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Details of Filing

Document Lodged:	Submissions
File Number:	NSD989/2019
File Title:	AUSTRALIAN BROADCASTING CORPORATION v MARTIN KANE & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 31/07/2019 4:46:19 PM AEST Registrar

Important Information

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

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FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL **NSD989/2019**

Australian Broadcasting Corporation
Applicant

Martin Kane
First Respondent

Commissioner of the Australian Federal Police
Second Respondent

Agent Ian Brumby of the Australian Federal Police
Third Respondent

SECOND AND THIRD RESPONDENTS' SUBMISSIONS IN REPLY
(for first case management hearing on 2 August 2019)

A. APPLICATION FOR EXPEDITION

1. The second and third respondents maintain their position that ongoing AFP investigations, and the McBride proceeding, provide sufficient reason for expedition of the proceeding. Further, it is not necessary to await the outcome of High Court proceedings alleging invalidity of a statutory provision not in issue in this proceeding.

2. At [4]-[6] of its submissions (**AS**), the applicant argues that no weight ought to be given to the possibility that the seized material could be materially relevant to the McBride proceeding or ongoing AFP investigations. That argument should be rejected for three reasons.

3. *First*, the second and third respondents have not reviewed the seized material, in accordance with undertakings provided to the applicant. In those circumstances, it is self-evidently not possible to particularise the potential relevance of the seized material. An officer of the AFP would be in no better position to do so than Ms Alexander.

4. *Second*, the seized material definitionally satisfies the third condition of the warrant. It is evidential material "as to which there are reasonable grounds for suspecting that they will afford evidence as to the commission of" specified indictable offences,[1] including the three offences for which Mr McBride has been committed to stand trial.[2] Far from being mere assertion, the statements at [30.1] and [30.2] of the Alexander Affidavit follow from the terms of the warrant itself.

5. *Third*, the mere fact that Mr McBride has been charged and committed to stand trial does not, contrary to AS[5]-[6], somehow preclude the relevance of the seized material to the prosecution or defence case.[3]

6. The public statements attributed to Mr McBride referred to at AS[5] do not alter the obligation of the prosecutor in the McBride proceeding to prove, with admissible evidence, every element of the relevant offences to the criminal standard. Mr McBride has pleaded not guilty. He is currently unrepresented. His reported public statements, which are general in nature and do not refer to specific documents, have not always accorded with the position he has taken in court.[4] At this stage, it is not possible to ascertain with any certainty which issues will be controversial when the McBride proceeding comes to trial. The Court should not place any weight on reported public assertions about how Mr McBride has indicated he may or may not wish to run his case.

7. The suggestion at AS[7]-[8] of delay or lack of urgency by the AFP ignores the complexity of the relevant investigations. The applicant has itself put on evidence of Acting AFP Commissioner Neil Gaughan explaining that investigations of this kind are "typically complex and lengthy", the "exhaustive, comprehensive and organized" evidential process undertaken by the AFP, and the "fairly lengthy evidence collection phase" necessary prior to executing a search warrant.[5]

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[1] Third condition of the warrant, which is annexure MR1 to affidavit of Michael Rippon filed 25 June 2019, pg 7-8.

[2] Cf the Bench Information Charges at annexure KA-3 to the Alexander Affidavit.

[3] Annexure MR17 to Rippon Affidavit, pg 27.5.

[4] See, for example, annexure MR16 to affidavit of Michael Rippon filed 30 July 2019 (**Rippon Affidavit**), pg 15, in relation to orders for the management of national security information.

[5] Annexure MR17 to Rippon Affidavit, pg 18, 19-20, 22.1, 24.3. See also MR 24.

8. The final sentence of AS[11] is inimical to the general presumption that criminal, and related, proceedings should be dealt with expeditiously and not fragmented.[6] Given the likelihood of the McBride proceeding going to trial next year, and the possibility of an appeal in this proceeding, whatever the outcome, the expedited timetable proposed by the second and third respondents is appropriate to minimise the risk of interference with the criminal justice process.

9. High Court proceedings S196/2019 commenced by Anika Smethurst and Nationwide News Pty Ltd and referred to at AS[12]-[14] concern the validity of s 79(3) of the *Crimes Act 1914* (Cth) (**Crimes Act**), as it stood on 29 April 2018.[7] Section 79(3) is irrelevant to the warrant in this proceeding. The warrant in this proceeding specified suspected offences contrary to s 73A of the *Defence Act 1903* (Cth) (**Defence Act**), ss 131.1 and 132.1 of the *Criminal Code Act 1995* (Cth) and s 70 of the Crimes Act.

10. Paragraphs 19 and 20 of the application in High Court proceeding S196/2019[8] indicate that the argument for s 79(3)'s invalidity relies on the specific terms of s 79(3), which relates to "official secrets". None of the offences specified in the warrant at issue in this proceeding concern official secrets. Section 73A's prohibition on communicating or obtaining military information of the kind to which that section applies is a long way from the argument advanced in [19]-[20] of the Smethurst application.

11. A possible future judgment from the High Court on the construction of an entirely separate criminal offence provision, and the applicant's mooted attempt to intervene in that proceeding, do not provide a basis to refuse the application for expedition of this proceeding.

12. If the applicant wishes to seek leave to amend its originating application, that leave should be sought promptly, and be supported by appropriate evidence. If leave is granted, the applicant has not submitted that those new claims could not also be dealt with expeditiously.

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[6] *Carmody v MacKellar* (1996) 68 FCR 265 at 278E.

[7] Application at annexure MR26 to the Rippon Affidavit.

[8] Annexure MR26 to the Rippon Affidavit, pg 100.

B. APPLICATION TO SET ASIDE THE NOTICE TO PRODUCE

Relevance to Originating Application

13. At AS[19], the applicant submits that the material sought in its notice to produce is relevant to its claims that seeking, issuing and executing the warrant were legally unreasonable. The applicant appears to accept that the other grounds of its application do not call into question the material sought.

14. The material sought is the "information on oath" that satisfied the first respondent that there were reasonable grounds for suspecting there would be evidential material at the applicant's premises. That material is irrelevant to the claim in [24] of the originating application that seeking and executing the warrant was legally unreasonable. It could only possibly be relevant to the claim in [23] relating to issuing the warrant.

15. In the circumstances, however, the claim of legal unreasonableness falls to be determined on the face of the warrant.

16. At AS[20], the applicant identifies four particulars of its unreasonableness claim, being those at [23(d), (e), (g) and (h)] of its Originating Application. The applicant contends that any reasonable decision maker would consider the matters at [23(d), (e), (g) and (h)] to be decisive considerations against the issue of the warrant.

17. The very fact that the first respondent exercised his discretion to issue the warrant to search premises of a broadcasting agency for material of the nature described therein demonstrates that those considerations were not considered decisive. If the first respondent was legally bound to treat those factors as decisive, as the applicant contends, the application will succeed. The terms of the material before the issuing officer are irrelevant to that contention.

18. The first particular relied upon alleges "a very significant intrusion of privacy" authorised by the warrant. Search warrants, by their very nature, involve a significant intrusion of privacy. That intrusion does not make the issue of a warrant legally unreasonable.

19. The second particular, "the importance of the protection of sources", can have very limited significance in circumstances where the applicant's own evidence demonstrates that the source in question, Mr McBride, has very publicly identified himself.[9]

20. The third particular, "the public interest in investigative journalism", arises in relation to any application for a search warrant authorising a search of premises belonging to a media organisation. That consideration does not make the issue of a warrant legally unreasonable.

21. Similarly, to the extent it is relevant to the issue of a warrant (which is not conceded), the fourth particular, "the implied freedom of political communication", could potentially arise in relation to any application for a search warrant authorising a search of premises belonging to a media organisation.

22. The applicant has not identified, beyond the bald assertion at AS[21], how the material sought is relevant to these particulars. The applicant has not alleged any either general or specific deficiency in the material sought that could render the issue of the warrant invalid.

23. The effect of the AS[22]-[23], if correct, would be that any allegation of legal unreasonableness in relation to the issue of a warrant, however speculative, would entitle an applicant to all material that was before the issuing officer. This Court should not accept such a potentially far-reaching conclusion, which is inconsistent with the consistent approach of this Court to applications for access to such material.

24. At AS[24]-[26], the applicant submits that the decisions of the respondents were legally unreasonable due to a disparity between the terms of the warrant and the terms of s 73A of the Defence Act. The term used in the warrant, "military information", exactly mirrors the terms of the relevant offences, which, among other matters, apply to "any other naval, military or air force information". In any case, this alleged defect in the warrant arises, if it exists, on the face on the warrant, and can be determined on the face

[9] See, for example, Annexure MR14 to the Rippon Affidavit, at pg 10: "Mr McBride said he gave the documents to the ABC".

of the warrant alone. The submission by the applicant that the material sought will assist its claim is pure speculation.

Disclosure of material unjustified in any event

25. The principle against allowing discovery for the purpose of "fishing" has long been well established in this Court.[10] The requirement for evidence or proper basis for suggesting that a search warrant might have been issued unlawfully before discovery will be allowed is applied "with some strictness in the law enforcement investigative context".[11]

26. It is true that in *Carmody v MacKellar,*[12] Merkel J said that the issue of a search warrant should not be immunised from review by the imposition of unrealistic criteria for discovery. That observation, however, must be read in light of his statement that "if there is not the slightest evidence or there is no other material to support the bare allegations made in the proceeding, then as a general rule, an order for discovery ought not to be made."[13]

27. That "general rule" applies to this case. Reliance by the applicants on *Carmody* is misplaced. In contrast to the applicant's claims in this case, in *Carmody,* the applicants directly impugned the adequacy of the material before the issuing judge, alleging both that the information provided did not satisfy the relevant statutory requirements and that the applicants for the warrants failed to make the full and frank disclosure the application required.[14] Despite that, Merkel J concluded that the evidence did not take those claims "outside of the realm of speculation", and refused discovery in relation to those claims.[15] The discovery that was ultimately ordered was narrow, and related to a

[10] Cf. *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175; *Lloyd v Costigan (No 2)* (1983) 82 FLR 104; *Nestle Australia Ltd v Commissioner of Taxation* (1986) 10 FCR 78 at 82; *Jilani v Wilhelm* (2005) 148 FCR 255 at [110]-[111].

[11] *SMEC Holdings Pty Ltd v Commissioner of the Australian Federal Police* [2018] FCA 609 at [25].

[12] (1996) 68 FCR 265 at 280.

[13] Ibid, cf *Jilani v Wilhelm* (2005) 148 FCR 255 at [109].

[14] (1996) 68 FCR 265 at 269E.

[15] Ibid at 281E.

different part of the case, concerning legal professional privilege arising from the issue of warrants in relation to a barrister in active practice.[16]

28. Merkel J's observation must also be read in light of recent decisions of this Court concerning discovery in cases alleging the invalidity of search warrants.

29. Contrary to AS[29], this case falls into the same category as the discovery application in *SMEC Holdings Pty Ltd*.[17] The applicants in that case asserted that, on the information before them and given various contextual features, the issuing officers could not have been satisfied that there were reasonable grounds for the suspicions identified in the search warrants.[18] In refusing discovery, Bromwich J held that it was insufficient that the "documents sought were relevant to the grounds" in the originating application and that there was "no lack of bona fides with regard to the claims made".[19] His Honour also considered that the applicant's propositions applied "to all challenges to the issue of a search warrant and largely states the obvious in the abstract".[20]

30. It is for the applicant to establish that the first respondent could not reasonably exercise the discretion in s 3E(1) of the Crimes Act, which requires satisfaction that there were reasonable grounds for suspecting that there would be evidential material at the applicant's premises.

31. As noted above, the fact that the first respondent exercised his discretion to issue the warrant demonstrates that the considerations identified by the applicant at AS[31]-[32] were not considered decisive. The recitation of the factual context for the warrant is unpersuasive. It does not provide a basis, or evidence, for suggesting that the warrant might have been issued unlawfully.[21] For example, the suggestion at AS[32] that the

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[16] ss at 269E, 281F.

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

[18] Ibid at [12]-[13].

[19] Ibid at [27].

[20] Ibid at [28].

[21] *Jilani v Wilhelm* [2005] FCAFC 269 at [109]; *SMEC Holdings Pty Ltd v Commissioner of the Australian Federal Police* [2018] FCA 609 at [24]-[25].

first respondent issued the warrant without regard to privacy considerations cannot be seriously entertained; as such considerations apply to the issue of every warrant.

32. Further, as a general proposition, the claims about the protection of sources, the importance of investigative journalism and the implied freedom could be made (whatever their merits) in relation to any search warrant directed at public commentators or media organisations. There is nothing special about the warrant in this respect. The applicant's submissions about those matters meet Bromwich J's description of "largely stating the obvious in the abstract".[22]

C. PROPOSED ORDERS

33. Despite opposing the second and third respondents' application for expedition, the applicant has proposed a timetable in its second draft minute of orders that would have the matter ready for hearing by mid-November. The short minutes proposed by the second and third respondents would have the matter ready for hearing by the beginning of October.

34. The applicant's second set of proposed orders seem to proceed on the assumption that any discovery application (to be filed by 9 August) will proceed by consent such that discovery will be given by 23 August. That assumption cannot be safely made, in circumstances where the applicant has provided neither prior indication that they intend to seek discovery, nor detail as to what discovery will be sought.

35. Having sought the supporting affidavit (but no other documents) by a notice to produce, neither the applicant nor its deponent have given any indication of the kinds of material that will be sought by discovery, nor how such material might assist it in making out any of the grounds in the originating application.

36. In any case, there are real questions as to whether, if such an application were successful, discovery of a presently undefined scope together with affidavits in support of any objection to production could be given in 14 days where there is an ongoing criminal

[22] *SMEC Holdings Pty Ltd v Commissioner of the Australian Federal Police* [2018] FCA 609 at [28].

investigation, doubtless attended by significant public interest immunity and legal professional privilege issues.

37. More generally, there is no reason why the discovery process envisaged in proposed orders 2-5 must conclude before the balance of the proposed timetable can be progressed.

38. Finally, the "other matter" noted in the applicant's draft minutes of orders seeks an undertaking from the second and third respondents not to access the seized material in circumstances where the applicant:

(a) has not consented to the expedition application;

(b) is not agreeing to the matter being listed for final hearing;

(c) have not pressed their claim for interlocutory relief restraining the second and third respondents from accessing the material; and

(d) has not made any other application or submission in support of such an undertaking being required.

Dated: 31 July 2019

Neil Williams SC

Alison Hammond
Sixth Floor Selborne Chambers