

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 24/06/2019 3:18:00 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Affidavit - Form 59 - Rule 29.02(1)
File Number: NSD989/2019
File Title: AUSTRALIAN BROADCASTING CORPORATION v MARTIN KANE & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Dated: 25/06/2019 9:43:03 AM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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



Form 59
Rule 29.02(1)

Affidavit

No. of 2019

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

Australian Broadcasting Corporation

Applicant

Martin Kane and others

Respondents

Affidavit of: **Michael Antony Rippon**
Address: C/- ABC Ultimo Centre, 700 Harris Street, Ultimo NSW 2007
Occupation: Solicitor
Date: 24 June 2019

Contents

Document number	Details	Paragraph	Page
1	Affidavit of Michael Antony Rippon in support of an originating application for relief pursuant to section 39B of the <i>Judiciary Act 1903</i> (Cth) and section 5 of the <i>Administrative Decisions (Judicial Review) Act 1977</i> (Cth), affirmed on 24 June 2019.	1	1
2	Annexure "MR1", being copy of the Search Warrant.	5	4
3	Annexure "MR2", being copy of Search Warrant attachment #1.	7	13
4	Annexure "MR3", being copy of Search Warrant attachment #2.	8	16

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)

[Version 3 form approved 02/05/2019]

I, Michael Antony Rippon, affirm:

1. I am a solicitor in the employment of the Applicant and I am authorised to make this affidavit on the Applicant's behalf.
2. I presently have carriage of this matter on behalf of the Applicant.
3. The content of this affidavit is based on my own knowledge and belief unless otherwise indicated.
4. I make this affidavit in support of the Applicant's application for relief pursuant to section 39B of the *Judiciary Act 1903* (Cth) and section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) set out in the Originating Application dated 24 June 2019.
5. The relief applied for by the Applicant concerns a search warrant purportedly issued under section 3E(1) of the *Crimes Act 1914* (Cth) by the First Respondent on 3 June 2019 and purporting to authorise the search of and seizure of materials from the Applicant's premises at ABC Ultimo Centre, 700 Harris Street, Ultimo in the State of New South Wales (**Search Warrant**).
6. A copy of the Search Warrant was provided to me on 5 June 2019 by the Third Respondent, Agent Ian Brumby of the Australian Federal Police. Annexed hereto and marked "**MR1**" is a copy of the Search Warrant.
7. Annexed hereto and marked "**MR2**" is a copy of a document entitled "CLAIMS FOR LEGAL PROFESSIONAL PRIVILEGE: PREMISES OTHER THAN THOSE OF A LAWYER, LAW SOCIETY OR LIKE INSTITUTION.", which is referred to at page 6 of the Search Warrant and a copy of which was provided to me on 5 June 2019 by the Third Respondent (**Search Warrant attachment #1**).



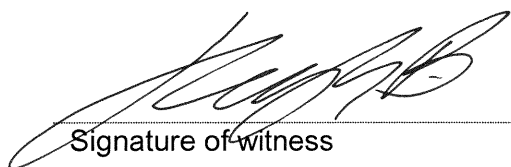
8. Annexed hereto and marked "MR3" is a copy of a document entitled "SEARCH OF PREMISES: RIGHTS OF THE OCCUPIER", which is referred to at page 7 of the Search Warrant and a copy of which was provided to me on 5 June 2019 by the Third Respondent (**Search Warrant attachment #2**).

Affirmed by the deponent
at Ultimo
in New South Wales
on 24 June 2019
Before me:

)
)
)
)
)



Signature of deponent



Signature of witness

Hugh Bennett, Solicitor

No. of 2019

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

Australian Broadcasting Corporation

Applicant

Martin Kane and others

Respondents

This is the annexure marked "**MR1**" referred to in the affidavit of Michael Antony Rippon affirmed before me on 24 June 2019 at Ultimo.

Signature of witness



Name of witness

Hugh Bennett

Qualification of witness

Solicitor

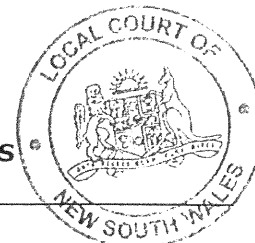
Address of witness

C/- 700 Harris Street, Ultimo NSW 2007

COMMONWEALTH OF AUSTRALIA

CRIMES ACT 1914: SECTION 3E

SEARCH WARRANT FOR SEARCH OF A PREMISES



To: Ian Robert Brumby
a constable within the meaning of the *Crimes Act 1914*, who is the executing officer in relation to this warrant;

And to any other constable whose name may be written on this warrant in accordance with section 3C(1) of the *Crimes Act 1914*, in which event that constable shall be the executing officer in relation to this warrant:

Whereas I Martin Kane
Registrar

an issuing officer within the meaning of section 3E of the *Crimes Act 1914*, am satisfied by information on oath that there are reasonable grounds for suspecting that there is (or will within the next 72 hours be) at the premises located at:

The Australian Broadcasting Corporation (ABC), ABC Ultimo Centre, 700 Harris Street, Ultimo in the State of New South Wales

evidential material, as defined in the *Crimes Act 1914*, which satisfies ALL of the following three conditions namely:

First condition: Things which are:

originals or copies of any one or more of the following, including any of them which are stored on a computer, or on a computer storage device, or on any other type of storage medium or storage device:

- Handwritten/digital notes
- Diary/ies
- Correspondence – internal and external
- Emails and other electronic forms of messaging
- Minutes
- Reports
- Briefing Documents
- Assessments
- Graphics, sketches, photographs or imagery/vision – drafts and final
- Story pitch
- Planning logs
- Broadcast and online schedules
- Raw or unedited footage in its entirety

- Journalist's piece to camera
- Scripts – drafts and finals including voice overs
- Story boards/plans
- Status updates
- Website content
- Documents classified as 'Secret'

Together with any manual, instruction, password or other thing that assists to gain access to or interpret or decode any of the above things.

Second condition: And which relate to any one or more of the following:

- David McBRIDE
- Daniel (Dan) OAKES
- Samuel (Sam) CLARK
- Gaven MORRIS
- Chris SMITH
- Australian Broadcasting Corporation (ABC)
- National Reporting Team
- Australian Defence Force (ADF)
- Department of Defence
- The Australian Army
- Special Forces
- Special Operations Command (SOCOMD)
- Special Operations Task Group (SOTG)
- Special Air Service Regiment (SASR)
- 2nd Commando Company (2CDO)
- Headquarters Joint Operations Command (HQJOC)
- Operation SLIPPER
- Afghanistan
- The 7.30 Report
- The Afghan Files
- Inside the Afghan Files
- Rules of Engagement
- The Ops Room
- Ghost Three Zero
- Chief of the Defence Force (CDF)
- Acting (and/or) Secretary of Defence
- Chief of Army (CA)

- Chief of Joint Operations (CJOPS)
- <http://theopsroom.com>
- <https://www.abc.net.au/news/2017-07-11/inside-the-afghan-files/8696182>
- <https://www.facebook.com/abcnews.au/videos/inside-the-afghan-files/10156950722999988/>
- <https://www.abc.net.au/7.30/afghan-veteran-raises-disturbing-allegations-over/8695400>
- <https://www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642>
- <https://www.abc.net.au/news/2017-07-11/defence-inquiry-investigating-killing-of-taliban-detainee-in-hut/8616602>
- <https://www.abc.net.au/news/2017-07-11/unarmed-men,-children-among-casualties-of-elite-forces/8424944>
- <https://www.abc.net.au/news/2017-07-11/the-spy-and-the-sas-solider-with-a-loaded-glock/8496608>
- <https://www.abc.net.au/news/2017-07-11/afghan-files-australias-secretive-rules-of-engagement/8496672>
- <https://www.abc.net.au/news/2017-07-11/afghan-files-shed-light-on-notorious-severed-hands-case/8496654>
- <https://www.abc.net.au/news/2017-07-11/relations-between-australias-special-forces-units-unhealthy/8496616>

Third condition:

And as to which there are reasonable grounds for suspecting that they will afford evidence as to the commission of the following indictable offence(s) against the laws of the Commonwealth:

Between 14 April 2016 and 1 October 2016, David William McBride gave Daniel Michael Oakes military information, contrary to section 73A(1) of the *Defence Act 1903* (Cth).

Between 14 April 2016 and 1 October 2016, Daniel Michael Oakes unlawfully obtained military information, contrary to section 73A(2) of the *Defence Act 1903* (Cth).

Between 1 March 2013 and 20 December 2014, David William McBride stole property belonging to the Commonwealth, contrary to section 131.1(1) of the *Criminal Code Act 1995* (Cth).

About Between 14 April 2016 and 1 October 2016, Daniel Michael Oakes dishonestly received stolen property from David William McBride, knowing or believing that the property was stolen, contrary to section 132.1 of the *Criminal Code Act 1995* (Cth).

About 1 May 2016, David William McBride unlawfully disclosed a fact or document which came into his knowledge by virtue of him being a Commonwealth officer,

contrary to section 70(1) of the *Crimes Act 1914* (Cth)

I hereby issue this warrant which authorises you to enter and search the premises described above.

AND by virtue of section 3F(1) of the *Crimes Act 1914* this warrant authorises the executing officer or a constable assisting to do all of the following;

- enter the premises described above at anytime and execute the warrant;
- if the premises are a conveyance, to enter the conveyance, wherever it is;
- search for and record fingerprints found at the premises and to take samples of things found at the premises for forensic purposes;
- search the premises for any evidential material that satisfies ALL of the three conditions specified above and to seize any such evidential material that may be found;
- seize any other thing found at the premises in the course of the search that the executing officer or the constable assisting believes on reasonable grounds to be:
 - (i) evidential material in relation to an offence to which the warrant relates;
 - (ii) evidential material in relation to another offence that is an indictable offence; or
 - (iii) evidential material (within the meaning of the *Proceeds of Crime Act 2002*) or tainted property (within the meaning of that Act).

if the executing officer or the constable assisting believes on reasonable grounds that seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing an offence;

- seize any other thing found at the premises in the course of the search that the executing officer or the constable assisting believes on reasonable grounds to be a seizable item, in that it is a thing that would present a danger to a person or that could be used to assist a person to escape from lawful custody.

AND by virtue of section 3F(2A) of the *Crimes Act 1914* this warrant authorises the executing officer or a constable assisting to do all of the following:

- to use:
 - a computer, or data storage device, found in the course of a search authorised under the warrant; or
 - a telecommunications facility operated or provided by the Commonwealth or a carrier; or
 - any other electronic equipment; or
 - a data storage device;

for the purpose of obtaining access to data (the **relevant data**) that is held in the computer or device found in the course of a search authorised under the warrant at any time when the warrant is in force, in order to determine

whether the relevant data is evidential material of a kind specified in the warrant; and

- if necessary to achieve the purpose mentioned above - to add, copy, delete or alter other data in the computer or device found in the course of a search authorised under the warrant; and
- if, having regard to other methods (if any) of obtaining access to the relevant data which are likely to be as effective, it is reasonable in all the circumstances to do so:
 - to use any other computer or a communication in transit to access the relevant data; and
 - if necessary to achieve that purposes - to add, copy, delete or alter other data in the computer or the communication in transit; and
- to copy any data to which access has been obtained, and that:
 - appears to be relevant for the purposes of determining whether the relevant data is evidential material of a kind specified in the warrant; or
 - is evidential material of a kind specified in the warrant; and
- to do any other thing reasonably incidental to any of the above authorised by section 3F(2A).

AND by virtue of section 3F(2B) of the *Crimes Act 1914* this warrant authorises the executing officer or a constable assisting to do all of the following:

- to use:
 - a computer found in the course of a search authorised under the warrant; or
 - a telecommunications facility operated or provided by the Commonwealth or a carrier;
 - any other electronic equipment;

for the purpose of obtaining access to data (the **relevant account-based data**) that is account-based data in relation to:

- a person who is the owner or lessee of the computer found in the course of a search authorised under the warrant; or
- a person who uses or has used the computer found in the course of a search authorised under the warrant;
- a deceased person who, before the person's death, was the owner or lessee of the computer found in the course of a search authorised under the warrant; or
- a deceased person who, before the person's death, used the computer found in the course of a search authorised under the warrant;

in order to determine whether the relevant account-based data is evidential material of a kind specified in the warrant; and

- if necessary to achieve the purpose mentioned above - to add, copy, delete or alter other data in the computer found in the course of a search authorised under the warrant; and

- if, having regard to other methods (if any) of obtaining access to the relevant account-based data which are likely to be as effective, it is reasonable in all the circumstances to do so:
 - to use any other computer or a communication in transit to access the relevant account-based data; and
 - if necessary to achieve that purpose-to add, copy, delete or alter other data in the computer or the communication in transit; and
- to copy any data to which access has been obtained, and that:
 - appears to be relevant for the purposes of determining whether the relevant account-based data is evidential material of a kind specified in the warrant; or
 - is evidential material of a kind specified in the warrant; and
- to do any other thing reasonably incidental to any of the above authorised by section 3F(2B).

This warrant does not authorise the executing officer or a constable assisting to conduct a search of a person who is at or near the premises when the warrant is executed.

And, by virtue of section 3G of the *Crimes Act 1914*, in executing this warrant:

- the executing officer may obtain such assistance as is necessary and reasonable in the circumstances;
- the executing officer, and any constable assisting in the execution of this warrant who is a police officer, may use such force against persons or things as is necessary and reasonable in the circumstances; and
- any person who has been authorised by the executing officer to assist in the execution of this warrant, but who is not a police officer, may use such force against things as is necessary and reasonable in the circumstances;

And the executing officer or a constable assisting may exercise such other of the powers available under Division 2 of Part IAA of that Act as are appropriate in the circumstances of the case;

And if you exercise the power under section 3L(4) of the *Crimes Act 1914* to secure electronic equipment on the premises, and if you then leave the premises, this warrant authorises a further entry to the premises to allow an expert to operate the equipment, provided that the further entry is made within 24 hours or such further period as may be authorised under that Act.

The offences to which this warrant relates are those specified above in the third condition.

Legal Professional Privilege

NOTE: This warrant is issued in recognition that a claim for legal professional privilege may be made in respect of documents covered by this warrant and on the understanding that, if that occurs, the executing officer will, as far as is reasonably practicable, follow the course of action set out in the document entitled "Claims for Legal Professional Privilege: Premises other than those of a Lawyer, Law Society or Like Institution" a copy of which is attached to this warrant.

NOTE the following:

"Evidential material" is defined in section 3C(1) of the *Crimes Act 1914* to mean:

a thing relevant to an indictable offence or a thing relevant to a summary offence, including such a thing in electronic form.

"Thing relevant to an indictable offence" is defined in section 3(1) of the *Crimes Act 1914* to mean:

- (a) either of the following:
 - (i) anything with respect to which an indictable offence against any law of the Commonwealth or of a Territory has been committed or is suspected, on reasonable grounds, to have been committed;
 - (ii) anything with respect to which a State offence that has a federal aspect, and that is an indictable offence against the law of that State, has been committed or is suspected, on reasonable grounds, to have been committed; or
- (b) anything as to which there are reasonable grounds for suspecting that it will afford evidence as to the commission of any such offence; or
- (c) anything as to which there are reasonable grounds for suspecting that it is intended to be used for the purpose of committing any such offence;

"Thing relevant to a summary offence" is defined in section 3(1) of the *Crimes Act 1914* to mean:

- (a) either of the following:
 - (i) anything with respect to which a summary offence against any law of the Commonwealth or of a Territory has been committed or is suspected, on reasonable grounds, to have been committed;
 - (ii) anything with respect to which a State offence that has a federal aspect, and that is a summary or simple offence against the law of that State, has been committed or is suspected, on reasonable grounds, to have been committed; or
- (b) anything as to which there are reasonable grounds for suspecting that it will afford evidence as to the commission of any such offence; or
- (c) anything as to which there are reasonable grounds for suspecting that it is intended to be used for the purpose of committing any such offence.

Statement of rights of the occupier

A statement of the rights of the occupier of premises is attached to this warrant.

This warrant may be executed at any time.

The time at which this warrant expires is midnight at the end of the seventh day after the day on which the warrant is issued (or lesser period).

GIVEN under my hand at Queanbeyan

in the State of New South Wales

this 3rd day of June 2019





Martin Kane
Registrar

Other person employed in a court who is authorised to issue search warrants.

No. of 2019

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

Australian Broadcasting Corporation

Applicant

Martin Kane and others

Respondents

This is the annexure marked “**MR2**” referred to in the affidavit of Michael Antony Rippon affirmed before me on 24 June 2019 at Ultimo.

Signature of witness



Name of witness

Hugh Bennett

Qualification of witness

Solicitor

Address of witness

C/- 700 Harris Street, Ultimo NSW 2007

**CLAIMS FOR LEGAL PROFESSIONAL PRIVILEGE:
PREMISES OTHER THAN THOSE OF A LAWYER, LAW SOCIETY OR LIKE
INSTITUTION.**

These guidelines should be followed by the executing officer or a constable assisting in any case where a search warrant is being executed on premises other than those of a Lawyer, Law Society or Like Institution and there is a claim for Legal Professional Privilege (or Client Legal Privilege) in respect of documents that are on the premises.

1. The officer may look at each document briefly, and without reading the contents, to determine the general nature of the document and to assess whether the document appears to be relevant to the matters under investigation and whether it appears likely that the document contains privileged material (in JMA Accounting Pty Ltd v CofT [2004] 211 ALR 380 the Full Federal Court ruled that it is not a breach of LPP for an investigator to look at a privileged document for these purposes).
2. If the officer decides that the document is not relevant to the matters under investigation they should return it to the occupier and proceed with the remainder of the search.
3. Similarly if the officer is satisfied, on the basis of a brief examination, that the document is clearly covered by Legal Professional Privilege they should return it to the occupier and proceed with the remainder of the search.
4. If the officer decides that the document appears to relevant to the matters under investigation and forms the view, on the basis of a brief examination, that the document is clearly not covered by Legal Professional Privilege they are entitled to seize the document under the authority of the search warrant.
5. If the officer decides that the document appears to be relevant to the matters under investigation, but cannot form a view on whether or not the document is covered by Legal Professional Privilege, the officer can ask the occupier if they are prepared to agree to follow the procedure set out in this document so that the claim for privilege can be resolved.
6. The relevant procedure is as follows:

The executing officer or a constable assisting will prepare a list of all relevant documents in cooperation with the occupier. The list should show the general nature of each document, the ground on which privilege is claimed, and the name of the person claiming privilege;

The documents will be placed in an envelope or other container which will be sealed;

The list and the container will be signed by the executing officer or constable assisting and the occupier;

The sealed container and a copy of the list will be delivered to a third party agreed between the executing officer or constable assisting and the occupier;

The third party shall hold the container and the copy of the list pending resolution of the claim for privilege;

Subject to any agreement to the contrary, the person claiming privilege will have four working days after delivery to the third party in which to commence proceedings to establish the privilege claimed. If proceedings are commenced within that time the sealed container and the copy of the list will be delivered to the registrar of the court in which the proceedings have been brought. The documents will then be held by the registrar pending the order of the court;

If proceedings are not commenced within four working days, or such other period as may be agreed, the third party will deliver the documents, or such of them as the executing officer still wishes to examine, to the executing officer and the executing officer will then deal with the documents as if they had been seized under the search warrant at the time of search;

Nothing in the previous dot points prevents the executing officer from discussing a claim for privilege with the person raising the claim. If agreement can be reached on which documents are covered by legal professional privilege, and which are not, the third party will be asked to act in accordance with that agreement.

7. If the occupier agrees to comply with that procedure, and to be bound by it, the officer should proceed to implement the procedure.
8. If the occupier does not agree to comply with that procedure, the executing officer or constable assisting may proceed to execute the search warrant doing the best they can to ensure that they do not read or seize privileged material. There can be no guarantee that they will not inadvertently read or seize privileged material.

No. of 2019

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

Australian Broadcasting Corporation

Applicant

Martin Kane and others

Respondents

This is the annexure marked "**MR3**" referred to in the affidavit of Michael Antony Rippon affirmed before me on 24 June 2019 at Ultimo.

Signature of witness



Name of witness

Hugh Bennett

Qualification of witness

Solicitor

Address of witness

C/- 700 Harris Street, Ultimo NSW 2007

CRIMES ACT 1914

SEARCH OF PREMISES: RIGHTS OF THE OCCUPIER

The following provisions of the Crimes Act 1914 set out the rights of an occupier of premises searched pursuant to a warrant under that Act.

Details of warrant to be given to occupier etc.

- 3H(1) If a warrant in relation to premises is being executed and the occupier of the premises or another person who apparently represents the occupier is present at the premises, the executing officer or a constable assisting must make available to that person a copy of the warrant.
- (2) Not applicable.
- (3) If a person is searched under a warrant in relation to premises, the executing officer or a constable assisting must show the person a copy of the warrant.
- (4) The executing officer must identify himself or herself to the person at the premises or the person being searched, as the case may be.
- (5) The copy of the warrant referred to in subsections (1) and (2) need not include the signature of the issuing officer or the seal of the relevant court.

Use of equipment to examine or process things

Equipment may be brought to warrant premises

- 3K(1) The executing officer of a warrant in relation to premises, or constable assisting, may bring to the warrant premises any equipment reasonably necessary for the examination or processing of a thing found at the premises in order to determine whether it is a thing that may be seized under the warrant.

Thing may be moved for examination or processing

- (2) A thing found at warrant premises, or a thing found during a search under a warrant that is in force in relation to a person, may be moved to another place for examination or processing in order to determine whether it may be seized under a warrant if:
- (a) both of the following apply:
 - (i) it is significantly more practicable to do so having regard to the timeliness and cost of examining or processing the thing at another place and the availability of expert assistance;
 - (ii) the executing officer or constable assisting suspects on reasonable grounds that the thing contains or constitutes evidential material; or
 - (b) for a thing found at warrant premises - the occupier of the premises consents in writing; or
 - (c) for a thing found during a search under a warrant that is in force in relation to a person – the person consents in writing.

Notification of examination or processing and right to be present

- (3) If a thing is moved to another place for the purpose of examination or processing under subsection (2), the executing officer must, if it is practicable to do so:
- (a) inform the person referred to in paragraph (2)(b) or (c) (as the case requires) of the address of the place and the time at which the examination or processing will be carried out; and
 - (b) allow that person or his or her representative to be present during the examination or processing.
- (3AA) The executing officer need not comply with paragraph 3(a) or (b) if he or she believes on reasonable grounds that to do so might:
- (a) endanger the safety of a person; or
 - (b) prejudice an investigation or prosecution.

Time limit on moving a thing

- (3A) The thing may be moved to another place for examination or processing for no longer than whichever of the following is applicable:
- (a) if the thing is a computer or data storage device—30 days;
 - (b) otherwise—14 days.
- (3B) An executing officer may apply to an issuing officer for one or more extensions of that time if the executing officer believes on reasonable grounds that the thing cannot be examined or processed within the time applicable under subsection (3A) or that time as previously extended.
- (3C) The executing officer must give notice of the application to the person referred to in paragraph (2)(b) or (c) (as the case requires), and that person is entitled to be heard in relation to the application.
- (3D) A single extension cannot exceed whichever of the following is applicable:
- (a) if the thing is a computer or data storage device—14 days;
 - (b) otherwise—7 days.

Equipment at warrant premises may be operated

- (4) The executing officer of a warrant in relation to premises, or a constable assisting, may operate equipment already at the warrant premises to carry out the examination or processing of a thing found at the premises in order to determine whether it is a thing that may be seized under the warrant if the executing officer or constable believes on reasonable grounds that:
- (a) the equipment is suitable for the examination or processing; and
 - (b) the examination or processing can be carried out without damage to the equipment or the thing.

Extended powers of examination and processing

- (5) For the purposes of this section, if a computer or data storage device (the **relevant computer or device**) was found in the course of a search authorised under a warrant, the examination or processing of the relevant computer or device may include:
- (a) using:
 - (i) the relevant computer or device; or

- (ii) a telecommunications facility operated or provided by the Commonwealth or a carrier; or
- (iii) any other electronic equipment; or
- (iv) a data storage device

for the purpose of obtaining access to data (the *relevant data*) that is held in the relevant computer or device in order to determine whether the relevant computer or device is a thing that may be seized under the warrant; and

- (b) if necessary to achieve the purpose mentioned in paragraph (a)—to add, copy, delete or alter other data in the relevant computer or device; and
 - (c) if, having regard to other methods (if any) of obtaining access to the relevant data which are likely to be as effective, it is reasonable in all the circumstances to do so:
 - (i) to use any other computer or a communication in transit to access the relevant data; and
 - (ii) if necessary to achieve that purpose—to add, copy, delete or alter other data in the computer or the communication in transit; and
 - (d) to copy any data to which access has been obtained, and that appears to be relevant for the purposes of determining whether the relevant computer or device is a thing that may be seized under the warrant; and
 - (e) to do any other thing reasonably incidental to any of the above.
- (6) For the purposes of this section, if a computer (the *relevant computer*) was found in the course of a search authorised under a warrant, the examination or processing of the relevant computer may include:
- (a) using:
 - (i) the relevant computer; or
 - (ii) a telecommunications facility operated or provided by the Commonwealth or a carrier; or
 - (iii) any other electronic equipment;

for the purpose of obtaining access to data (the *relevant account-based data*) that is account-based data in relation to:

- (iv) a person who is the owner or lessee of the relevant computer; or
- (v) a person who uses or has used the relevant computer; or
- (vi) a deceased person who, before the person's death, was the owner or lessee of the relevant computer; or
- (vii) a deceased person who, before the person's death, used the relevant computer;

in order to determine whether the relevant computer is a thing that may be seized under the warrant; and

- (b) if necessary to achieve the purpose mentioned in paragraph (a)—to add, copy, delete or alter other data in the relevant computer; and
- (c) if, having regard to other methods (if any) of obtaining access to the relevant account-based data which are likely to be as effective, it is reasonable in all the circumstances to do so:
 - (i) to use any other computer or a communication in transit to access the relevant account-based data; and

- (ii) if necessary to achieve that purpose—to add, copy, delete or alter other data in the computer or the communication in transit; and
 - (d) to copy any data to which access has been obtained, and that appears to be relevant for the purposes of determining whether the relevant computer is a thing that may be seized under the warrant; and
 - (e) to do any other thing reasonably incidental to any of the above.
- (7) Subsections (5) and (6) do not authorise the addition, deletion or alteration of data, or the doing of any thing, that is likely to:
- (a) materially interfere with, interrupt or obstruct:
 - (i) a communication in transit; or
 - (ii) the lawful use by other persons of a computer;

unless the addition, deletion or alteration, or the doing of the thing, is necessary to determine:

- (iii) in the case of subsection (5)—whether the relevant computer or device is a thing that may be seized under the warrant referred to in that subsection; or
 - (iv) in the case of subsection (6)—whether the relevant computer is a thing that may be seized under the warrant referred to in that subsection; or
 - (b) cause any other material loss or damage to other persons lawfully using a computer.
- (8) In the case of a warrant that was in force in relation to premises, it is immaterial whether a thing mentioned in subsection (5) or (6) is done:
- (a) at the premises; or
 - (b) at any other place.
- (9) In the case of a warrant that was in force in relation to a person, it is immaterial whether a thing mentioned in subsection (5) or (6) is done:
- (a) in the presence of the person; or
 - (b) at any other place.

Use of electronic equipment at premises

- 3L(1) The executing officer of a warrant in relation to premises, or a constable assisting, may operate electronic equipment at the warrant premises to access data (including data not held at the premises) if he or she suspects on reasonable grounds that the data constitutes evidential material.

Note: A constable can obtain an order requiring a person with knowledge of a computer or computer system to provide assistance: see section 3LA.

- (1A) If the executing officer or constable assisting suspects on reasonable grounds that any data accessed by operating the electronic equipment constitutes evidential material, he or she may:
- (a) copy any or all of the data accessed by operating the electronic equipment to a disk, tape or other associated device brought to the premises; or
 - (b) if the occupier of the premises agrees in writing—copy any or all of the data accessed by operating the electronic equipment to a disk, tape or other associated device at the premises;

and take the device from the premises.

(1B) If:

- (a) the executing officer or constable assisting takes the device from the premises; and
- (b) the Commissioner is satisfied that the data is not required (or is no longer required) for a purpose mentioned in section 3ZQU or for other judicial or administrative review proceedings;

the Commissioner must arrange for:

- (c) the removal of the data from any device in the control of the Australian Federal Police; and
- (d) the destruction of any other reproduction of the data in the control of the Australian Federal Police.

- (2) If the executing officer or a constable assisting, after operating the equipment, finds that evidential material is accessible by doing so, he or she may:
 - (a) seize the equipment and any disk, tape or other associated device; or
 - (b) if the material can, by using facilities at the premises, be put in documentary form - operate the facilities to put the material in that form and seize the documents so produced.
- (3) A constable may seize equipment under paragraph (2)(a) only if:
 - (a) it is not practicable to copy the data as mentioned in subsection (1A) or to put the material in documentary form as mentioned in paragraph (2)(b); or
 - (b) possession by the occupier of the equipment could constitute an offence.
- (4) If the executing officer or a constable assisting suspects on reasonable grounds that:
 - (a) evidential material may be accessible by operating electronic equipment at the premises; and
 - (b) expert assistance is required to operate the equipment; and
 - (c) if he or she does not take action under this subsection, the material may be destroyed, altered or otherwise interfered with;

he or she may do whatever is necessary to secure the equipment, whether by locking it up, placing a guard or otherwise.

- (5) The executing officer or a constable assisting must give notice to the occupier of the premises of his or her intention to secure equipment and of the fact that the equipment may be secured for up to 24 hours.
- (6) The equipment may be secured:
 - (a) for a period not exceeding 24 hours; or
 - (b) until the equipment has been operated by the expert; whichever happens first.
- (7) If the executing officer or a constable assisting believes on reasonable grounds that the expert assistance will not be available within 24 hours, he or she may apply to an issuing officer for an extension of that period.
- (8) The executing officer or a constable assisting must give notice to the occupier of the premises of his or her intention to apply for an extension, and the occupier is entitled to be heard in relation to the application.

- (9) The provisions of this Division relating to the issue of warrants apply, with such modifications as are necessary, to the issuing of an extension.

Use of electronic equipment at other place

- 3LAA(1) If electronic equipment is moved to another place under subsection 3K(2), the executing officer or a constable assisting may operate the equipment to:
- (a) access data (including data held at another place); or
 - (b) access account-based data.
- (2) If the executing officer or constable assisting suspects on reasonable grounds that any data accessed by operating the electronic equipment constitutes evidential material, he or she may copy any or all of the data accessed by operating the electronic equipment to a disk, tape or other associated device.
- (3) If the Commissioner is satisfied that the data is not required (or is no longer required) for a purpose mentioned in section 3ZQU or for other judicial or administrative review proceedings, the Commissioner must arrange for:
- (a) the removal of the data from any device in the control of the Australian Federal Police; and
 - (b) the destruction of any other reproduction of the data in the control of the Australian Federal Police.
- (4) If the executing officer or a constable assisting, after operating the equipment, finds that evidential material is accessible by doing so, he or she may:
- (a) seize the equipment and any disk, tape or other associated device; or
 - (b) if the material can be put in documentary form – put the material in that form and seize the documents so produced.
- (5) A constable may seize equipment under paragraph (4)(a) only if:
- (a) it is not practicable to copy the data as mentioned in subsection (2) or to put the material in documentary form as mentioned in paragraph (4)(b); or
 - (b) possession of the equipment, by the person referred to in paragraph 3K(2)(a) or (b) (as the case requires) could constitute an offence.

Person with knowledge of a computer or a computer system to assist access etc.

- 3LA(1) A constable may apply to a magistrate for an order requiring a specified person to provide any information or assistance that is reasonable and necessary to allow a constable to do one or more of the following:
- (a) access data held in, or accessible from, a computer or data storage device that:
 - (i) is on warrant premises; or
 - (ia) is found in the course of an ordinary search of a person, or a frisk search of a person, authorised by a warrant under section 3E; or
 - (ii) has been moved under subsection 3K(2) and is at a place for examination or processing; or
 - (iii) has been seized under this Division;
 - (b) copy data held in, or accessible from, a computer, or data storage device, described in paragraph (a) to another data storage device;
 - (c) convert into documentary form or another form intelligible to a constable:
 - (i) data held in, or accessible from, a computer, or data storage device, described in paragraph (a); or

- (ii) data held in a data storage device to which the data was copied as described in paragraph (b); or
 - (iii) data held in a data storage device removed from warrant premises under subsection 3L(1A).
- (2) The magistrate may grant the order if the magistrate is satisfied that:
- (a) there are reasonable grounds for suspecting that evidential material is held in, or is accessible from, the computer or data storage device; and
 - (b) the specified person is:
 - (i) reasonably suspected of having committed the offence stated in the relevant warrant; or
 - (ii) the owner or lessee of the computer or device; or
 - (iii) an employee of the owner or lessee of the computer or device; or
 - (iv) a person engaged under a contract for services by the owner or lessee of the computer or device; or
 - (v) a person who uses or has used the computer or device; or
 - (vi) a person who is or was a system administrator for the system including the computer or device; and
 - (c) the specified person has relevant knowledge of:
 - (i) the computer or device or a computer network of which the computer or device forms or formed a part; or
 - (ii) measures applied to protect data held in, or accessible from, the computer or device.
- (3) If:
- (a) the computer or data storage device that is the subject of the order is seized under this Division; and
 - (b) the order was granted on the basis of an application made before the seizure;

the order does not have effect on or after the seizure.

Note: An application for another order under this section relating to the computer or data storage device may be made after the seizure.

- (4) If the computer or data storage device is not on warrant premises, the order must:
- (a) specify the period within which the person must provide the information or assistance; and
 - (b) specify the place at which the person must provide the information or assistance; and
 - (c) specify the conditions (if any) determined by the magistrate as the conditions to which the requirement on the person to provide the information or assistance is subject.

Offences

- (5) A person commits an offence if:
- (a) the person is subject to an order under this section; and
 - (b) the person is capable of complying with a requirement in the order; and
 - (c) the person omits to do an act; and
 - (d) the omission contravenes the requirement.

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

- (6) A person commits an offence if:
- (a) the person is subject to an order under this section; and
 - (b) the person is capable of complying with a requirement in the order; and
 - (c) the person omits to do an act; and
 - (d) the omission contravenes the requirement; and
 - (e) the offence to which the relevant warrant relates is:
 - (i) a serious offence; or
 - (ii) a serious terrorism offence.

Penalty for contravention of this subsection: Imprisonment for 10 years or 600 penalty units, or both.

Compensation for damage to equipment

3M(1) This section applies if:

- (a) as a result of equipment being operated as mentioned in section 3K, 3L or 3LAA:
 - (i) damage is caused to the equipment; or
 - (ii) damage is caused to data recorded on the equipment or data access to which was obtained from the operation of the equipment; or
 - (iii) programs associated with the use of the equipment, or with the use of the data, are damaged or corrupted; and
 - (b) the damage or corruption occurs because:
 - (i) insufficient care was exercised in selecting the person who was to operate the equipment; or
 - (ii) insufficient care was exercised by the person operating the equipment.
- (2) The Commonwealth must pay the owner of the equipment, or the user of the data or programs, such reasonable compensation for the damage or corruption as the Commonwealth and the owner or user agree on.
- (3) However, if the owner or user and the Commonwealth fail to agree, the owner or user may institute proceedings in a court of competent jurisdiction for such reasonable amount of compensation as the court determines.
- (4) In determining the amount of compensation payable, regard is to be had to whether any of the following persons, if they were available at the time, provided any appropriate warning or guidance on the operation of the equipment:
- (a) if the equipment was operated under a warrant issued in relation to premises – the occupier of the premises, or the occupier’s employees or agents;
 - (b) if the equipment was operated under a warrant issued in relation to a person – that person, or that person’s agents.
- (5) Compensation is payable out of money appropriated by the Parliament.
- (6) For the purposes of subsection (1):
damage, in relation to data, includes damage by erasure of data or addition of other data.

Copies of seized things to be provided

- 3N(1) Subject to subsection (2), if a constable seizes, under a warrant relating to premises:
- (a) a document, film, computer file or other thing that can be readily copied; or
 - (b) a storage device the information in which can be readily copied;

the constable must, if requested to do so by the occupier of the premises or another person who apparently represents the occupier and who is present when the warrant is executed, give a copy of the thing or the information to that person as soon as practicable after the seizure.

- (2) Subsection (1) does not apply if:
- (a) the thing that has been seized was seized under subsection 3L(1A) or paragraph 3L(2)(b) or 3LAA(4)(b); or
 - (aa) the thing embodies data that was accessed under the warrant at a place other than the premises; or
 - (b) possession by the occupier of the document, film, computer file, thing or information could constitute an offence.

Occupier entitled to be present during search

- 3P(1) If a warrant in relation to premises is being executed and the occupier of the premises or another person who apparently represents the occupier is present at the premises, the person is, subject to Part IC, entitled to observe the search being conducted.
- (2) The right to observe the search being conducted ceases if the person impedes the search.
- (3) This section does not prevent 2 or more areas of the premises being searched at the same time.

Receipts for things seized under warrant or moved

- 3Q(1) If a thing is seized under a warrant or moved under subsection 3K(2), the executing officer or a constable assisting must provide a receipt for the thing.
- (2) If 2 or more things are seized or moved, they may be covered in the one receipt.

Restrictions on personal searches

- 3S A warrant cannot authorise a strip search or a search of a person's body cavities.

Conduct of ordinary searches and frisk searches

- 3ZR An ordinary search or a frisk search of a person under this Part must, if practicable, be conducted by a person of the same sex as the person being searched.