must be construed as having the meaning that those words bear in s 73A (see [14] and [33] above). The suggestion that those words have no "certain meaning" (AS[47]) is a complaint about

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[19] See *Australian Broadcasting Corporation v Cloran* (1984) 4 FCR 151 at 154.

[20] *Beneficial Finance Corporation & Ors v Commissioner of Australian Federal Police & Ors* (1991) 31 FCR 523 at 543.

[21] *Beneficial Finance Corporation & Ors v Commissioner of Australian Federal Police & Ors* (1991) 31 FCR 523 at 539; *Caratti v Commissioner of the Australian Federal Police & Anor* (2017) 257 FCR 166 at [37(4)].

s 73A itself, which takes the ABC nowhere in circumstances where it no longer agitates any constitutional challenge to the validity of the provision.

38. Nothing in the broader context of the warrant suggests that "military information" was intended to bear a wider scope than the statutory words. The ABC cannot support such an inference by pointing to the material identified in the first and second conditions. To take one example, "Documents classified as 'Secret'" (first condition) which relate to "Rules of Engagement" (second condition) clearly constitute "military … information" within the meaning of s 73A. Noting that rules of engagement are ADF directives regulating (relevantly) the ADF's use of force in all of its operations (SOAFI[115]), these materials are information withheld from public availability concerning the capability, planning and execution of Australia's defences through military operations (see [14] above, cf AS[47]). To the extent that the ABC relies upon the content of the Afghan Files Stories to bolster its arguments on this ground (see AOA[21](d)), those stories – which described the receipt of "secret defence force documents" classified as SECRET and AUSTEO (SOAFI[61]-[62]), and reported on topics including "Australia's secretive rules of engagement" (SOAFI Annexure 19E) and "Relations between Australia's special forces units" (SOAFI Annexure 19F) – do not assist it.

39. However, even if the error pleaded in AOA[21] is correct, it would have no effect on the warrant's validity (cf AS[44]). If one part of a search warrant is invalid, in some circumstances it can be severed from the warrant, with the result that the warrant remains otherwise valid.[22] Indeed, a warrant is to be read and construed as valid to the extent possible.[23] The ABC bears the onus of proving that, if the s 73A suspected offences were severed, the warrant would have operated differently such that severance is not possible.[24] The ABC is unable to discharge that onus in this case. Each of the s 73A offences listed in the third condition of the warrant was accompanied by a separate offence with an overlapping physical element. On a proper construction of the warrant: (a) both the s 70(1) offence and the s 73A(1) offence hinged upon McBride's alleged disclosure of Commonwealth information to Oakes in circumstances where such disclosure was not in the course of McBride's official duty; (b) both the s 132.1 offence and the s 73A(2) offence hinged upon Oakes's alleged receipt from McBride of material that McBride had stolen from the Commonwealth, and the relevant "unlawfulness" relied upon as grounding Oakes's suspected breach of s 73A(2) was the suspected commission of the

[22] *Parker v Churchill* (1986) 9 FCR 334 at 350; *Beneficial Finance Corporation & Ors v Commissioner of Australian Federal Police & Ors* (1991) 31 FCR 523 at 545; *Caratti v Commissioner of the Australian Federal Police & Anor* (2017) 257 FCR 166 at [46].
[23] Again, because it is an "instrument" for the purpose of s 46(2) of the *Acts Interpretation Act 1901* (Cth).
[24] *Caratti v Commissioner of the Australian Federal Police & Anor* (2017) 257 FCR 166 at [46]-[49].

receiving offence in s 132.1; and (c) the s 132.1 offence was directed towards the same conduct, over the same suspected time period, as the s 73A(1) offence.

40. As a result, even if the description of the s 73A offences in the third condition of the warrant was deficient or evidenced some deficient understanding of the law (which is denied), Kane still had grounds to issue the warrant on the basis of the other offences listed in that condition. The inclusion of those other offences means that the scope of the search and seizure authorised by the warrant would not have been any narrower if the s 73A offences had been omitted. Noting the breadth of the definition of "thing relevant to an indictable offence" in s 3(1) of the Crimes Act, and of s 3F, all material that could be seized under the s 73A limbs of the third condition could equally be seized under the other limbs. To sever the s 73A offences would have no effect on the warrant's scope.

Grounds 6-7: Legal reasonableness

41. Grounds 6-7, in the narrower form the ABC now advances, allege that the decisions to seek and issue the warrant were legally unreasonable. Authority to *issue* a search warrant depends on the issuing officer's satisfaction that there are reasonable grounds for suspecting that evidential material relating to offences will be found at the premises. This is a "low threshold requirement".[25] It does not require an allegation that the offences have, in fact, been committed by named persons, or proof of those offences.[26] The warrant in this case makes clear on its face that it was issued based on such satisfaction of reasonably held suspicion. It is for the ABC to establish that Kane could not have been satisfied that there were reasonable grounds for suspecting that there would be evidential material at the ABC's premises which satisfied the three conditions of the warrant.[27] This is a "difficult and exacting task".[28] In *Caratti*, the Full Court affirmed that "the decision manifested in the search warrant issued must be read beneficially, and not with an eye keenly attuned to the perception of error".[29] The decision to *seek* the warrant was an exercise of an even broader discretion as to the use of police investigative powers. There is no evidence or suggestion that the respondents did not exercise that discretion following due and proper consideration and the formation of a genuine view that it would be appropriate to seek the warrant.[30]

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[25] *Williams v Keelty* (2001) 111 FCR 175 at [211].

[26] *SMEC Holdings Pty Ltd v Commissioner of the Australian Federal Police* [2018] FCA 609 at [38].

[27] *Williams v Keelty* (2001) 111 FCR 175 at [236]; *Wong v Commissioner, Australian Federal Police* [2014] FCA 443 at [4].

[28] *Wong v Commissioner, Australian Federal Police* [2014] FCA 443 at [4].

[29] *Caratti v Commissioner of the Australian Federal Police & Anor* (2017) 257 FCR 166 at [34].

[30] Cf the discussion in *Hinchcliffe v Commissioner of Police* (2002) 118 FCR 308 at [33]-[37].

42. The ABC advances three matters that, taken collectively, purportedly compel the conclusion that seeking and issuing the warrant was legally unreasonable. The *first*, at AS[54], is answered by [27]-[36], [38]-[39] above. *Second*, as to AS[55]: these submissions proceed on the misapprehension that the warrant was solely concerned with the investigation into and prosecution of McBride. Yet the second and fourth suspected offences specified in the warrant concerned Oakes's conduct. Even if the warrant was directed to the suspected McBride offences only, its scope would be justified. The public statements attributed to McBride do not alter the prosecutor's obligation in the McBride proceeding to prove, with admissible evidence, every element of the relevant offences to the criminal standard.[31] McBride has pleaded not guilty. His reported public statements, which are general in nature, have not always accorded with the position he has taken in court.[32] Neither when the warrant was sought, nor when it was issued, nor even now, could any certain view be taken of the issues that will be controversial when the McBride proceeding comes to trial.

43. The matters at AS[55] also do not support the ABC's assertion that the AFP knew with particularity what documents the ABC had received. Given that (a) McBride's trial has not yet occurred (SOAFI[71]); (b) press reports suggest that McBride has claimed that he disclosed documents to at least three media outlets (SAOFI Annexure 24, p482); and (c) the AFP sought to carry out a forensic procedure aimed at determining with which documents Oakes/Clark may have had contact (SOAFI Annexure 32, p495); it cannot be concluded that the AFP already knew what documents the ABC had received – let alone that it had secured all necessary evidence of the communication and receipt.

44. *Third,* the risk identified at AS[56] that documents seized under a search warrant may reveal the identity of confidential sources does not render the seeking or issuing of a search warrant legally unreasonable. There is nothing in the terms of s 3E of the Crimes Act to suggest that the risk of identifying confidential sources is a matter to which those seeking and issuing warrants must give weight, let alone treat as decisive. Search warrants, by their very nature, involve an intrusion by the state into the privacy of those to whom a search warrant is directed. The procedure by which the warrant was issued and executed took pains to preserve the rights of the ABC. The warrant was accompanied by a statement of the rights of the occupier of premises, and by explicit instructions as to how claims of legal professional privilege could be made and maintained (SOAFI, Annexure 33 pp504-505). The ABC did not have any legal *right* to protect the identity of confidential sources. Section 126K of the Evidence Act, which in any event creates a discretion exercisable by a court rather than an entitlement to confidentiality, designedly does not extend to search warrants (see [52]

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[31] See *Australian Broadcasting Corporation v Kane* [2019] FCA 1716 at [39]-[40], [45].

[32] See, eg, what is reported in SOAFI Annexure 26, p486 in relation to orders for managing national security information.

below). In addition, any potential impact on confidential sources does not render the seeking or issuing of the warrant unreasonable for the same reasons articulated at [19]-[24] above.

Ground 8: Legal Professional Privilege (LPP) claims

45. The warrant did not authorise the seizure of documents subject to LPP. But the authorities emphasise the need for focused and specific evidence in order to ground a claim for legal professional privilege.[33] In particular, verbal formulae and bare conclusory assertions of purpose are not sufficient to make out a claim for privilege.[34] In addition, if only part of a document is subject to LPP, then it is only that part of the document what can properly be withheld on the ground of LPP.

46. The Rippon affidavit makes LPP claims over 13 documents (and any duplicates). Column 3 of the table at Rippon [7] purports to provide the basis for the LPP claim. That material is insufficient to support the claims made in both scope and nature. *First,* language such as "a line in the email" or "the email chain discloses a communication" suggest that many of the documents could only give rise to a claim for part privilege. Further, in all but one case, the documents are said to "disclose" a privileged communication; only the 12th document is said to *be* a privileged communication. Logically, if only a line of the email, or one email in a chain, discloses a privileged communication, then other parts of the document are not privileged. *Second,* the affidavit contains assertions as to the dominant purpose of communications supported only by reference to the legal role of one of the parties to that communication. Contrary to the position set out in *Barnes,* there is no evidence as to the thought processes behind, or the nature and purpose of advice being sought in respect of, each document. The respondents identified these deficiencies in the ABC's supporting material in correspondence on 4 and 16 October 2019 but have not received any substantive response.

Ground 9: "Source protection" claims

47. Section 126K(1) of the Evidence Act provides that in some circumstances, a journalist is not compellable to answer questions or produce documents that would disclose the identity of a confidential informant. Section 126K is given an extended operation in s 131A. Both provisions stand against the ABC's contentions in this proceeding. Three features of the statutory text make this clear. *First*, s 131A of the Commonwealth Act extends s 126K to specified "disclosure requirements" set out in s 131A(2) including subpoenas, interrogatories and notices to produce, but **not** search warrants (unlike s 131A of the *Evidence Act 2008* (Vic)). When the Commonwealth Parliament first introduced

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[33] *Barnes v Federal Commissioner of Taxation* (2007) 67 ATR 284 at [18].

[34] *Kennedy v Wallace* (2004) 142 FCR 185 at [13].

"journalist privilege", and enacted s 131A, in response to ALRC Report 102, it deliberately chose not to implement the ALRC's recommendation to extend that protection to the search warrant context.[35] And when it amended s 131A by the *Evidence Amendment (Journalists' Privilege) Act 2011* (Cth), it left s 131A(2) unaltered. *Second,* unlike LPP, s 126K does not reflect any pre-existing common law right. "Journalist privilege" is a creation of the Evidence Act. Its scope is therefore determined by a conventional process of statutory interpretation. *Third,* the protection of s 126K is discretionary. Section 126K(2) provides that a court may order that s 126K(1) is not to apply, if satisfied that the public interest in the disclosure of evidence outweighs other factors identified in s 126K(2)(a) and (b).

48. The argument at AS[60] that s 126K "implicitly extends" to search warrants is without foundation. A discretionary rule of evidence, created by the Evidence Act, cannot be "impliedly extended" to operate as a substantive rule of law in relation to a disclosure requirement excluded from s 126K. The passage quoted from *Baker v Campbell* (1983) 153 CLR 52 at 95-96 in fact demonstrates this point. LPP is a substantive rule of law and not a mere rule of evidence, in contrast to the discretionary immunity conferred by s 126K.[36] "Source protection" is not in this sense "analogous" to LPP (cf AS[60]).

49. Even if "source protection" could function as a substantive common law right, which plainly it cannot, it could support, at most, partial redactions of the documents over which the ABC makes claims (which documents the respondents' representatives have accessed on a confidential basis, putting aside 3 documents that the ABC has not yet provided). It would not support any claims in respect of material revealing the identity of McBride, who identified himself as the source of what the ABC published.[37]

Relief

50. The application should be dismissed with costs. Should, contrary to these submissions, the ABC succeed in respect of one or more of these grounds or part thereof, the respondents would seek to be heard as to the relief, if any, that ought to flow from that success.[38]

Dated: 18 October 2019

Neil Williams SC, Celia Winnett and Alison Hammond
Sixth Floor Selborne Chambers

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[35] See ALRC Report 102 (2005), Recommendation 14-1; Explanatory Memorandum for the Evidence Amendment (Journalists' Privilege) Bill 2007 at [19] ("the privilege does not apply to investigatory and other non-curial processes such as search warrants").

[36] See *Glencore International AG v Federal Commissioner of Taxation* (2019) 93 ALJR 967 at [21].

[37] See SOAFI Annexure 27 and *Ashby v Commonwealth (No 2)* (2012) 203 FCR 440 at [30]-[31].

[38] See *Caratti v Commissioner of the Australian Federal Police (No 2)* [2016] FCA 1132 at [461]; *Cassaniti v Croucher* (1997) 37 ATR 269 at 280; *Wright v Queensland Police Service* [2002] 2 Qd R 667 at [57].