

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 22/07/2019 3:16:42 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, reading "Warwick Soden".

Dated: 23/07/2019 9:28:25 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

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

NO NSD 989 OF 2019

AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

Affidavit of: Kristy Lee Alexander
Address: Level 42, 19 Martin Place, Sydney
Occupation: Senior Executive Lawyer
Date affirmed: 22 July 2019

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3.	Annexure KA-2 being copy of a Bench Information Charge dated 5 September 2018.	[8]	22
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5.	Annexure KA-4 being a copy of orders made by the Supreme Court of the Australian Capital Territory (Elkaim J) dated 11 July 2019.	[14]	29

Deponent

Witness

Filed on behalf of the Second Respondent, Commissioner of the Australian Federal Police

File ref: 19004307

Prepared by: Kristy Alexander
AGS lawyer within the meaning of s 55I of the *Judiciary Act* 1903

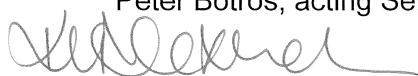
Address for Service:
The Australian Government Solicitor,
Level 42, MLC Centre, 19 Martin Place, Sydney, NSW 2000
Kristy.Alexander@ags.gov.au

Telephone: 02 9581 7640
Lawyer's Email:
Kristy.Alexander@ags.gov.au
Facsimile: 02 9581 7732
DX 444 Sydney

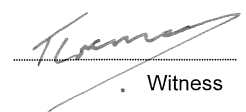
Document Number	Details	Paragraph(s) of affidavit referring to annexure(s)	Page
6.	Annexure KA-5 being a copy of the Undertaking.	[21]	40
7.	Annexure KA-6 being a copy of a letter from the ABC to AGS dated 10 June 2019.	[22.1]	42
8.	Annexure KA-7 being a copy of a letter from AGS to the ABC dated 11 June 2019.	[22.2]	44
9.	Annexure KA-8 being a copy of a letter from the ABC to AGS dated 13 June 2019.	[22.3]	47
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12.	Annexure KA-11 being a copy of a letter from the ABC to AGS dated 18 June 2019.	[22.6]	58
13.	Annexure KA-12 being a copy of a letter from AGS to the ABC dated 20 June 2019.	[22.7]	61
14.	Annexure KA-13 being a copy of a letter from the ABC to AGS dated 21 June 2019.	[22.8]	64
15.	Annexure KA-14 being a copy of a letter from AGS to the ABC dated 21 June 2019.	[22.9]	67
16.	Annexure KA-15 being a copy of a letter from the ABC to AGS dated 2 July 2019.	[22.10]	69
17.	Annexure KA-16 being a copy of a letter from AGS to the ABC dated 4 July 2019.	[22.11]	73
18.	Annexure KA-17 being a copy of a letter from the ABC to AGS dated 8 July 2019.	[22.12]	77
19.	Annexure KA-18 being a copy of an email from AGS to the ABC dated 8 July 2019.	[22.13]	80

I, Kristy Lee Alexander of Level 42, 19 Martin Place, Sydney in the State of New South Wales, Senior Executive Lawyer, affirm:

1. I am an AGS lawyer within the meaning of s 55I of the *Judiciary Act 1903*. I have primary responsibility for this matter for and on behalf of the Australian Government Solicitor (**AGS**), legal representative for the second and third respondents.
2. I make this affidavit in support of an interlocutory application by the second respondent, which is to be filed at the same time as this affidavit (the **Expedition Application**).
3. I make this affidavit on the basis of my direct knowledge, from my review of relevant documents referred to in this affidavit, and on the basis of matters that I have been informed about by Detective Superintendent Andrew Smith, Coordinator Offshore & Sensitive Investigations, Crime Operations, Australian Federal Police (the **AFP**) and Peter Botros, acting Senior Federal Prosecutor, Commonwealth Director of Public



Deponent



Witness

Prosecutions (the **CDPP**), which I believe to be true. Where I depose to a matter on the basis of information and belief, I have specifically identified so.

4. This affidavit is divided into 4 parts:
 - 4.1. Background – [5] to [23];
 - 4.2. Application – [24] to [25];
 - 4.3. Prejudice to McBride criminal prosecution – [26] to [28];
 - 4.4. Prejudice to AFP investigations – [29] to [30].


BACKGROUND

5. On 11 July 2017, the applicant (the **ABC**) published various articles and programs concerning 'The Afghan Files'. Those documents, which included security classified documents, are described as the product of a 'Defence leak' in a story titled 'The Afghan Files' by Daniel Michael Oakes (**Mr Oakes**) and Sam Clark, a copy of which is annexed to this affidavit and marked '**KA-1**'.¹
6. I am informed by DS Smith that on 19 July 2017, the AFP commenced an investigation in connection with 'The Afghan Files' story (the **Investigation**).

McBride proceeding

7. On 5 September 2018, David William McBride (**Mr McBride**) was charged with Theft contrary to s 131.1.01 of the Criminal Code (Cth).
8. Annexed to this affidavit and marked '**KA-2**' is a copy of a Bench Information Charge. Mr McBride entered a plea of not guilty in respect of this charge on 30 October 2018.
9. On 7 March 2019, Mr McBride was further charged with:
 - 9.1. unlawfully giving information as to defences, contrary to section 73A(1) of the *Defence Act 1903* (Cth); and
 - 9.2. unlawfully disclosing a Commonwealth document contrary to section 70(1) of the *Crimes Act 1914* (Cth).
10. Annexed to this affidavit and marked '**KA-3**' is a copy of four Bench Information Charges. Mr McBride entered a plea of not guilty in respect of the alleged McBride offences on 30 May 2019.
11. I refer to the offences identified at [7] and [9] as the **alleged McBride offences**.

¹ Obtained from: <https://www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642?pfmredir=sm>.



Deponent



Witness

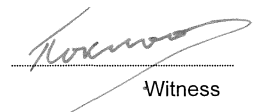
12. I am informed by Mr Botros that on 30 May 2019, Mr McBride was committed to stand trial in respect of the alleged McBride offences pursuant to s 88B of the *Magistrates Court Act 1930* (ACT), on his application and with the prosecutor's consent (the **McBride proceeding**).
13. On 11 July 2019, the Supreme Court of the Australian Capital Territory (Elkaim J) made orders pursuant to ss 19(1A) and 22 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) in relation to the McBride proceeding.
14. Annexed to this affidavit and marked '**KA-4**' is a copy of these orders.
15. I am informed by Mr Botros that on 18 July 2019, the McBride proceeding was listed for mention before a Registrar. At that mention the Registrar directed the Prosecution to file an indictment, case statement, list of witnesses and trial questionnaire by 8 August 2019 and Mr McBride to file his response by 15 August 2019. The matter was stood over for further mention on 22 August 2019.
16. I am informed by Mr Botros that the CDDP anticipate that the Court will likely provide an indication of when the McBride proceeding will be listed for pre-trial applications and trial at the mention on 22 August 2019. I am further informed by Mr Botros that the CDDP consider that the pre-trial applications may be listed this year, and the trial will in all likelihood be listed for some time next year.

Search warrant

17. On 3 June 2019, the first respondent issued the search warrant at issue in this proceeding. That search warrant authorised the third respondent to enter the ABC's premises in order to search for specified classes of things that might afford evidence as to:
 - 17.1. the commission of the alleged McBride offences; and
 - 17.2. whether Mr Oakes, a journalist employed by the ABC, had committed the following offences:
 - 17.2.1. unlawfully obtaining military information, contrary to section 73A(2) of the *Defence Act 1903* (Cth); and
 - 17.2.2. dishonestly receiving stolen property from Mr McBride, contrary to section 132.1 of the *Criminal Code Act 1995* (Cth).
18. That search warrant is Annexure 'MR-1' of the affidavit of Michael Antony Rippon affirmed 24 June 2019 and filed in this proceeding.
19. I am informed by DS Smith that the third respondent executed the search warrant on 5 June 2019 and that he and constables assisting him seized documents and things pursuant to the search warrant (the **Seized Material**).



Deponent

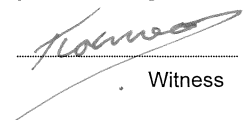


Witness

20. Following the execution of the search warrant, a mutual undertaking was agreed to the effect that the AFP officers executing the search warrant would not disclose or act upon any Seized Material for a certain period of time to permit review of the seized documents by the ABC for the purpose of it making particular claims in relation to the documents (the **Undertaking**).
21. A copy of the Undertaking is annexed to this affidavit and marked '**KA-5**'.
22. The ABC and the AFP/AGS subsequently exchanged correspondence. In broad terms, that correspondence related to the Undertaking, the commencement of these proceedings, the listing of the First Case Management Hearing (the **FCMH**), and this Expedition Application.
- 22.1. '**KA-6**' is a letter from the ABC to AGS dated 10 June 2019;
- 22.2. '**KA-7**' is a letter from AGS to the ABC dated 11 June 2019;
- 22.3. '**KA-8**' is a letter from the ABC to AGS dated 13 June 2019;
- 22.4. '**KA-9**' is a letter from the ABC to AGS dated 14 June 2019;
- 22.5. '**KA-10**' is a letter from AGS to the ABC dated 17 June 2019;
- 22.6. '**KA-11**' is a letter from the ABC to AGS dated 18 June 2019;
- 22.7. '**KA-12**' is a letter from AGS to the ABC dated 20 June 2019;
- 22.8. '**KA-13**' is a letter from the ABC to AGS dated 21 June 2019;
- 22.9. '**KA-14**' is a letter from AGS to the ABC dated 21 June 2019;
- 22.10. '**KA-15**' is a letter from the ABC to AGS dated 2 July 2019;
- 22.11. '**KA-16**' is a letter from AGS to the ABC dated 4 July 2019;
- 22.12. '**KA-17**' is a letter from the ABC to AGS dated 8 July 2019;
- 22.13. '**KA-18**' is an email from AGS to the ABC dated 8 July 2019.
23. The following presently relevant matters are apparent from the exchange of correspondence:
- 23.1. the parties disagree about the effect of the Undertaking;
- 23.2. whatever its effect, the AFP has now provided an undertaking not to access any of the Seized Material until 9 August 2019;
- 23.3. the Commissioner accepts in-principle that it is appropriate to refrain from accessing any of the Seized Material until the determination of this proceeding,



Deponent



Witness

but is not willing to undertake to do so without the ABC's agreement to deal with this matter expeditiously (in view of the prejudice identified below); and

23.4. the ABC has not agreed that the matter should be dealt with expeditiously.

APPLICATION

24. By the Expedition Application, the second respondent seeks a direction that this proceeding be determined expeditiously.
25. For the reasons identified in the following 2 sections of this affidavit the second respondent's specific concern is to ensure that this proceeding is heard and determined in time to avoid substantial prejudice to the McBride proceeding and the AFP's ongoing investigations.

PREJUDICE TO MCBRIDE PROCEEDING

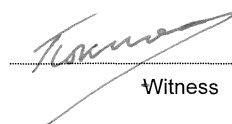
26. For the reasons outlined in this section, the interests of justice require the matter to be expedited so as not to prejudice the McBride proceeding.
27. There are 4 interrelated species of prejudice that may arise in this connection: prejudice to the prompt resolution of the McBride proceeding; prejudice to the CDPP's ability to comply with its disclosure obligations; prejudice to Mr McBride's ability to use the Seized Material in support of his defence; and prejudice to the CDPP's ability to deploy the Seized Material on the Crown case.
28. I am informed by DS Smith that on the basis of the terms of the search warrant and the broader circumstances outlined above, the AFP considers it to be likely that the Seized Material includes material subject to the CDPP's duty of disclosure in the McBride proceeding. Given that circumstance, it is possible that either Mr McBride, or the CDPP, may seek to use some of the Seized Material in the McBride proceeding.

PREJUDICE TO AFP INVESTIGATIONS

29. For the reasons outlined in this section, the interests of justice require the matters to be expedited so as not to prejudice ongoing AFP investigations.
30. I am informed by DS Smith that the AFP considers there to be a risk of prejudice to the Investigation insofar as it concerns Mr McBride. This risk of prejudice arises because:
- 30.1. it is likely that the Seized Material contains information relevant to the alleged McBride offences given the terms of the search warrant;
- 30.2. the Seized Material may be directly relevant to the alleged McBride offences or give rise to further avenues of inquiry in relation to those offences;
- 30.3. in the event that the Seized Material gives rise to further avenues of inquiry, but the AFP is delayed in accessing the Seized Material:




Deponent



Witness

- 30.3.1. the AFP will have less time to investigate those lines of enquiry;
- 30.3.2. the availability of those lines of enquiry might disappear as a consequence of the effluxion of time; and
- 30.3.3. the risk of loss of relevant evidence that might have been available as a consequence of the AFP investigating those further lines of inquiry increases.


Affirmed by the deponent at Sydney in the
State of New South Wales on 22 July 2019



.....

Before me:

Signature of witness:



.....
Tristan Lockwood, AGS lawyer within the
meaning of s 55I of the *Judiciary Act 1903*

Schedule

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
Division: General

No NSD 989 of 2019

Respondents

Second Respondent

Commissioner of the Australian Federal Police

Third Respondent

Agent Ian Brumby of the Australian Federal Police

Date: 22 July 2019

ANNEXURE KA-1

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

NO NSD 989 OF 2019


AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 12 pages is the annexure marked KA-1 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:



.....
Signature

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

ABC NEWS



The Afghan Files

Defence leak exposes deadly secrets of Australia's special forces

By the National Reporting Team's Dan Oakes and Sam Clark

Updated 11 Jul 2017, 8:08am
Published 11 Jul 2017, 6:06am

SHARE THIS STORY

Hundreds of pages of secret defence force documents leaked to the ABC give an unprecedented insight into the clandestine operations of Australia's elite special forces in Afghanistan, including incidents of troops killing unarmed men and children.

The ABC can reveal that some of the cases detailed in the documents are being investigated as possible unlawful killings.

This comes a day after the ABC revealed the alleged cover up of the killing of an Afghan boy and another alleged incident in which a father and son were shot dead during a raid.

The documents, many marked AUSTEO — Australian Eyes Only — suggest a growing unease at the highest levels of Defence about the culture of Australia's special forces as they prosecuted a bloody, secretive war against insurgents across a swathe of southern Afghanistan.

One document from 2014 refers to ingrained “problems” within special forces, an “organisational culture” including a “warrior culture” and a willingness by officers to turn a blind eye to poor behaviour.

Another document refers to a “desensitisation” and “drift in values” among elite Special Air Service soldiers serving in Afghanistan, while others allude to deep divisions between the two elite units which primarily comprise the special forces - the SAS based in Perth and 2 Commando Regiment based in Sydney.

A large proportion of the documents are reports on at least 10 incidents between 2009-2013 in which special forces troops shot dead insurgents, but also unarmed men and children.

The Afghan Files

This is one story in a seven-part series based on leaked documents exposing Australian special forces troops' role in the Afghanistan war. For context, they are best read in order.

#1

Leaked documents expose deadly secrets of Australian special forces

NOW READING

#2

An interrogation, a shooting and no witnesses

#3

What the documents reveal about killings of unarmed Afghans

#4

The spy and the SAS soldier with a loaded Glock

#5

Who is the enemy? Australia's secretive rules of engagement

#6

Chaos over severed hands

#7

Relations between Australia's special forces units on 'knife edge'

The Inspector General of the Australian Defence Force is investigating at least two of the incidents as part of its inquiry into the conduct in Afghanistan of special forces, which includes alleged unlawful killing.

Those two incidents — which both occurred in September 2013 — are the deaths of a man and his six-year-old child during a raid on a house, as revealed yesterday by the ABC, and the killing of a detainee who was alone with an Australian soldier and allegedly tried to seize his weapon.

A report into another 2013 incident in which an Afghan man riding a motorcycle was killed by Australian troops, and a female passenger possibly injured, states that Afghan authorities were becoming increasingly agitated over Australians allegedly killing unarmed civilians, and threatened to stop working with Australians.

Inside the Afghan Files ABC News

The documents also provide fresh details of some notorious incidents, including the severing of the hands of dead Taliban fighters by Australian troops.

The report shows Federal Liberal MP Andrew Hastie, then a SAS officer and commander of the soldier who cut off the hands, immediately expressed alarm about what happened and reported the incident up the chain of command.

The incident also caused tension between the SAS and Australian Defence Force Investigative Service (ADFIS), with the commanding officer of the SAS Regiment writing an angry letter to the head of ADFIS, in which he claimed ADFIS was seeking to charge SAS members over the incident in order to obscure their own culpability in what happened.

Another letter, sent in 2013 by a senior officer of 2 Commando to Chief of Army David Morrison, exposes the rift between the SAS and 2 Commando.

The letter, in response to claims made by SAS Victoria Cross winner Mark Donaldson in his autobiography, said relations between the two units were on a “perilous knife edge” and in “an extremely unhealthy state”.

The most dense and complex documents are those that seek to codify what tests Australian soldiers have to apply before they shoot to kill.

In 2013, sparked by an incident the previous year in which Australians killed two unarmed Afghan men, a series of directives and memos was issued by the Defence Force hierarchy stressing the need to be certain that Afghans were “directly participating in hostilities” before shooting them.

The documents indicate just how difficult this certainty could be to arrive at, particularly regarding ‘spotters’, or Afghans who kept watch and relayed information to Taliban fighters, without necessarily being armed.

Spotters could be shot for riding a motorcycle in a ‘stop-start’ fashion, talking on a radio or “manoeuvring to gain a tactical advantage”, according to the documents. But as Australia began to step back from operations in Afghanistan, purportedly to allow the Afghan security forces to take responsibility for security in Uruzgan province, an Australian officer hinted that Afghan patience might be wearing thin.

“This shift may require a review of the burdens of proof as they pertain to the necessity of engaging spotters perceived to be directly participating in hostilities,” he wrote after an Afghan man on a motorcycle was shot and killed, but the Australian soldier responsible cleared.

“The necessity of [special forces] to press the tactical advantage of the engagement needs to be weighed against the political disadvantage created by civilian casualty allegations against [Coalition forces] at this stage of the campaign.”

Delve further into the documents and read the full stories uncovered as part of the ABC's investigation into The Afghan Files.

What the documents reveal about killings of unarmed Afghans

A helicopter attack killing boys and their donkeys, a detainee allegedly lunging for a knife shot dead and a boy mistakenly killed as he hid under blankets are all detailed in the documents.

They show that on a number of occasions Defence investigations only occurred because locals complained to Afghan authorities, and those authorities demanded answers from the Australian forces, or because journalists or NGOs raised concerns.

Some of the incidents detailed have been publicly acknowledged by Defence previously, usually in response to media reporting, but the outcomes of investigations are seldom made public – until now.

Read summaries of 10 cases between 2009-2013 in which special forces troops shot dead insurgents, but also unarmed men and children.

READ THE SUMMARIES

An interrogation, a shooting and no witnesses

Inside a hut, in the far east of Afghanistan's Uruzgan Province, an Australian soldier was left alone with a captured insurgent.

But while others outside prepared for a helicopter transfer, the detainee was shot dead.

The ABC can reveal the secretive defence inquiry probing allegations of unlawful killings in Afghanistan is now investigating the incident.

READ THE STORY

‘What the f* are you doing’: Chaos over severed hands**

It was one of the most notorious incidents in Australia’s recent military history — the severing of hands of dead Taliban fighters in Afghanistan.

When it was first reported by the media in August, 2013, it caused a public furore and deep concern within Defence.

Now, for the first time, secret defence documents obtained by the ABC reveal the full story of how and why the “chopped hands” controversy came about.

READ THE STORY

The spy and the SAS soldier with a loaded Glock

Even in a warzone like Afghanistan, spies and soldiers need to relax, to let their hair down.

And so it was that on December 7, 2013, a handful of officers from the Australian Secret Intelligence Service and nine Australian soldiers — deployed to guard the spies — decided to put a lamb on the barbie.

But what started as a convivial dinner in covert premises in Kabul ended badly with an SAS trooper pulling his handgun on a female ASIS officer.

READ THE STORY

Who is the enemy?

From the very beginning of the war in Afghanistan, Australian troops were faced almost every day with decisions that had to be made within a split second.

The farmer smiling at you as you patrolled through his village could have an AK-47 stashed behind a nearby wall. The youth watching silently as you left your base could be reporting your movements to the insurgents.

The Taliban didn't wear uniforms and often did not carry weapons on them. They travelled on motorbikes and in utes. They shook your hand by day and laid improvised explosive devices by night.

Now, Defence documents obtained by the ABC give an insight into the ambiguities and difficulties faced by troops on the ground.

READ THE STORY

‘Unhealthy’ relations between elite teams

They are the most celebrated and prestigious units in the Australian Army.

The SAS - the Special Air Service Regiment - and the 2nd Commando Regiment are Australia's special forces elite, the soldiers tasked with the most difficult missions in warzones like Afghanistan.

But now Defence Department documents leaked to the ABC reveal that relations between the two units – which also have a crucial role in domestic counter-terrorism operations – have reached an all time low.

READ THE STORY

Got a confidential news tip?

Signal

A free, instant messaging and phone calling service. The content of the messages are encrypted end-to-end, meaning no-one but us can read them.

Contact us on Signal: **0419 242 515**

WhatsApp

An instant messaging service owned by Facebook that offers end-to-end encryption. While the messages are private, WhatsApp stores some data like phone numbers and timestamps.

Contact us on WhatsApp: **0419 242 515**

No system is 100 per cent secure, but these services can be used to protect your identity. Please read the terms and conditions of these services to work out the best method of communication for you.

The Afghan Files

This is one story in a seven-part series based on leaked documents exposing Australian special forces troops' role in the Afghanistan war. For context, they are best read in order.

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#7
Relations between Australia's special forces units on 'knife edge'

Photos: Margaret Burin

Topics: defence-industry, defence-forces, defence-and-national-security,
afghanistan, australia

ANNEXURE KA-2

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

NO NSD 989 OF 2019

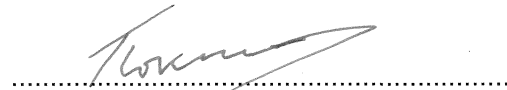
AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 1 page is the annexure marked KA-2 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:



Signature

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



DPP

BENCH
INFORMATION CHARGE

FOLDER: 200144

Case No: CC 18/41388

For hearing on:

Defendant: MCBRIDE, DAVID WILLIAM
NFA

Alias:
Date of Birth: 15/12/1963
Occupation:

Informant: BRUMBY, IAN/ROBERT

Act and Section under which proceedings taken order charge laid:

CTH - CRIMINAL CODE ACT 1995

Section: 131.1.01

OFFENCE THEFT

OFFENCE FROM: 01/01/2013

OFFENCE TO: 26/02/2018

Between about 1 January 2013 and about 26 February 2018 at Griffith and other places in the ACT, David William McBride did dishonestly appropriate property belonging to a Commonwealth entity with the intention of permanently depriving the entity of the property, contrary to s 131.1(1) of the Criminal Code (Cth).

ANNEXURE KA-3

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

NO NSD 989 OF 2019

AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 4 pages is the annexure marked KA-3 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:


.....

Signature

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

BENCH
INFORMATION/CHARGE

For Hearing on:

SEVENTH DAY OF MARCH, 2019 AT 09:45 IN THE FORENOON
A.C.T. MAGISTRATES COURT
IN THE AUSTRALIAN CAPITAL TERRITORY

Case No. **CC2019/2900**

Defendant: DAVID WILLIAM MCBRIDE
NO FIXED ABODE
Date of Birth: 15 DEC 1963
Occupation:

PROCEEDINGS IN THIS MATTER WILL BE
CARRIED ON BY THE DIRECTOR OF PUBLIC
PROSECUTIONS UNDER THE PROVISIONS OF
SECTION 6 OF THE DIRECTOR OF PUBLIC
PROSECUTIONS ACT

Informant: TURNER, PHILIP JAMES, Badge No. 10547

Date and Time apprehended: Charged Before Court
Bail Bond Number:

Act and Section under which proceedings taken or charge laid:

IN CONTRAVENTION OF SECTION 70(1) OF THE CTH - CRIMES ACT 1914

CCA070.01

OFFENCE

THAT HE, IN THE AUSTRALIAN CAPITAL TERRITORY, BETWEEN 14 APRIL 2016 AND
ABOUT 31 MAY 2016, BEING A COMMONWEALTH OFFICER PUBLISHED ANY FACT OR
DOCUMENT WHICH CAME INTO HIS KNOWLEDGE OR POSSESSION BY VIRTUE OF
BEING A COMMONWEALTH OFFICER, AND WHICH IT IS HIS DUTY NOT TO DISCLOSE.

DATE
ADJUDICATION:

MAGISTRATE:
PROSECUTOR:

BENCH
INFORMATION/CHARGE

For Hearing on:

SEVENTH DAY OF MARCH, 2019 AT 09:45 IN THE FORENOON
A.C.T. MAGISTRATES COURT
IN THE AUSTRALIAN CAPITAL TERRITORY

Case No. **CC2019/2899**

Defendant: DAVID WILLIAM MCBRIDE
NO FIXED ABODE
Date of Birth: 15 DEC 1963
Occupation:

PROCEEDINGS IN THIS MATTER WILL BE
CARRIED ON BY THE DIRECTOR OF PUBLIC
PROSECUTIONS UNDER THE PROVISIONS OF
SECTION 6 OF THE DIRECTOR OF PUBLIC
PROSECUTIONS ACT

Informant: TURNER, PHILIP JAMES, Badge No. 10547

Date and Time apprehended: Charged Before Court
Bail Bond Number:

Act and Section under which proceedings taken or charge laid:

IN CONTRAVENTION OF SECTION 73A(1) OF THE CTH - DEFENCE ACT 1903

DA073.001

OFFENCE

THAT HE, IN THE AUSTRALIAN CAPITAL TERRITORY, BETWEEN 14 APRIL, 2016 AND 01 OCTOBER, 2016 BEING A MEMBER OF THE DEFENCE FORCE, DID COMMUNICATE INFORMATION TO ANOTHER PERSON, NAMELY DANIEL OAKES AND THAT INFORMATION WAS A PLAN, DOCUMENT OR INFORMATION RELATING TO ANY NAVAL, MILITARY OR AIRFORCE INFORMATION AND THAT COMMUNICATION WAS NOT IN THE COURSE OF HIS DUTIES.

DATE
ADJUDICATION:

MAGISTRATE:
PROSECUTOR:

BENCH
INFORMATION/CHARGE

For Hearing on:

SEVENTH DAY OF MARCH, 2019 AT 09:45 IN THE FORENOON
A.C.T. MAGISTRATES COURT
IN THE AUSTRALIAN CAPITAL TERRITORY

Case No. **CC2019/2898**

Defendant: DAVID WILLIAM MCBRIDE
NO FIXED ABODE

Date of Birth: 15 DEC 1963

Occupation:

PROCEEDINGS IN THIS MATTER WILL BE
CARRIED ON BY THE DIRECTOR OF PUBLIC
PROSECUTIONS UNDER THE PROVISIONS OF
SECTION 6 OF THE DIRECTOR OF PUBLIC
PROSECUTIONS ACT

Informant: TURNER, PHILIP JAMES, Badge No. 10547

Date and Time apprehended: Charged Before Court

Bail Bond Number:

Act and Section under which proceedings taken or charge laid:

IN CONTRAVENTION OF SECTION 73A(1) OF THE CTH - DEFENCE ACT 1903

DA073.001

OFFENCE

THAT HE, IN THE AUSTRALIAN CAPITAL TERRITORY, BETWEEN 01 AUGUST, 2014 AND
31 DECEMBER, 2014 BEING A MEMBER OF THE DEFENCE FORCE, DID COMMUNICATE
INFORMATION TO ANOTHER PERSON, NAMELY ANDREW CLARK AND THAT
INFORMATION WAS A PLAN, DOCUMENT OR INFORMATION RELATING TO ANY NAVAL,
MILITARY OR AIR FORCE INFORMATION AND THAT COMMUNICATION WAS NOT IN
THE COURSE OF HIS DUTIES.

DATE
ADJUDICATION:

MAGISTRATE:
PROSECUTOR:

BENCH
INFORMATION/CHARGE

For Hearing on:

SEVENTH DAY OF MARCH, 2019 AT 09:45 IN THE FORENOON
A.C.T. MAGISTRATES COURT
IN THE AUSTRALIAN CAPITAL TERRITORY

Case No. **CC2019/2897**

Defendant: DAVID WILLIAM MCBRIDE
NO FIXED ABODE
Date of Birth: 15 DEC 1963
Occupation:

PROCEEDINGS IN THIS MATTER WILL BE
CARRIED ON BY THE DIRECTOR OF PUBLIC
PROSECUTIONS UNDER THE PROVISIONS OF
SECTION 6 OF THE DIRECTOR OF PUBLIC
PROSECUTIONS ACT

Informant: TURNER, PHILIP JAMES, Badge No. 10547

Date and Time apprehended: Charged Before Court
Bail Bond Number:

Act and Section under which proceedings taken or charge laid:

IN CONTRAVENTION OF SECTION 73A(1) OF THE CTH - DEFENCE ACT 1903

DA073.001

OFFENCE

THAT HE, IN THE AUSTRALIAN CAPITAL TERRITORY, BETWEEN 01 AUGUST, 2014 AND 31 DECEMBER, 2014 BEING A MEMBER OF THE DEFENCE FORCE, DID COMMUNICATE INFORMATION TO ANOTHER PERSON, NAMELY CHRIS MASTERS AND THAT INFORMATION WAS A PLAN, DOCUMENT OR INFORMATION RELATING TO ANY NAVAL, MILITARY OR AIRFORCE INFORMATION AND THAT COMMUNICATION WAS NOT IN THE COURSE OF HIS DUTIES.

DATE
ADJUDICATION:

MAGISTRATE:
PROSECUTOR:

ANNEXURE KA-4

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

NO NSD 989 OF 2019

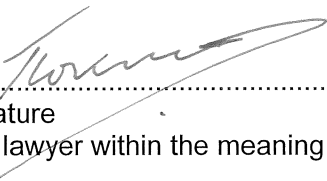
AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 10 pages is the annexure marked KA-4 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:


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

Form 4.2 General form of order—criminal proceeding

Court Procedures Rules 2006

In the Supreme Court of the Australian Capital Territory

Criminal jurisdiction

SCC 127 of 2019

The Queen

and

David William McBride

Date of order: Thursday 11 July 2019

Judge: The Honourable Justice Elkaim

How obtained: Directions

Attendance: Mr Botros as counsel for the Crown
 Mr McBride as counsel for the Defendant
 Mr Berger as counsel for Interested Party
 Mr Lewis as counsel for Interested Party

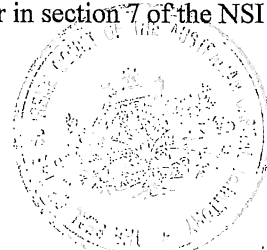
THE COURT NOTES THAT:

- A. These orders are made by consent pursuant to ss 19(1A) and 22 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (the **NSI Act**).
- B. To the extent that a disclosure of national security information is to be made in the proceedings (including to any person for the purposes of the proceedings) in accordance with these orders, the disclosure may be undertaken without notice to the Attorney-General under ss 24 or 25 of the NSI Act (as the case may be).
- C. To the extent that a disclosure of national security information is to be made in the proceedings (including to any person for the purposes of the proceedings) other than in accordance with these orders:
- (i) notice of the disclosure is to be given to the Attorney-General under ss 24 or 25 of the NSI Act (as the case may be); and
 - (ii) disclosure will thereafter be subject to any non-disclosure certificate given by the Attorney-General until a Court makes a determination under s 31 of the NSI Act.
- D. Under section 23(2) of the NSI Act and reg 7A of the *National Security Information (Criminal and Civil Proceedings) Regulation 2015* (the **NSI Regulation**), the requirements of Part 2 of the NSI Regulation apply to these proceedings to the extent that these Orders:
- (i) do not deal with a matter prescribed by the NSI Regulation or;
 - (ii) do not make inconsistent provision for the disclosure, protection, storage, handling or destruction of national security information in the proceedings.
- E. In the event the Australian Broadcasting Corporation (ABC) or another media entity wishes to apply to intervene in these proceedings and seek to vary these orders any such application, together with any affidavit evidence the ABC or another media entity wishes to rely on shall be filed, and served on each party and the Attorney-General by 5 pm 26 July 2019. If any application is made the matter is to be listed by arrangement with his Honour's associate as soon as possible after the filing of any application.

BY CONSENT THE COURT MAKES THE FOLLOWING ORDERS UNDER section 22 of the NSI Act:

A. PRELIMINARY

1. Liberty is reserved to each party and the Attorney-General to apply to the Court to vary these Orders.
2. These Orders:
 - 2.1. will operate until further order; and
 - 2.2. may be varied by application on the giving of 5 working days' notice to the Australian Government Solicitor (AGS) and any affected party or such shorter time as agreed or as ordered by the Court.
3. These orders do not control or limit the disclosure or use of information:
 - 3.1. by the Commonwealth, its agencies, officers and officials in relation to their activities, functions and duties apart from these proceedings; or
 - 3.2. by the parties, in respect of any unclassified prosecution brief of evidence; or
 - 3.3. by any person, to the extent that the person is dealing with information and/or a document that is freely available to the public (including through, but not limited to, such publicly accessible means as the internet, a library, a bookshop or a newsagency).
4. For the avoidance of doubt, these orders apply to 'criminal proceedings' (as defined by section 13 of the NSI Act) and continue to apply according to their terms after the conclusion of this proceeding.
5. In these Orders:
 - 5.1. '**Commonwealth**' includes officers and authorised officials of the Department of Defence and the Commonwealth Attorney-General's Department, but does not include the Prosecution.
 - 5.2. '**Defendant**' means the defendant in these proceedings, Mr David William McBride.
 - 5.3. '**Defendant Representative**' means:
 - 5.3.1. a solicitor or counsel engaged by the Defendant to represent him in these proceedings; and
 - 5.3.2. any other person whom such solicitor, counsel, or the Defendant concludes requires access to Sensitive Information for the purposes of the defendant's representation in these proceedings,who is listed in Schedule A to these Orders or who has been approved as a Defendant Representative through the mechanism described in Part H of these Orders.
 - 5.4. '**Department of Defence**' means the Commonwealth Department of Defence.
 - 5.5. '**national security**' has the same meaning as provided for in section 8 of the NSI Act.
 - 5.6. '**national security information**' has the same meaning as provided for in section 7 of the NSI Act.
 - 5.7. '**Parties**' means:
 - 5.7.1. the Prosecution;
 - 5.7.2. the Defendant; and



5.7.3. the Defendant Representative(s).

5.8. **'Prosecution'** means:

5.8.1. members of the Australian Federal Police acting as, or assisting, the informant in this proceeding; and

5.8.2. the Commonwealth Director of Public Prosecutions (CDPP), officers of the CDPP and counsel briefed by the CDPP in this proceeding.

5.9. **'Relevant Person'** means:

5.9.1. the Prosecution;

5.9.2. the Defendant Representative(s);

5.9.3. the Commonwealth Attorney-General and AGS lawyers or Commonwealth officials representing the Commonwealth's interests in relation to the NSI Act in these proceedings;

5.9.4. the Associate to the presiding Judge and court officials undertaking duties for the purposes of these proceedings, including the Registrar of the Supreme Court (the **Registrar**); and

5.9.5. official court transcribers engaged to provide recording and transcription services for these proceedings and holding a security clearance, if any, which the Commonwealth advises the Registrar is appropriate to the particular Sensitive Information which is to be disclosed in the proceedings,

but does not include a person who has or will have access to Sensitive Information in the ordinary course of their duties for the Commonwealth and who has a genuine 'need to know' that information.

5.10. **'Security Classified Document'** means:

5.10.1. a document which has the following security classifications marked on it:

5.10.1.1. 'Restricted';

5.10.1.2. 'Protected';

5.10.1.3. 'Confidential';

5.10.1.4. 'Secret';

5.10.1.5. 'Highly Protected';

5.10.1.6. 'Top Secret'; or

5.10.1.7. any of the security classifications listed in subparagraphs 5.10.1.1 to 5.10.1.6 used in conjunction with any of the following caveats:

5.10.1.7.1. sensitive compartment information (codewords);

5.10.1.7.2. foreign government markings;

5.10.1.7.3. special handling instructions 'EXCLUSIVE FOR' or 'CABINET'; or



5.10.1.7.4. releasability caveats 'AUSTEO' or 'AGAO'.

5.10.2. a document which the Commonwealth advises the Parties and the Court must be treated as a Security Classified Document, whether the advice is provided before or after the document is received by a Relevant Person or the Defendant; or

5.10.3. a copy of a Security Classified Document; or

5.10.4. a document which, by these Orders, must be treated as a Security Classified Document;

but does not include a document or part thereof:

5.10.5. which the Commonwealth has advised in writing is not a Security Classified Document for the purposes of these Orders; or

5.10.6. which is reasonably ascertainable as being freely available to the public through publicly accessible means of access (such as a library, the internet, a bookshop, or newsagency).

5.11. **'Sensitive Information'** means:

5.11.1. any information contained in a Security Classified Document;

5.11.2. any national security information obtained by the Defendant in the course of his service with the Australian Defence Force;

5.11.3. any information from which 5.11.1 and 5.11.2 could be discerned; and

5.11.4. any information which the Commonwealth advises the parties and the Court is Sensitive Information, whether the advice is provided before or after the information is disclosed,

but does not include information:

5.11.5. in respect of which the Commonwealth has advised in writing is not Sensitive Information for the purposes of these Orders;

5.11.6. which is reasonably ascertainable as being freely available to the public through publicly accessible means of access (such as library, Internet, or book shop).

5.12. **'Security Cleared Premises of a Defendant Representative'** means a premises of a Defendant Representative which has been assessed and approved in writing by the Commonwealth for the purpose of these Orders.

B. DISCLOSURE OF SENSITIVE INFORMATION AND SECURITY CLASSIFIED DOCUMENTS

General prohibition on disclosure, publication etc

6. A person must not, in connection with the proceeding, disclose, publish, communicate, reveal or make available Sensitive Information or Security Classified Documents to any person by any means except where:

6.1. it is done by a Relevant Person or the Defendant in accordance with these Orders; or

6.2. it is done in accordance with orders made by the Court under s 31 of the NSI Act following such notices, certificates, processes and hearings as are required under ss 24 to 29A of the NSI Act;

- 6.3. It has been disclosed or admitted into evidence in open court in accordance with these orders or another order of the court or released for inspection in accordance with these orders; or
- 6.4. it is done with the prior written approval of the Commonwealth.

Disclosures by the Defendant; and by Relevant Persons, other than to the Defendant

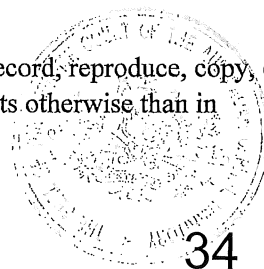
7. A Relevant Person or the Defendant may only publish, disclose, communicate, permit access to or otherwise reveal Sensitive Information or Security Classified Documents if the following requirements are satisfied:
 - 7.1. the publication, disclosure, communication, access or revealing is necessary for the conduct of the proceedings; and
 - 7.2. the publication, disclosure, communication, access or revealing is confined to one or more of the following persons:
 - 7.2.1. other Relevant Persons;
 - 7.2.2. the Chief Justice or Justice of the Supreme Court; or
 - 7.2.3. any other person in respect of whom the Commonwealth has provided written consent to the disclosure.

Disclosure by Relevant Persons to the Defendant

8. A Relevant Person may only disclose, communicate, permit access to or otherwise reveal Sensitive Information or Security Classified Documents to the Defendant if the following requirements are satisfied:
 - 8.1. the disclosure, communication, access or revealing is necessary for the conduct of the proceedings; and
 - 8.1.1. the disclosure, communication, access or revealing occurs at the Security Cleared Premises of a Defendant Representative in the presence of a Defendant Representative; or
 - 8.1.2. disclosure, communication, access or revealing occurs at the offices of AGS or the Commonwealth in a manner which has the prior written approval of the Commonwealth; or
 - 8.1.3. the disclosure, communication, access or revealing otherwise occurs in accordance with these Orders.
9. If the Defendant or Defendant Representative takes notes during any period of access to the Sensitive Information and Security Classified Documents as described in Order 8, and the notes record, reproduce, copy or summarise in any way Sensitive Information, the Defendant or Defendant Representative must clearly mark the top of each page of the document in which those notes are contained with the word 'SECRET'.
10. Any notes taken by the Defendant or a Defendant Representative as described by Order 9 comprise Security Classified Documents for the purposes of these Orders unless the Commonwealth advises in writing that such notes are not Security Classified Documents.

C. RECORDING, STORING, HANDLING, TRANSPORTING ETC SENSITIVE INFORMATION AND SECURITY CLASSIFIED DOCUMENTS

11. A Relevant Person or the Defendant must not convey, transmit, transport, store, record, reproduce, copy, create, prepare, handle, or destroy Sensitive Information or Security Classified Documents otherwise than in accordance with:



11.1. the requirements of Part 2 of the NSI Regulation; or

11.2. any variation to those requirements agreed in writing between the Commonwealth and the Relevant Person or the Defendant for the purposes of this Order.

12. Despite Order 11, a Defendant Representative and/or the Defendant may only create, prepare, record, reproduce, copy, or handle Sensitive Information or Security Classified Documents assigned a classification of SECRET or above:

12.1. in accordance with the requirements of Part 2 of the NSI Regulation, or any variation to those requirements agreed in writing between the Commonwealth and the Defendant Representative or the Defendant for the purposes of this Order; and

12.2. in a place specified in order 8.1.1 or 8.1.2, in closed Court, or in another place assessed and approved of in writing by the Commonwealth for the purposes of this Order.

13. Orders 11 and 12 do not prevent any person from disclosing Sensitive Information in the course of face-to-face discussions, provided the disclosure is in accordance with the requirements of Order 7.

D. USE OF SENSITIVE INFORMATION AND SECURITY CLASSIFIED DOCUMENTS IN COURT

14. A Relevant Person or the Defendant must not in any proceedings in open Court:

14.1. disclose or reveal any Sensitive Information; or

14.2. invite or cause a witness or any other person to disclose or reveal any Sensitive Information.

15. If a Relevant Person or the Defendant believes that it is necessary to:

15.1. disclose or reveal any Sensitive Information in Court; or

15.2. invite or cause a witness or any other person to disclose or reveal any Sensitive Information in Court, they must advise AGS as soon as practicable after coming to that belief.

16. Upon receiving advice under Order 15, AGS must advise the Parties of:

16.1. any process or means by which the Commonwealth considers that particular Sensitive Information could be used in Court without it being disclosed or revealed to any person other than a person specified in Order 7.2; and

16.2. any of the following orders which the Commonwealth proposes to seek to enable the use of the Sensitive Information in Court while maintaining the protection of that information:

16.2.1. an order for the closure of the Court;

16.2.2. an order as to the persons who may be present in Court while it is closed;

16.2.3. orders as to the secure recording of the proceedings in closed Court and any secure making and handling of the transcript in those proceedings;

16.2.4. orders as to the other notes or records made during the course of proceedings in closed Court;

16.2.5. orders as to electronic devices which are permitted to be brought into the closed Court proceedings;

16.2.6. any other orders the Commonwealth advises.

17. A Relevant Person or the Defendant who tenders or otherwise asks the Court to receive a Security Classified Document must tender the document as a confidential exhibit or ask the Court to receive the document on a confidential basis.
18. If the Court agrees to receive a document as a confidential exhibit or receive the document on a confidential basis, it will be dealt with as a Classified Court Document in accordance with Orders 34 to 38.

E. CLOSED COURT HEARINGS

19. Subject to any further order of the court, only Relevant Persons and the Defendant may be present when the Court is closed.
20. If a Relevant Person or the Defendant takes any notes during the period in which the Court is closed, they must clearly mark the top of each page of the document in which those notes are contained with the word 'SECRET'. Those notes comprise Security Classified Documents for the purposes of these Orders unless the Commonwealth advises in writing that such notes are not Security Classified Documents.

Recording and transcription of closed court hearings

21. There is to be no recording or transcription of the proceedings that take place when the Court is closed other than on equipment approved in writing by the Commonwealth for that purpose.
22. The transcript of any part of the proceedings held in closed Court (the **Closed Court Transcript**) is to be:
 - 22.1. marked 'SECRET' (or such higher classification as advised by the Commonwealth from time to time); and
 - 22.2. treated as a Security Classified Document for the purposes of these Orders.

Redaction and release of the Closed Court Transcript

23. The Closed Court Transcript must be provided securely to the Commonwealth (through AGS) and such of the Parties as were present during the part of the proceedings held in closed Court.
24. The Commonwealth must, within 10 working days of receiving a copy of the Closed Court Transcript, or within such further time as the Court allows, notify the Court and the Parties of any redactions to the Closed Court Transcript that it considers necessary to enable the Closed Court Transcript to be produced in an unclassified form suitable for public release.
25. Within 5 working days of receiving notification from the Commonwealth pursuant to Order 24, each of the Parties is to inform the Court and the Commonwealth if they consider that the proposed redactions to the Closed Court Transcript ought to be varied.
26. If no Party informs the Court and the Commonwealth that the proposed redactions to the Closed Court Transcript ought to be varied, the Court will accept the proposed redactions if it is satisfied that the proposed redactions are appropriate.
27. If a Party informs the Court and the Commonwealth in accordance with Order 25 that the Party considers the proposed redactions to the Closed Court Transcript ought to be varied, or if the Court considers, pursuant to Order 26, that the proposed redactions are not appropriate:
 - 27.1. the Parties are to have an opportunity to be heard on the issue and to adduce any evidence and make any submissions; and

27.2. the Court will rule on the proposed redactions to the Closed Court Transcript as soon as practicable.

28. If it considers it appropriate to do so the court may grant leave to media interests to be heard in respect of the proposed redactions to the transcript, whether prior to or after making a determination under orders 27 and 28;
29. Within 2 working days after the Court's ruling pursuant to Order 27, the Parties and the Commonwealth will advise the Court whether they seek a stay of that ruling pending an appeal (in which case the transcript will not be released until all such appeals are resolved).
30. If the Parties or the Commonwealth do not seek a stay of a Court ruling made pursuant to Order 27, the Court may publicly release so much of the Closed Court Transcript (if any) as can be released in accordance with the Court's ruling.

F. ELECTRONIC DEVICES IN COURT

31. During any part of the proceedings for which the Court is open, no person other than a Relevant Person or the Defendant is permitted to bring into the courtroom any mobile phone or other electronic device capable of transmitting or recording information.
32. During any part of the proceedings for which the Court is closed, no person is permitted to bring into the courtroom any mobile phones or any other electronic device capable of transmitting or recording information except a Relevant Person where using a device specifically approved or provided by the Commonwealth for that purpose.

G. FILING, STORING AND ACCESS TO CLASSIFIED COURT DOCUMENTS

33. All Security Classified Documents must be filed by handing the documents in a sealed envelope to:
 - 33.1. the presiding Judge or the presiding Judge's Associate; or
 - 33.2. the Registrar.
34. The Registrar will place all Security Classified Documents produced, filed or tendered in the proceedings (hereafter referred to as **Classified Court Documents**) on a file being used for these proceedings and no other proceedings (hereafter referred to as the **Classified Court File**).
35. Other than when in use for the purposes of the proceedings, the Classified Court File will be:
 - 35.1. placed in a sealed envelope(s) marked 'Court file in proceedings No. [INSERT] - To be opened only by or with the authority of the presiding Judge'; and
 - 35.2. securely stored:
 - 35.2.1. in a locked safe, which is only accessible by the Registrar or the presiding Judge or the presiding Judge's Associate; or
 - 35.2.2. where directed by the Court, by the Commonwealth on behalf of the Court, on condition that the envelope not be opened or interfered with and that it be delivered to the presiding Judge as directed from time to time.
36. If a person (other than a person referred to in Order 7.2) wishes to access a Classified Court Document, they may seek to do so by writing to the Registrar specifying the Classified Court Document(s) to which access is sought and the reason access is sought.

37. Where a written request is made in accordance with Order 36 and, but for these Orders the person would have been given access to the Classified Court Document(s), the following steps will be taken:

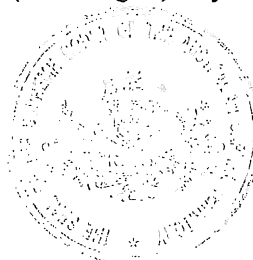
- 37.1. the presiding Judge will provide a copy of the request to the parties and (through AGS) the Commonwealth;
- 37.2. the parties and the Commonwealth must, within 5 working days of receiving the request from the presiding Judge, advise the presiding Judge whether any objection is made to the inspection and, if so, on what basis; and
- 37.3. if any objection relates to the disclosure of Sensitive Information in the document, the Commonwealth must, within a further 10 working days, provide the presiding Judge with:
 - 37.3.1. a copy of the document from which all Sensitive Information has been redacted (the **Redacted Court Document**); or
 - 37.3.2. advice that the objection is withdrawn; or
 - 37.3.3. advice that the objection is maintained.

38. The presiding Judge will thereafter:

- 38.1. insofar as subparagraphs 37.3.1 or 37.3.2 apply – provide access to such of the Classified Court Document(s) or Redacted Court Document(s) as applicable; and
- 38.2. insofar as subparagraph 37.3.3 applies – make arrangements with the Commonwealth, the parties and the person applying for access to the Classified Court Document(s), for the objection to inspection to be heard and determined by the Court.

H. APPROVAL OF DEFENDANT LEGAL REPRESENTATIVES

- 39. Where a Defendant reasonably believes that a person who is not already a Relevant Person requires access to Sensitive Information or Security Classified Documents for the purposes of the conduct of, and the Defendant's representation in, these proceedings, the Defendant or a legal representative of the Defendant may request that those persons be approved as Defendant Representatives.
- 40. A request that a person be approved will be given to AGS, and must state the identity of the person, including that person's full name, any previous names, their date of birth, and their city and country of birth.
- 41. AGS will disclose the request to a person nominated by the Department of Defence to receive it for the sole purpose of the Department of Defence deciding whether the person should be approved.
- 42. Neither AGS nor the Department of Defence, their representative or their delegate (if any) is to disclose the information provided under Order 40 to the Prosecution, nor to any other person other than for the purpose of deciding whether to approve the person.
- 43. Within 10 working days of notice of a request for approval being given to AGS under Order 40 (or such longer period as is agreed by the Defendant), the Department of Defence (or a delegate) may advise in writing whether the person is either:
 - 43.1. approved;
 - 43.2. not approved; or



43.3. approved with respect to specific Sensitive Information or Security Classified Documents (with that Sensitive Information or those Security Classified Documents to be specified in writing).

44. A person seeking to be approved must not receive Sensitive Information or Security Classified Documents prior to being approved.
45. Where the Defendant wishes to disclose Sensitive Information or Security Classified Documents to a person who is 'not approved' in accordance with Order 43.2, the Defendant may issue a notice under s 24 of the NSI Act to that effect.

Date entered: 15 July 2019



Deputy Registrar

ANNEXURE KA-5

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

NO NSD 989 OF 2019

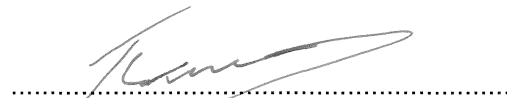
AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 1 page is the annexure marked KA-5 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:



Signature

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

Undertaking

On 5 June 2019, the Australian Federal Police (**AFP**) executed a search warrant at the Australian Broadcasting Corporation (**ABC**) offices at the ABC Ultimo Centre, 700 Harris Street, Ultimo (the **Premises**) (**Search Warrant**).

The ABC considers there is material on the Premises to which it may be entitled to make a claim of legal professional privilege or confidential relationships privilege (journalist's privilege), or a claim to the effect that the material falls outside the terms of the Search Warrant (**Claim**).

Without admission as to the validity of the Search Warrant, the search of the Premises, and/or seizure of any material under the Search Warrant, the ABC seeks, and the AFP provides, the following undertaking:

1. The AFP officers executing the Search Warrant (**Executing Officers**) will not disclose or act upon any material found on the Premises, including any information contained in such to any other person (including to another member of the AFP), until the ABC has had a reasonable opportunity to review that material and make a Claim.
2. The ABC undertakes to complete the review process as soon as is reasonably practical, being not more than 14 days from 5 June 2019.
3. Following the review by the ABC, material over which no Claim is made will be made available to AFP investigators immediately.
4. If the AFP disputes a Claim or its effect on the execution of a search warrant, the AFP will advise the ABC accordingly.
5. Unless the ABC initiates a court process to hear the dispute within 14 days of AFP advising of dispute of a Claim, the AFP may access the material. Subject to this, the AFP will not disclose or act upon any material over which a Claim is made until any such Claim has been finally determined.
6. The Executing Officers will take all necessary steps to isolate the material obtained (including through appropriate sealing and storage of the material) so that it is not available, provided or disclosed to any other person (including another member of the AFP) pending the determination of the process outlined in clauses 1-5 above.



Michael Rippon
Senior Lawyer
ABC Legal



Detective Superintendent Andrew Smith
Australian Federal Police

ANNEXURE KA-6

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

NO NSD 989 OF 2019

AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 1 page is the annexure marked KA-6 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:



.....
Signature

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

Our Ref: 18435
Your Ref:

10 June 2019

Federal Agent Ian Brumby
Australian Federal Police
47 Kings Avenue
BARTON ACT 2601

By email: [REDACTED]@afp.gov.au

Dear Sir

Search Warrant on premises of the Australian Broadcasting Corporation (ABC)

We refer to the search warrant executed at the ABC's Ultimo headquarters on Wednesday, 5 June 2019 by the AFP (**Search Warrant**).

As you are aware, the ABC's position from the outset of the execution of the Search Warrant was that the warrant may be defective and that the ABC's position was reserved in that regard.

The ABC now requests a copy of all documents comprising or underlying the AFP's application to the Court in relation to the Search Warrant, including the information sworn on oath by you.

We request that you produce the above **URGENTLY**, and by no later than **close of business tomorrow, Tuesday, 11 June 2019**, by return email.

If we do not hear back from you and receive the requested documents within the period specified in this request, the ABC reserves its right to make an application to the Court without further notice to you, in which event this letter will be relied upon, including on the question of costs.

Should the AFP decline to produce the abovementioned documents, we anticipate that the ABC will make an application to the Court either for access to the relevant Court file, or for an order that the relevant documents be produced to us by the AFP.

We look forward to your prompt response.

Yours sincerely



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

ANNEXURE KA-7

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

NO NSD 989 OF 2019

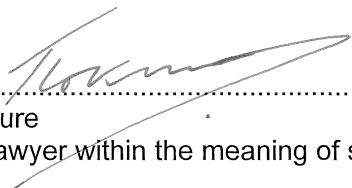
AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 2 pages is the annexure marked KA-7 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:



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



Your ref. 18435
Our ref. 19004307

11 June 2019

Michael Rippon
Senior Lawyer
ABC Legal

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

Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

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

Dear Mr Rippon

Search warrant at premises of the Australian Broadcasting Corporation (ABC)

1. We refer to your letter of 10 June 2019 addressed to Federal Agent Ian Brumby of the Australian Federal Police (AFP) in relation to the search warrant executed by the AFP at the ABC's premises in Ultimo on 5 June 2019 (the search warrant). We have been instructed by the AFP to respond to your letter.
2. Your letter asserts that the search warrant 'may be defective' and requests 'a copy of all documents comprising or underlying the AFP's application to the Court in relation to the Search Warrant, including the information sworn on oath by [FA Brumby]' (the requested material). Your letter asks the AFP to produce the requested material by close of business today, 11 June 2019.
3. We have just been instructed in relation to this matter and are not in a position to provide a substantive response by the deadline specified in your letter. To assist us in taking instructions in relation to your request, please identify the basis upon which the ABC asserts:
 - a. the search warrant may be defective and
 - b. it is entitled to the requested material (including identifying the purpose for which the ABC seeks the requested material).
4. Your letter indicates that the ABC may, without further notice to the AFP, make certain applications to a court in relation to the requested material. Such applications would be premature if they were to be made before the ABC providing a response which properly articulates its position in respect of the matters outlined at paragraph 3 above. You should expect that any failure to properly articulate the ABC's position on those matters will be relied upon by the AFP in any proceedings relating to the search warrant and/or the requested material, including in relation to the question of costs.

5. Please address further correspondence in relation to this matter to the writer.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kristy Alexander', with a stylized, cursive script.

Kristy Alexander

Senior Executive Lawyer

T 02 9581 7640

kristy.alexander@ags.gov.au

ANNEXURE KA-8

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

NO NSD 989 OF 2019

AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 3 pages is the annexure marked KA-8 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:



.....
Signature

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

Our Ref: 18435
Your Ref: 19004307

13 June 2019

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

By email: kristy.alexander@ags.gov.au

Dear Ms Alexander

Search warrant on premises of the Australian Broadcasting Corporation (ABC)

We refer to your letter of 11 June 2019, to which I respond on behalf of the ABC as follows.

The ABC believes that the Search Warrant for Search of a Premises [*sic*] purportedly issued by the Local Court of NSW on 3 June 2019 and executed at the Ultimo premises of the ABC on 5 June 2019 (**warrant**) is defective and liable to be set aside.

The deficiencies, in so far as they are presently able to be discerned by the ABC, include the following:

1. The issue of the warrant appears to be an abuse of power, in circumstances where Mr McBride has already been charged and committed in respect of the allegations underlying the suspected offences set out in the third condition of the warrant.
2. The three conditions of the search warrant do not provide a real and meaningful perimeter to the matters of which the issuing officer was required to be satisfied by information on oath or affirmation in accordance with section 3E(1) of the *Crimes Act 1914* (Cth).
3. As the AFP was advised prior to the issue of the warrant, the ABC cannot be compelled to produce any document that would disclose the identity of its confidential informants in the absence of an order under section 126K(2) of the *Evidence Act 1995* (Cth). No such order appears to have been obtained.
4. The third condition of the warrant refers to suspected offences under subsections 73A(1) and (2) of the *Defence Act 1903* (Cth), comprising the giving and obtaining of 'military information'. The language used in the third condition is not a fair or accurate summary of the information that is proscribed by section 73A. The meaning of the words 'military ... information' in section 73A are informed by the context in which they appear, including the heading to the section. The subject matter of the warrant, discerned from the first and second conditions, do not seek 'military information' within the meaning of section 73A.

It follows that the issuing officer cannot have been reasonably satisfied by information on oath or affirmation that there were reasonable grounds to suspect that there was or would be any evidential material relevant to suspected offences under section 73A at the ABC's premises as required by section 3E(1) of the *Crimes Act 1914* (Cth).

5. Further and in any event, none of the documents seized in execution of the warrant appear to us to be capable of giving rise to any offences under section 73A, when that section is properly construed.
6. Further, it is an element of the suspected offence under section 73A(2) that the conduct alleged, namely the obtaining of military information, was unlawful. The only arguably unlawful conduct that is identified in the warrant is the alleged breach of section 132.1 of the Criminal Code. The alleged breach of that section is, however, deficient for the reasons outlined in [10] and [11] below.
7. The third condition of the warrant refers to a suspected breach of section 131.1(1) of the Criminal Code. That offence, however, requires proof of the dishonest appropriation of another's property with the intention of depriving that person permanently of the property. The terms of the warrant do not identify the property that was allegedly dishonestly appropriated. In those circumstances, it is not apparent how the issuing officer could have been satisfied that there was or would be any evidential material relevant to any suspected offence under section 131.1(1) at the ABC's premises as required by section 3E(1) of the *Crimes Act 1914* (Cth).
8. Further, it is not apparent how, on the basis of the documents sought in the warrant, the AFP or the issuing officer could have been satisfied that any such documents could afford evidence in support of a reasonable suspicion that any person had in fact been permanently deprived of any property within the meaning of section 131.1(1).
9. Nor is it apparent, having regard either to the terms of the warrant, or the matters which were the subject of the search upon execution of the warrant, how the issuing officer could have been satisfied that there are reasonable grounds for suspecting that there was the requisite intent to permanently deprive a person of their property, as required by section 131.1(1).
10. The third condition of the warrant also refers to a suspected breach of section 132.1(1) of the Criminal Code. The warrant does not, however, identify the allegedly stolen property that is suspected of having been received. In those circumstances, it is not apparent how the issuing officer could have been satisfied that there was or would be any evidential material relevant to the suspected offence as required by section 3E(1) of the *Crimes Act 1914* (Cth).
11. Section 132.1(1) also requires proof of dishonesty on the part of the recipient of stolen property. In circumstances where the alleged recipient is a professional journalist, it is not apparent how the issuing officer could reasonably have held a suspicion, based on information on oath or affirmation, as to this element of the offence.
12. The final suspected offence in the third condition of the warrant concerns section 70(1) of the *Crimes Act 1914* (Cth) (now repealed). It was an element of the repealed offence that the accused have disclosed a fact or document that came into their knowledge 'by virtue of him being a Commonwealth officer' contrary to duty not to disclose. It is not apparent:
 - a. how either the AFP or the issuing officer could reasonably have held a suspicion that Mr McBride was a Commonwealth officer;
 - b. what fact(s) or document(s) Mr McBride is said to have acquired;
 - c. how either the AFP or the issuing officer could reasonably have held a suspicion that Mr McBride acquired those facts or documents 'by virtue of him being a Commonwealth officer'; or
 - d. how either the AFP or the issuing officer could reasonably have held a suspicion that Mr McBride had a duty not to disclose those facts or documents.

Finally, it is not apparent that any consideration was given by either the AFP or the issuing officer to the operation of the defence in section 122.5(6) of the Criminal Code, or the operation of the implied Constitutional freedom to discuss government and political matters as a constraint on statutory offences founded upon the disclosure or theft of historic information or documents of manifestly, the highest public interest in a representative democracy.

In the above circumstances, we invite the AFP to withdraw the warrant, return the documents and other materials that were seized in the course of the execution of the warrant on 5 June 2019, and provide its undertaking that any copies of or extracts from such documents and other materials have been destroyed. Please confirm the AFP's intention in respect of these matters by no later than **4pm on Monday, 17 June 2019**.

Unless the AFP provides confirmation of intention in respect of these matters by 4pm on 17 June 2019, the ABC, as presently advised, intends to commence proceedings for orders setting aside the warrant by no later than 19 June 2019. The effect of the commencement of proceedings will be to restrain the AFP from reviewing, disclosing or acting upon the seized materials in accordance with the undertaking signed by the ABC and the AFP on 5 June 2019.

Having regard to case management considerations, and in the hope of narrowing the areas of dispute between the ABC and the AFP if it becomes necessary to commence proceedings (or, potentially, opening a dialogue that may lead to a resolution of the dispute between us), the ABC would be assisted by being provided, initially at least on a confidential basis, with the information given on oath or affirmation to the issuing officer, Registrar Kane, at the time the warrant was issued. Please provide that information by no later than **4pm on Monday, 17 June 2019**.

If it becomes necessary for the ABC to commence proceedings against the AFP as foreshadowed above, the ABC will rely on this letter and any absence of co-operation in support of its claims in the proceedings, including its entitlement to costs.

The ABC otherwise reserves all of its rights in respect of the warrant, the search, the documents presently in the possession of the AFP and the AFP's undertaking.

We look forward to your urgent response.

Yours sincerely



Connie Carnabuci
General Counsel
ABC Legal
E: carnabuci.connie@abc.net.au



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

ANNEXURE KA-9

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

NO NSD 989 OF 2019

AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 1 page is the annexure marked KA-9 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:



.....
Signature

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

Our Ref: 18435
Your Ref: 19004307

14 June 2019

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

By email: kristy.alexander@ags.gov.au

Dear Ms Alexander

Search warrant on premises of the Australian Broadcasting Corporation (ABC) ('warrant')

We refer to our letter to you dated 13 June 2019.

We confirm that unless the ABC receives the confirmation sought with respect to withdrawal of the warrant (and associated matters) by 4pm on Monday, 17 June 2019, the ABC presently intends to commence proceedings in the Federal Court on or before 19 June 2019 for orders setting the warrant aside.

We also confirm, in accordance with the undertaking signed by the ABC and the AFP on 5 June 2019, that the effect of the commencement of proceedings will be to restrain the AFP from reviewing, disclosing or acting upon the seized materials.

Without derogating from that position, and for the avoidance of doubt, we confirm that the ABC makes a Claim pursuant to the undertaking in respect of all materials seized, on relevance, legal professional privilege and journalist's privilege grounds, such that none of the seized materials may be inspected or any of the information contained in them disclosed or acted upon by the AFP.

We look forward to receiving your response to our letter of 13 June 2019.

Yours sincerely



Connie Carnabuci
General Counsel
ABC Legal
E: carnabuci.connie@abc.net.au



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

ANNEXURE KA-10

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

NO NSD 989 OF 2019

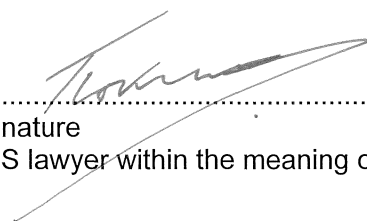
AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 4 pages is the annexure marked KA-10 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:



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



Your ref. 18435
Our ref. 19004307

17 June 2019

Ms Connie Carnabuci and Mr Michael Rippon
ABC Legal
ABC Ultimo Centre
700 Harris Street
ULTIMO NSW 2007

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

Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

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

Dear Ms Carnabuci and Mr Rippon

Search warrant at premises of the Australian Broadcasting Corporation (ABC)

1. We refer to your letters dated 13 June 2019 and 14 June 2019 regarding the search warrant executed by our client, the Australian Federal Police (AFP) at the Ultimo premises of the ABC on 5 June 2019 (the warrant).
2. Our client does not agree that the warrant is defective and liable to be set aside. We address each of the alleged deficiencies identified in your 13 June 2019 letter by reference to your paragraph numbers below.
3. **Paragraph 1:** A search warrant can be issued and executed after criminal proceedings have commenced: see for example *Rowell v Larter* (1986) 6 NSWLR 21 and *R v Fraser-Adams* (2001) 161 FLR 120. Accordingly, no question of abuse of power or possible contempt can arise from the issuing and execution of the warrant in the present circumstances.
4. **Paragraph 2:** Our client does not accept that the warrant read as a whole suffers from the deficiency you allege. The three conditions clearly define the scope of the search authorised by the warrant and the general nature of the offences are sufficiently disclosed so as to indicate the authorised area of search: see *Caratti v Commissioner of the Australian Federal Police (No 2)* [2016] FCA 1132 at [131].
5. **Paragraph 3:** Section 126K of the *Evidence Act 1995* (Cth) concerns the disclosure of an informant's identity in proceedings in a federal court. While ss 131A and 131B extend the application of Division 1C of the Evidence Act, those provisions do not extend the application of Division 1C to a search warrant. Nor can it be said that an application for a search warrant is a 'proceeding' to which the Evidence Act applies. In any event, it is apparent from the terms of the third condition of the warrant that the identity of the alleged informant was not in any relevant sense confidential at the time at which the warrant was issued.

6. **Paragraph 4:** The offences set out in the warrant concerning s 73A(1) and (2) of the *Defence Act 1903* (Cth) are identified by use of the precise terms of s 73A(1) and (2), not by any 'summary'. Documents which do not satisfy the third condition of the warrant will fall outside its scope. One of the documents identified by reference to a URL in the warrant has the headline: "The ROE: a tightly-held secret", and opens with the statement: "No army wants to let its enemy know when it will pull the trigger and when it will hold fire." It then goes on to provide details apparently taken from a security-classified document that purport to do just that. Your letter does not explain how secret operational defence material of this kind would fall outside the scope of "military information", either in its ordinary meaning or read contextually. Accordingly, it does not follow that the issuing officer "cannot have been reasonably satisfied" that there were reasonable grounds to suspect that there was or would be any evidential material relevant to suspected offences under s 73A at ABC's premises.
7. **Paragraph 5:** This is a generalised assertion about the documents seized under the warrant that could not impact on the validity of the earlier decision to issue the warrant. It is moreover not particularised by reference to any particular document seized. In any event, the documents seized do not need to be capable of giving rise to an offence. It is sufficient that they have relevance to or probative connection with, an issue arising upon an allegation of the offence alleged: *Parker v Churchill* (1985) 9 FCR 316 at 326.
8. **Paragraphs 6, 7, 8, 9, and 10:** It is not a requirement of validity that the terms of the warrant particularise the conduct said to be unlawful, the property that was allegedly dishonestly appropriated or the stolen property that is suspected of having been received. It is sufficient that the warrant alleges relevant offences known to law, which this warrant does. The authorities make it clear that the statement of the offence in a search warrant need not be made with the precision of an indictment: see for example *Beneficial Finance v Australian Federal Police* (1991) 31 FCR 523, *Williams v Keelty* (2001) 111 FCR 175 and *Caratti v Commissioner of the Australian Federal Police (No 2)* [2016] FCA 1132.
9. **Paragraph 11:** The test is not whether the issuing officer could reasonably have held a suspicion himself, rather, it was only necessary for the issuing officer to be satisfied that there are reasonable grounds for entertaining the suspicion: see *Williams v Keelty* (2001) 111 FCR 175 at 213. There are reasonable grounds for entertaining such a suspicion in circumstances where the gravamen of the matter alleged is that at the time Mr Oakes received documents from Mr McBride he knew the documents were classified documents that Mr McBride had stolen from the Department of Defence, and which Mr McBride was not authorised to provide to him.
10. **Paragraph 12:** Mr McBride was at the relevant time a Major in the Australian Defence Force. It is tolerably clear from the warrant read as a whole that documents which he allegedly provided to journalists were obtained by him in his capacity as such an officer. We do not understand how the matters in paragraph 12 can be seriously advanced.

11. **Operation of potential defences:** Section 3E of the Crimes Act does not require an issuing officer to consider possible defences when issuing a warrant. We also note that the defence in s 122.5(6) of the Criminal Code only applies to offences under Division 122 of the Criminal Code. The offences described in the third condition of the warrant are not offences which fall within Division 122. Finally, since Division 122 was added to the Criminal Code by Act No 67 of 2018, we do not understand how it can be said to be relevant at all to the indictable offences set out in the warrant, which do not extend past 1 October 2016.

Conclusion

12. In light of the matters outlined above, we are instructed that our client does not propose to withdraw the warrant or return the documents and other materials that were seized in the course of the execution of the warrant on 5 June 2019.
13. In so far as your request for the affidavit in support of the application for the search warrant is concerned, we note that nothing in your 13 June 2019 letter identifies a basis upon which a case of invalidity could be brought. Nor do any of the matters raised provide a proper basis for seeking to compel the production of the affidavit by compulsory process, if a proceeding challenging the warrant were to be commenced.

ABC's legal professional privilege, journalist privilege and relevance claims

14. We note that your 14 June 2019 letter confirms that the ABC makes a Claim pursuant to the terms of the undertaking signed by the ABC and the AFP on 5 June 2019 in respect of 'all materials seized', on relevance, legal professional privilege and journalist privilege grounds. The journalist privilege claims are baseless for the reason stated above. No particulars of the LPP claims or relevance claims have been provided. In the absence of a particularisation of such claims there is no proper basis for your clients to resist access to the documents. The undertaking sets out a process for the determination of access claims in respect of particular documents, a process on which the ABC does not appear at this stage to have embarked. It does not provide for a blanket claim over all documents to operate as a stay of any access while a different proceeding, one concerning the issuing of the warrant, is determined. Unless proceedings are commenced, the AFP will proceed to access the seized material within 7 days of the date of this letter.
15. Whether a further stay of access is appropriate, or alternatively should be the subject of an interlocutory injunction application by your client, is a matter to be determined in light of whether any proceeding of the kind you foreshadow could be brought expeditiously to final hearing, in light of the public interest considerations that lead courts to deal expeditiously with challenges to search warrants.

16. Finally, we note your advice that in the absence of our client withdrawing the warrant, the ABC intends to commence proceedings for orders setting aside the warrant. We confirm that we are instructed to accept service of those proceedings should they be filed and we can provide you with counsel's available dates for an early first return date.

Yours sincerely



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

ANNEXURE KA-11

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

NO NSD 989 OF 2019


AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 2 pages is the annexure marked KA-11 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:



.....
Signature

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

Our Ref: 18435
Your Ref: 19004307

18 June 2019

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

By email: kristy.alexander@ags.gov.au

Dear Ms Alexander

Search warrant on premises of the Australian Broadcasting Corporation (ABC) ('warrant')

We refer to your letter dated 17 June 2019 (**your letter**), and to our previous correspondence with you.

The ABC maintains its position with respect to the deficiencies identified in our letter of 13 June 2019. We note your client has declined the ABC's invitation to withdraw the warrant and return the materials seized, and, consequently, we confirm that the ABC intends to commence proceedings to challenge the validity of the warrant.

The undertaking

We refer to paragraphs 14 and 15 of your letter concerning the ABC's claims in respect of legal professional privilege, journalist's privilege and relevance. It appears that the parties' respective understandings of the operation of the undertaking signed on 5 June 2019 (**the undertaking**) are at odds.

The assertion that there is no proper basis for the ABC to resist access to the seized materials because of an "absence of particularisation" is unfounded. Nothing in the undertaking requires the ABC to particularise the basis upon which it makes a claim over the seized material. If your client considers that the ABC does not have a proper claim within the meaning of the undertaking, it has the right under paragraph 4 of the undertaking to advise the ABC accordingly of that position.

Further, nothing in the undertaking prevents the ABC from making a claim in respect of all materials seized, contrary to the assertion at paragraph 14 of your letter.

In addition, your statement that the AFP will access the seized material within 7 days of the date of your letter is wholly inconsistent with the undertaking.

For ease of reference, the process contemplated by the undertaking is as follows: The ABC may communicate to your client that it is making a Claim in respect of any seized material (as it has done by way of our letter dated 14 June 2019), after which time your client may advise the ABC that it disputes the Claim. We understand your letter of 17 June 2019 to be advising the ABC of a dispute for the

purpose of paragraph 4 of the undertaking. Pursuant to paragraph 5 of the undertaking, the ABC then has **14 days** from the date of the AFP advising of a dispute in which to initiate a court process in respect of the dispute.

At a minimum, your client is precluded from accessing any of the seized materials for a period of 14 days from yesterday, 17 June 2019.

Notwithstanding the above, your client's ability to access the seized materials will inevitably be affected by the commencement of proceedings by which a challenge is made to the validity of the warrant. In circumstances where your client has been put on notice that the ABC will make such a challenge (a process which could ultimately result in your client being ordered to return the seized material to the ABC), it would be entirely inappropriate for your client to access the seized materials at any time before a final determination of that challenge.

In all the circumstances, and given your client's indication that it will proceed to (impermissibly) access the seized material within 7 days of the date of your letter, the ABC is well positioned to seek an urgent injunction restraining such access. Given the ABC's impending challenge to the validity of the warrant, the likelihood of such an injunction being granted is high.

In order to avoid the need for the parties to expend the unnecessary time and resources involved in bringing and responding to an injunction application, the ABC invites your client to confirm, by reply, that it will not access any of the materials seized until such time as a final determination has been reached on any challenge by the ABC to the validity of the warrant (and subject to the outcome of such challenge). We seek that confirmation by no later than **5pm on Thursday, 20 June 2019**.

If we do not receive your client's confirmation by that time, the ABC will proceed to seek an injunction in order to restrain the AFP's access to the seized material, and will rely on this letter in relation to same, including in respect of its entitlement to costs.

We look forward to your urgent response.

Yours sincerely



Connie Carnabuci
General Counsel
ABC Legal
E: carnabuci.connie@abc.net.au



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

ANNEXURE KA-12

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

NO NSD 989 OF 2019

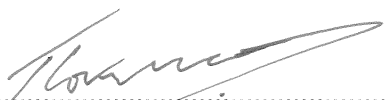
AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 2 pages is the annexure marked KA-12 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:



.....
Signature

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



Your ref. 18435
Our ref. 19004307

20 June 2019

Ms Connie Carnabuci and Mr Michael Rippon
ABC Legal
ABC Ultimo Centre
700 Harris Street
ULTIMO NSW 2007

Australian Government Solicitor

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Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

By email: carnabuci.connie@abc.net.au
ripton.michael@abc.net.au

Dear Ms Carnabuci and Mr Rippon

Search warrant at premises of the Australian Broadcasting Corporation (ABC)

1. We refer to your letter dated 18 June 2019.
2. As indicated in our letter of 17 June 2019, the undertaking agreed to by the AFP and the ABC on 5 June 2019 provides a mechanism by which the ABC can identify particular documents over which it asserts a claim, for example, of legal professional privilege, for which purpose it provides a period of time for inspection and preparation of claims.
3. We note that the ABC has not identified any claim made in respect of any document seized pursuant to the warrant. An assertion that all documents are subject to legal professional privilege, journalist privilege and are outside the scope of the warrant is plainly not a claim of the kind that the undertaking contemplates.
4. The ABC has asked that the AFP provide an undertaking not to access the seized material pending the outcome of proceedings which have not yet been commenced. The grounds of the ABC's application have not yet been identified, beyond the matters referred to in your letter of 13 June 2019, which suffer the shortcomings identified in our letter of 17 June 2019. Our client could not responsibly give such an undertaking in advance of receiving the ABC's application, receiving an undertaking from the ABC that it will prosecute the proceeding with expedition, and ascertaining whether the matter might be brought to hearing within a reasonably short time frame. If the ABC's application lacks merit, and if the matter cannot be brought to a hearing within a reasonable time, then our client would be unlikely to proffer such an undertaking.
5. Noting the above, we suggest that if, as you have previously advised, the ABC proposes to commence proceedings within a day or so, the solicitors acting for the ABC in such proceedings should approach the court to obtain an early return date so that the matter can be brought before the court for directions. As advised in our 17 June 2019 letter, we can provide the available dates of our counsel so that a

mutually convenient date can be obtained from the Registry when the matter is filed. We note that the ABC's position is protected at this point in time by the undertaking our client gave in its 17 June 2019 letter. Should a short extension of that undertaking be required then our client will consider the question when it arises.

6. Finally, we trust that you will place our correspondence before the court should the ABC proceed with an interlocutory application.
7. Please do not hesitate to contact me should you wish to discuss any of the matters addressed above.

Yours sincerely



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

ANNEXURE KA-13

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

NO NSD 989 OF 2019

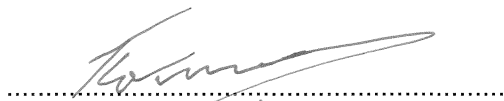
AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 2 pages is the annexure marked KA-13 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:



Signature
AGS lawyer within the meaning of s 55l of the *Judiciary Act 1903*

Our Ref: 18435
Your Ref: 19004307

21 June 2019

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

By email: kristy.alexander@ags.gov.au

Dear Ms Alexander

Search warrant on premises of the Australian Broadcasting Corporation (ABC) ('warrant')

We refer to your letter of yesterday's date (**your letter**) and to our previous correspondence with you.

It is clear that the parties remain in disagreement as to the operation of the undertaking signed on 5 June 2019, and as to the appropriateness of any suggestion by your client that it would access the seized documents, which include documents over which a claim of legal professional privilege is made, when a challenge to the warrant's validity is known to be imminent. The ABC's position regarding these matters is set out in our letter of 18 June 2019 (and in previous correspondence). Without traversing those matters again in full, we respond to your letter as follows:

We reject entirely the position at paragraph 3 of your letter.

We do not accept that your client is incapable of responsibly providing the assurances sought in our letter of 18 June 2019, whether because the ABC's challenge to the validity of the warrant has yet to be filed, or because your client considers that it has good prospects of meeting such a challenge.

The ABC has put your client on notice that proceedings are to be commenced, and has set out the likely grounds. Your client's views as to any shortcomings in, or challenge to, the ABC's substantive grounds should not be conflated with the issue of whether access to seized documents ought to be restrained (in the event that your client does not agree that it is already restrained by its own undertaking, or otherwise refuses to agree to refrain from accessing the documents) while the question of the warrant's validity remains to be determined.

The initiating process for the proceedings has been drafted and reviewed by senior counsel, and is in the course of being finalised. We presently anticipate being in a position to file and serve originating process on Monday, 24 June 2019.

The return date for the proceedings will be a matter for the Court. The ABC will, of course, comply with its case-management obligations. If the AFP wishes to contend that the proceedings ought be expedited so as to have priority over other matters before the Court, it will of course be free to bring an application to that effect, on evidence, before the Court. We note, however, that no explanation has been provided

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GPO Box 9994 Sydney NSW 2001 | Tel: +61 2 8333 5849

to us as to any ostensible urgency in this matter. It is difficult to understand how this matter could truly be characterised as urgent, given that:

1. the ABC stories with which the AFP's investigation is concerned were published almost 2 years ago;
2. the AFP has, according to the press conference by Acting Commissioner Neil Gaughan on 6 June 2019, been investigating the matters the subject of the warrant since April 2018; and
3. the AFP informed the ABC of the possible execution of a search warrant on the premises of the ABC as early as January 2019.

In so far as you state that the ABC's position is protected at this point in time by the undertaking your client gave, we take you to be referring to the suggestion in your earlier letter that unless proceedings are commenced, the AFP will proceed to access the seized material within 7 days (of 17 June 2019).

We remain of the view that your client has no entitlement to access the seized materials upon expiry of the arbitrary 7 day timeframe referred to above which, as stated previously, is inconsistent with the 14 day period referenced in the undertaking, and that on the terms of the undertaking, the ABC has until 1 July 2019 to commence proceedings.

In any event, however, you are on notice of the ABC's intention to commence proceedings against the AFP and the basis for those proceeding. You cannot be in any doubt about how aggrieved the ABC is by the AFP's conduct in relation to this matter or its resolve to challenge that conduct. Any attempt to access the seized materials in those circumstances would, with respect, be a gross act of bad faith.

Way forward

On the basis that the ABC agrees to commence proceedings concerning the warrant by no later than Tuesday, 25 June 2019 (well within the 14 day period), the ABC seeks your client's confirmation that it will not access any of the materials seized until a final determination has been reached in those proceedings.

We seek your client's confirmation by no later than **4pm, Friday 21 June 2019**.

If your client does not agree to the above, we expect we will proceed to seek an injunction.

Yours sincerely



Connie Carnabuci
General Counsel
ABC Legal
E: carnabuci.connie@abc.net.au



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

ANNEXURE KA-14

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

NO NSD 989 OF 2019

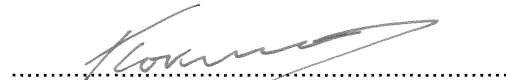
AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 1 page is the annexure marked KA-14 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:



Signature

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



Your ref. 18435
Our ref. 19004307

21 June 2019

Ms Connie Carnabuci and Mr Michael Rippon
ABC Legal
ABC Ultimo Centre
700 Harris Street
ULTIMO NSW 2007

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

Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

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

Dear Ms Carnabuci and Mr Rippon

Search warrant at premises of the Australian Broadcasting Corporation (ABC)

1. We refer to your letter dated 21 June 2019.
2. We note you have indicated that the ABC intends to commence proceedings concerning the warrant by no later than Tuesday, 25 June 2019.
3. In light of this, we are instructed that our client undertakes not access any of the materials seized pursuant to the warrant for a period of 14 days from next Tuesday. This should provide adequate time for the matter to be listed for a first return date without inconveniencing the court.
4. Our client will consider its position with respect to a further undertaking once the ABC's application is received. If the ABC's application raises properly arguable grounds and can be brought to a timely hearing our client may well be agreeable to providing an undertaking in the terms you have requested. Should our client refuse to provide such an undertaking, our client will undertake not to access the seized materials for a further 7 days to allow the ABC time to seek an injunction.
5. In so far as timing is concerned, we note that courts generally treat matters involving an interference with the criminal investigation process with expedition. Nothing in your letter of 21 June 2019 suggests that the present case should be treated differently.

Yours sincerely

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

ANNEXURE KA-15

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

NO NSD 989 OF 2019

AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 3 pages is the annexure marked KA-15 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:



Signature

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

Our Ref: 18435
Your Ref: 19004307

2 July 2019

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

By email: kristy.alexander@ags.gov.au

Dear Ms Alexander

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

We refer to the email from the Associate to the Honourable Justice Abraham dated 1 July 2019, and to our previous correspondence with you.

First Case Management Hearing

Regarding her Honour's request that the parties confer as to a mutually suitable date for a first Case Management Hearing, we advise that the following of the proposed dates are suitable to Counsel for the Applicant:

- Friday 2 August 2019;
- Monday 5 August 2019;
- Wednesday 28 August 2019.

Please advise whether the above dates are convenient to Counsel for the Second and Third Respondent, and, if so, whether we have your consent to us sending an email in reply to her Honour's Associate in the following form:

Dear Associate

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

We refer to your email dated 1 July 2019 regarding suitable dates for a first Case Management Hearing in the above matter.

This correspondence is sent on behalf of the Applicant, and with the consent of the Second and Third Respondents, whose representative is copied to this email. We note the First Respondent is not copied to this email. For clarity, we confirm we have not conferred with the First Respondent as to a suitable date for a first Case Management Hearing, noting we have not yet

received a Notice of Address for Service from the First Respondent, and have been unable to source any direct contact details for the First Respondent (who is a Registrar of the Local Court of NSW), beyond the details of Court Registries at which he is known to preside.

We advise that the following dates are mutually convenient to the Applicant and to the Second and Third Respondents for a first Case Management Hearing at 9.30am:

- *Friday 2 August 2019;*
- *Monday 5 August 2019;*
- *Wednesday 28 August 2019.*

Yours faithfully,

We would be grateful to receive your response to the above by close of business on **Thursday 4 July 2019**.

High Court Proceedings

We are aware that Ms Anika Smethurst and Nationwide News Pty Ltd have commenced proceedings in the High Court of Australia against the Commissioner of Police and Mr James Lawton in respect of the warrant for the search of the premises of Ms Smethurst issued on 3 June 2019 and executed by the AFP on 4 June 2019 (**Smethurst Search Warrant**).

We advise the ABC is presently considering its position with respect to its potential involvement in those High Court proceedings.

Undertaking

We refer to your letter dated 21 June 2019. In that letter, you confirmed that the AFP undertakes not to access any of the materials seized pursuant to the warrant for a period of 14 days from Tuesday 25 June 2019. You also advised that the AFP would consider its position with respect to a further undertaking once the ABC's originating application was received. That originating application was served last Monday 24 June 2019 (**Originating Application**).

Noting all of the above (hearing dates, the High Court proceedings, the Originating Application), our client seeks an undertaking that no member, employee or agent of the AFP (including the Second and Third Respondents) will view, access, copy or disseminate or cause to be viewed, accessed, copied or disseminated any materials seized from the ABC's premises at ABC Ultimo Centre, 700 Harris Street, Ultimo, NSW in purported execution of the search warrant on 5 June 2019 (**seized materials**), or any copies of seized materials, or any related lists or schedules, until a final determination has been reached in the proceedings commenced by the Originating Application. For the avoidance of doubt, the undertaking is to continue to have effect until determination of all matters in the proceedings, whether they be dealt with in their entirety in the Federal Court, or in part in the Federal Court and the High Court.

We repeat the matters set out in our letter of 21 June 2019 concerning our request for an undertaking, and, in addition, note our understanding that the AFP has provided an undertaking with respect to the Smethurst Search Warrant to the same effect as the undertaking sought by our client, namely, that it will not make available to AFP investigators material seized during the execution of the Smethurst Search Warrant pending determination of the High Court proceedings.

We seek your confirmation that the above undertaking is given by no later than close of business this **Thursday 4 July 2019.**

Yours sincerely



Connie Carnabuci
General Counsel
ABC Legal
E: carnabuci.connie@abc.net.au



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

ANNEXURE KA-16

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

NO NSD 989 OF 2019

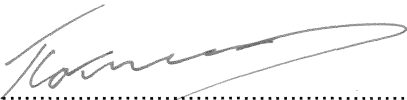
AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 3 pages is the annexure marked KA-16 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:



.....
Signature

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



Our ref. 19004307

4 July 2019

Connie Carnabuci & Michael Rippon
ABC Legal

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

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Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

Dear Ms Carnabuci and Mr Rippon

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

1. We refer to your letter of 2 July 2019, and to our previous correspondence to you.
2. For the reasons that follow, our client does not agree with your proposed correspondence to the Court or to provide an undertaking in the terms sought.

BACKGROUND

3. As you are aware, the search warrant that is the subject of this proceeding related to offences concerning both Daniel Michael Oakes and David William McBride. Mr McBride has been committed to stand trial before the Supreme Court of the Australian Capital Territory on a date to be fixed (the **McBride proceeding**).
4. Our client is unwilling to give any undertaking that would undermine:
 - a. its ability to review the seized material and take further investigatory steps in connection with the McBride proceeding, as it considers appropriate
 - b. the ability of the Commonwealth Director of Public Prosecutions (**CDPP**) to:
 - comply with its disclosure obligations in the McBride proceeding with respect to the seized material, and
 - review and deploy the seized material in the context of the McBride proceeding, as it considers appropriate.
5. Further, we do not consider a Court would grant interlocutory relief, or case manage proceedings in such a way, that had this effect. Nor do we consider a Court would adopt a course that delayed the resolution of the McBride proceeding: to do so would be at odds with the public interest in the expeditious completion of criminal matters and the principle of judicial restraint in matters of this type (to avoid fragmentation of the criminal justice process).
6. These considerations imbue the case management imperative ‘to facilitate the quick and efficient’ resolution of proceedings’ with even greater significance than it would in any event demand: s 37M of the *Federal Court of Australia Act 1976*.

7. Our client's position is that this proceeding should be determined expeditiously, such that it is listed for hearing in time to be determined:
 - a. at least 3 months before the McBride trial, which we understand may be listed in 2020, and
 - b. in any event, by no later than the end of this year.

FIRST CASE MANAGEMENT HEARING

8. Part 8 of the *Central Practice Note: National Court Framework and Case Management*, provides that the first case management hearing (**FCMH**) will generally be listed within 5 weeks of filing and serving of a proceeding and be conducted with a view to identifying the issues at the earliest possible stage.
9. In the absence of any explanation for departing from the general approach, and having specific regard to the considerations outlined above, our client is in principle opposed to your request that the FCMH be listed in mid to late August.
10. Rather, our client's position is that the FCMH should be listed at the earliest point in time that the case management issues between the parties can be meaningfully ventilated. We are instructed that the McBride proceeding may be listed for trial as early as 18 July 2019 (when it is listed for mention). We therefore suggest that the FCMH could be listed shortly after that mention, at which point in time the Court will likely be in a position to timetable the proceeding through to a final hearing.
11. Our counsel are available each day between 22 July 2019 and 5 August 2019.

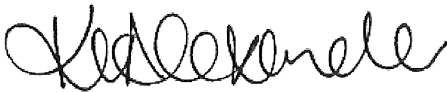
UNDERTAKING

12. If you are willing to consent to a direction that the proceeding be expedited, and to timetabling orders consistent with [7], above, and the Court makes those orders, we are instructed that our client would be willing to give an undertaking not to access the seized material until the determination of this Federal Court proceeding.
13. Our client is not willing to give an undertaking that purports to have effect until the determination of a High Court proceeding that you may or may not commence, or otherwise seek to involve yourself in. Nor can the terms of an undertaking given in an unrelated proceeding, which does not involve pending criminal proceedings, have any logical bearing on the terms of any undertaking to be given in this matter.
14. In addition to your consent to the abovementioned orders, our client would also require a reciprocal undertaking (a) to deal with any claims arising in respect of the seized material in accordance with a specified process and within particular time periods, similar to those outlined in the 5 June 2019 undertaking, and (b) to take all reasonable steps to ensure the expeditious resolution of this proceeding (and any other proceeding that may be commenced relating to the search warrant or the seized material).
15. We would propose that both undertakings be expressed as subject to a right to apply for a court order releasing the parties from the undertaking.

NEXT STEPS

16. If you agree to this proposal, our client would be willing to agree to the FCMH being listed on any date between 22 July 2019 and 5 August 2019 (although our preference would be for it to be listed sooner rather than later). Our client would also agree to a further extension of the existing undertaking to a date 1 week from the date of the FCMH, so that the specific terms of the ongoing undertaking can be finalised.
17. If you do not agree to the approach outlined above, we anticipate receiving instructions:
 - a. to seek the listing of the FCMH in the week of 22 July 2019
 - b. to file an application seeking that the proceeding be expedited, and
 - c. in due course, to seek orders to the effect outlined above.
18. Please provide your response by no later than 12 pm Monday, 8 July 2019.

Yours sincerely



Kristy Alexander

Senior Executive Lawyer

T 02 9581 7640 F 02 9581 7732

M 0412 911 268

kristy.alexander@ags.gov.au

ANNEXURE KA-17

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

NO NSD 989 OF 2019

AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule
Respondents

The following 2 pages is the annexure marked KA-17 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:



.....
Signature

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

Our Ref: 18435
Your Ref: 19004307

8 July 2019

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

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

Dear Ms Alexander

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

We refer to your letter dated 4 July 2019, and to our previous correspondence with you.

First Case Management Hearing

Paragraph 9 of your letter states that we have requested a first listing date “in mid to late August.” We refer you to the opening paragraphs of our letter of 2 July 2019, by which we advised that **2, 5 and 28 August 2019** were suitable to counsel for the Applicant.

We note your advice at paragraph 11 of your letter that your counsel is available from 22 July 2019 to 5 August 2019. It would appear, therefore, that 2 August 2019 and 5 August 2019 are mutually acceptable dates. In those circumstances, we do not understand why your clients should have any difficulty with us writing to the Court to advise that a listing on either of those dates is acceptable.

We propose to send the draft email set out in our letter of 2 July 2019 to her Honour’s Associate, amended to remove “*Wednesday 28 August 2019*”. Please let us know if we have your clients’ consent.

Expedition of Proceedings

As we have noted in previous correspondence, your clients are free to bring an application, on evidence, to expedite these proceedings. In your correspondence to date, you have not provided us with any information that causes us to hold the view that such a course is warranted.

Our letter of 21 June 2019 noted that we had been given no explanation as to any ostensible urgency in this matter, and we identified several specific matters which, in our view, cast doubt over whether the matter could truly be characterised as urgent. To add to those matters, we note our understanding that:

- The AFP received a referral from the Australian Defence Force in relation to the matters now the subject of its investigations on 11 July 2017;
- On 5 September 2018, Mr McBride was arrested and charged by AFP officers; and

- The AFP waited a further 8 months after that to execute a search warrant on the ABC purportedly in connection with charges against Mr McBride, despite being made aware of the ABC stories with which its investigation was concerned almost 2 years prior. (The ABC filed its application for judicial review less than 3 weeks after the search warrant was executed, with concerns about its validity initially raised on the day of execution).

These circumstances do not reflect a concern with the “expeditious completion of criminal matters” as referred to in your letter.

Further, your letter in response dated 21 June 2019 did not engage with each of the matters identified in our correspondence. The only additional information provided in your most recent letter is an indication that Mr McBride’s criminal proceeding “may” be listed for trial at some point in 2020.

The ABC will comply with its case-management obligations, however, we are not prepared to consent to a direction that usual procedure be departed from in the absence of any compelling reason that this is a case in which expedition is warranted.

Undertaking

The ABC’s application poses serious questions to be tried in relation to the validity of the search warrant, and raises matters of significant public interest and importance. It alleges serious defects in the search warrant itself, and in the manner in which it was issued. There are proceedings currently afoot in the High Court of Australia which are likely to have a bearing on the issues in this proceeding (and in which you are now on notice that the ABC is highly likely to intervene).

There is a real possibility that the present proceedings will result in a finding that the seized materials were obtained unlawfully. Any ultimate success by the ABC in these proceedings is at risk of being rendered nugatory if your client were to be granted access to those materials in the interim.

In addition, we remain of the view that consistent with the undertaking signed on 5 June 2019, your clients are not entitled to access the seized material now that the ABC has commenced proceedings. We refer you to our previous correspondence on that issue but repeat that any attempt by your client to access the seized materials in these circumstances would be a gross act of bad faith.

In our view, the most reasonable (and just) approach is for your client to provide an undertaking in the form set out in our letter of 2 July 2019. We request again that the undertaking be provided.

Please confirm your clients’ position with respect to these matters (including in relation to the date of the first case management hearing) by no later than **12.00pm on Tuesday 9 July 2019**.

Yours sincerely



Connie Carnabuci
General Counsel
ABC Legal
E: carnabuci.connie@abc.net.au



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

ANNEXURE KA-18

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

NO NSD 989 OF 2019

AUSTRALIAN BROADCASTING CORPORATION

Applicant

MARTIN KANE

and others named in the Schedule

Respondents

The following 2 pages is the annexure marked KA-18 referred to in the affidavit of Kristy Lee Alexander made 22 July 2019 before me:



.....
Signature

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

Lockwood, Tristan

From: Alexander, Kristy
Sent: 08 July 2019 16:52
To: Connie Carnabuci (ABC); Michael Rippon
Cc: Genevieve Hartney; Kia Daley; Lockwood, Tristan
Subject: Australian Broadcasting Corporation v Martin Kane & Ors - Federal Court proceedings
NSD 989/2019 [SEC=UNCLASSIFIED] [AGSDMS-DMS.FID3847021]

Dear Ms Carnabuci and Mr Rippon

We refer to your letter received today.

With a view to avoiding any further unnecessary delay in writing to the Court, our client agrees to you writing in the amended terms suggested (ie, removing the reference to 28 August 2019), subject to including the following additional paragraph at the end of the draft email:

The legal representatives for the second and third respondents have requested that we include the following: The second and third respondents intend to bring an application to expedite this proceeding, which they have indicated they will shortly file. That application is premised on a concern about potential prejudice to ongoing AFP investigations and the criminal prosecution of Mr McBride in the ACT Supreme Court. Their position is that this proceeding should be heard in time to be determined by no later than the end of this year (and potentially sooner). This application is opposed by the applicants. The second and third respondents' position is that the FCMH should be listed as soon as possible after 22 July 2019, at which point in time there will be greater certainty about the extent of expedition required. However, the second and third respondents have agreed to a FCMH on 2 or 5 August 2019 subject to the ability of the Court to list the expedition application at this time (their estimate is 1 hour).

We do not accept that any of the matters raised in your letter satisfactorily answer the compelling basis set out in our letter of 4 July 2019 for (a modest) expedition of the proceedings. Rather, it is apparent that you seek to take issue with investigatory decisions, which have no bearing on the present application or the broader public interests engaged in relation to the trial of Mr McBride. Our client accordingly intends to rely on this exchange of correspondence on the question of costs of the expedition application.

For the reasons previously explained, our client does not agree that it is disentitled from accessing the seized material by virtue of the 5 June 2019 undertaking merely because these proceedings have been commenced. Nor do we consider your proposed application to intervene in a separate proceeding to have any bearing on the question of whether the current undertaking should be continued. However, with a view to avoiding an unnecessary dispute about the issue, our client will agree to extend its undertaking to 9 August 2019, at which point there will be greater certainty about how the matter will proceed.

Please contact us with any queries.

Regards
Kristy

Kristy Alexander
Senior Executive Lawyer
Australian Government Solicitor
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kristy.alexander@ags.gov.au
Find out more about AGS at <http://www.ags.gov.au>

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mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS.