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

No. NSD 989 of 2019

BETWEEN:

AUSTRALIAN BROADCASTING CORPORATION
Applicant

MARTIN KANE and OTHERS
Respondents

APPLICANT'S OPENING SUBMISSIONS

A. INTRODUCTION

1. On 11 July 2017, the applicant (**ABC**) published on its website a series of online stories by Daniel Oakes (**Oakes**) and Sam Clark (**Clark**) titled "The Afghan Files" (**Afghan Files Stories**). In preparing the Afghan File Stories, Oakes and Clark relied on information provided to Oakes by informants in circumstances where Oakes had promised the informants not to disclose the informants' identity. The Afghan Files Stories stated that they were based on information provided by such sources.

2. On 3 June 2019, the first respondent (**Kane**) issued a search warrant that purported to authorise the third respondent (**Brumby**) or a constable assisting him to enter and search the ABC's premises in Sydney, and to seize materials. On 5 June 2019, Brumby executed the warrant at the ABC's premises, and he and the constables assisting him seized documents and things purportedly pursuant to the warrant.

3. By its application filed on 24 June 2019, and amended by leave granted on 20 August 2019, the ABC seeks, among other things, declarations that the warrant was invalid and that the search was unlawful, and orders requiring the return to the ABC of all seized materials in the possession, custody or power of Brumby, the second respondent (**Commissioner**) or the Australian Federal Police (**AFP**).

B. THE SCOPE OF THE POWER TO ISSUE THE WARRANT

4. By its first ground [OA [18A]], the ABC contends that Kane's decision to issue the search warrant was not authorised by s 3E(1) of the *Crimes Act 1914* (Cth) (**Crimes Act**) on its proper construction, having regard — in particular — to the implied freedom of political communication.

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5. It is now well established that there is implied in the Constitution a qualified limitation on legislative power in order to ensure that the people of the Commonwealth may exercise a free and informed choice as electors — the implied freedom of political communication.[1] The test applied in determining whether a law infringes the implied freedom involves three questions:[2]

> 1. Does the law effectively burden the implied freedom in its terms, operation or effect?
> 2. If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
> 3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

6. The ABC does not contend that s 3E(1) of the Crimes Act is itself invalid by reason of the implied freedom. Rather, the ABC submits that that the implied freedom imposes limits on the scope of the discretion conferred by s 3E(1), with the result that, in the circumstances of this case, Kane's decision to issue the search warrant was not authorised by s 3E(1) and was therefore *ultra vires*.

7. Section 3E(1) of the Crimes Act confers on an issuing officer a discretion to issue a search warrant,[3] if the issuing officer is satisfied of the matters set out in that provision. It is well established that, where an Act confers a discretion on an administrative decision-maker, the exercise of that discretion is "constrained by the constitutional restrictions upon the legislative power".[4] That is:[5]

> The discretion is effectively confined so that an attempt to exercise the discretion inconsistently with [the Constitution] is not only outside constitutional power — it is equally outside statutory power and judicial review is available to restrain any attempt to exercise the discretion in a manner obnoxious to the [Constitution].

8. It follows that an issuing officer cannot exercise the discretion in s 3E(1) in a way that is inconsistent with the implied freedom — such an exercise of discretion could not be authorised by the Crimes Act and would therefore be *ultra vires*.[6]

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1 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560; *McCloy v New South Wales* (2015) 257 CLR 178, 194–5 [2] (French CJ, Kiefel, Bell and Keane JJ).

2 *Clubb v Edwards* (2019) 93 ALJR 448, 462 [5] (Kiefel CJ, Bell and Keane JJ). The test applied in determining whether a law infringes the implied freedom was identified in *Lange* (1997) 189 CLR 520, 561–2, and modified in *Coleman v Power* (2004) 220 CLR 1, *McCloy* (2015) 257 CLR 178, 194–5 [2] (French CJ, Kiefel, Bell and Keane JJ) and *Brown v Tasmania* (2017) 261 CLR 328, 363–4 [104] (Kiefel CJ, Bell and Keane JJ), 375–6 [155]–[156] (Gageler J), 413 [271] (Nettle J), 432–3 [319]–[325] (Gordon J).

3 See *Rogers v Moore* (1992) 39 FCR 201, 217; *Lord v Commissioner, AFP* (1997) 74 FCR 61, 86–7.

4 *Wotton v Queensland* (2012) 246 CLR 1, 14 [21] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also *Shrimpton v Commonwealth* (1945) 69 CLR 613, 629–30 (Dixon J); *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 613–4 (Brennan J).

5 *Miller* (1986) 161 CLR 556, 614 (Brennan J).

6 See *Miller* (1986) 161 CLR 556, 613–4 (Brennan J); *Wotton* (2012) 246 CLR 1, 9-10 [10], 13–14 [21]–[22] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 220 [72] (French CJ and Kiefel J), 231 [113] (Gummow, Hayne, Crennan and Bell JJ).

9. In determining whether Kane's decision to issue the search warrant was *ultra vires* for that reason, the following analysis is required:

   9.1 first, identify the nature and extent of the burden on the implied freedom resulting from the exercise of discretion (here, the issue of the warrant);

   9.2 second, identify the purpose compatible with the maintenance of the constitutionally prescribed system of representative government that is served by the law that confers the discretion (here, s 3E(1) of the Crimes Act); and

   9.3 third, ask whether, if the relevant law were to authorise burdens on the implied freedom of the kind that resulted from the relevant exercise of discretion, would that be disproportionate to what can reasonably be justified in pursuit of the statutory purpose.

10. If the answer to the question in [9.3] is "yes", then the decision was *ultra vires* — on its proper construction, s 3E(1) of the Crimes Act cannot authorise decisions that impose an unjustifiable burden on the implied freedom.

11. ***First stage: burden***. The issue of the warrant imposed an effective burden on the implied freedom. The warrant purported to authorise a search of the premises of the ABC, which is a news organisation [SAFI [30]-[35]]. Journalists employed by the ABC rely on information provided to them by sources who have been promised that their identity will be kept confidential [SAFI [46]].

12. When a warrant is executed on the premises of a news organisation seeking or relating to evidential material obtained from confidential sources, there is an inherent risk that, in the course of executing the warrant, the identity of confidential sources will be revealed. That risk is significantly increased where, as here: (a) the material described in the second condition of the warrant included articles stated to have been based on information provided by confidential sources [SAFI [64]]; (b) the offences described in the third condition of the warrant related to the disclosure of information by a person who the respondents can be inferred to have understood to be a confidential source; and (c) the warrant purported to authorise a very broad search, with no conditions or limitations that might effectively operate to protect the identity of other confidential sources.

13. Information that electors obtain as a result of journalists' work — including work that results from information provided by confidential sources — can be relevant to the decisions that electors make at elections and referenda [SAFI [53]]. If the identity of sources of significant information were revealed, those sources may be at risk of various types of harm to reputation, livelihood, property or person [SAFI [47]]. If sources of

significant information were to face harm of those or other kinds, they and other actual or potential sources may be deterred from providing information in future [SAFI [47]]. As the High Court has recognised:[7]

> [T]he free flow of information is a vital ingredient in the investigative journalism which is such an important feature of our society. Information is more readily supplied to journalists when they undertake to preserve confidentiality in relation to their sources of information.

14. By creating a significant risk that, in execution of the warrant, the identity of confidential sources would be revealed, the issue of the warrant imposed an effective burden on political communication — it sent a chilling message to actual and potential sources that decreased the likelihood that information capable of informing the decisions that electors make at elections and referenda would be provided to journalists in future. Although it is indirect, this is a substantial burden. There are types of information that journalists cannot access except by making a promise of confidentiality to a source. If other actual or potential sources are deterred from providing information in future, electors may never be made aware of that information.

15. ***Second stage: purpose***. The ABC accepts that s 3E of the Crimes Act has a purpose that is compatible with the maintenance of the constitutionally prescribed system of representative government. That purpose can be summarised as permitting the issue of search warrants to "facilitate the gathering of evidence against, and the apprehension and conviction of, those who have broken the criminal law", subject to limits that seek to "balance the need for an effective criminal justice system against the need to protect the individual from arbitrary invasions of his privacy and property".[8]

16. ***Third stage: proportionality***. The ABC does not contend that issue of *any* search warrant authorising a search of the premises of a news organisation or journalist will impose a disproportionate burden on the implied freedom. Rather, the ABC contends that the issue of a warrant authorising a search of the premises of a news organisation or journalist will impose a disproportionate burden where, as in this case: (a) the material described in the second condition of the warrant included publications stated to have been based on information provided by confidential sources [SAFI [64]]; (b) the offences described in the third condition of the warrant related to the disclosure of information by a person who the respondents can be inferred to have understood to be a confidential source; (c) the terms of the warrant were not narrowly confined, but instead purported to authorise a very broad search which, if executed, involved an inherent risk that the identity of other confidential

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7 *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346, 354. See also Victoria, *Parliamentary Debates*, Legislative Assembly, 7 June 2012, 2660–1.

8 *George v Rockett* (1990) 170 CLR 104, 110. See also *Corbett* (2007) 230 CLR 606, 628 [89] (Callinan and Crennan JJ).

sources would be revealed; and (d) the warrant was not subject to any express condition that would operate to protect the identity of those confidential sources.

17. In determining whether the burden that a law imposes on the implied freedom is proportionate, or justified, a majority of the High Court has adopted an approach of asking whether the law is "suitable", "necessary", and "adequate in its balance".[9] The ABC submits that a similar approach can be taken in determining whether an exercise of discretion under a law would disproportionately or unjustifiably burden the freedom.

18. ***Suitable.*** A law will be "suitable" if it has a rational connection to the purpose identified at the second stage above.[10] To be "suitable", an exercise of a discretion under a law must similarly have such a connection. The ABC accepts that the exercise of the discretion to issue the warrant had a rational connection to the purpose identified in [15] above.

19. ***Necessary.*** A law will not be "necessary" if there are obvious and compelling, reasonably practicable alternative means of achieving the same purpose that have a less restrictive effect on the implied freedom.[11] The ABC submits that an exercise of a discretion under a law will not be "necessary" if there is another reasonably practicable means of achieving the same purpose that will have a less restrictive effect on the freedom.

20. Kane's decision to issue the search warrant in this case was not "necessary" in the sense described above. There were obvious and compelling, reasonably practicable alternative means of achieving the purpose that was sought to be achieved by the issue of the warrant, with a less restrictive effect on the freedom. In particular, Kane could have issued the warrant:

    20.1 in terms that precisely identified the area of the search, rather than in the vague, uncertain and conclusory terms used in the warrant, which purported to authorise a very broad search; or

    20.2 subject to a condition that the warrant did not authorise the seizure of material that identified, or had the capacity to identify, confidential sources other than those specifically identified in the warrant, whose identity was already known to the AFP.

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9 See *McCloy* (2015) 257 CLR 178, 194–5 [2] (French CJ, Kiefel, Bell and Keane JJ); *Clubb* (2019) 93 ALJR 448, 462 [5]–[6], 470–1 [70]–[74] (Kiefel CJ, Bell and Keane JJ), 506–9 [266]–[275] (Nettle J).

10 See *Unions NSW v New South Wales* (2013) 252 CLR 530, 557 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Tajjour v New South Wales* (2014) 254 CLR 508, 571 [112] (Crennan, Kiefel and Bell JJ); *McCloy* (2015) 257 CLR 178, 209–10 [54] (French CJ, Kiefel, Bell and Keane JJ).

11 See *Unions NSW* (2013) 252 CLR 530, 556 [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy* (2015) 257 CLR 178, 210 [57] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2017) 261 CLR 328, 371–2 [139] (Kiefel CJ, Bell and Keane JJ).

21. The fact that the protection afforded by s 126K(1) of the *Evidence Act 2008* (Vic) expressly extends to search warrants[12] demonstrates that the purpose identified in [15] above can be achieved subject to appropriate measures to protect the identity of confidential sources. However, Kane did not adopt those alternatives. Because it was not "necessary" in the sense described above, Kane's decision to issue the warrant in its terms was outside the scope of the discretion conferred by s 3E(1) of the Crimes Act, and was invalid.

22. This analysis is consistent with established authority about the scope of the search that may be authorised by a warrant. In *R v Tillett; ex parte Newton*,[13] Fox J observed that a warrant will be invalid if it is "wider than is necessary to carry out the manifest legislative purpose", giving as an example a warrant which authorised a general search of bank premises, or all documents relating to a particular account, when the information pointed to one forged cheque. In *Caratti v Commissioner, AFP (No 2)*, Wigney J held that Fox J's comments were to be read as meaning "anything wider than permitted under the relevant statutory provision, properly construed".[14] On its proper construction, s 3E(1) must be consistent with the implied freedom. In cases where the issue of a search warrant imposes an effective burden on the implied freedom, s 3E(1) does not authorise an issuing officer to issue a warrant that is wider than is necessary to achieve the purpose of the issue of the warrant. The warrant issued by Kane did not satisfy that requirement.

23. ***Adequate in its balance.*** Whether a law is "adequate in its balance" requires a value judgment, consistent with the limits of the judicial function, describing the balance between the purpose served by the law and the extent of the burden it imposes on the freedom.[15] Whether an exercise of discretion under a law is "adequate in its balance" should be assessed by reference to whether, if the relevant law were to authorise burdens of the kind that arise from that particular exercise of discretion, it would be disproportionate to, or go beyond, what could reasonably be justified in pursuit of the relevant purpose.[16]

24. It is only necessary to reach this stage of the analysis if a law is both "suitable" and "necessary".[17] If this stage of the analysis is reached, the ABC submits that Kane's decision to issue the warrant was not "adequate in its balance". The burden that the warrant imposed on the implied freedom was substantial — it created a significant and unchecked risk of the disclosure of the identity of confidential sources, and in doing so

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12 *Evidence Act 2008* (Vic), s 131A(2)(g).
13 (1969) 14 FLR 101, 125.
14 [2016] FCA 1132, [172].
15 *McCloy* (2015) 257 CLR 178, 194–5 [2] (French CJ, Kiefel, Bell and Keane JJ).
16 See *Brown* (2017) 261 CLR 328, 422–3 [290] (Nettle J).
17 *Clubb* (2019) 93 ALJR 448, 462 [6] (Kiefel CJ, Bell and Keane JJ).

reduced the willingness of other actual or potential sources to come forward in future. If burdens of that kind are authorised, there may be information of public importance that will never be made known to electors, because sources are unwilling to come forward.

25. Thus, if s 3E(1) of the Crimes Act were construed as authorising those kinds of burdens on the implied freedom, it would go well beyond what could reasonably be justified in pursuit of the purpose identified in [15] above.

C. INVALIDITY ON THE FACE OF THE WARRANT

26. By its second, third and fourth grounds [OA [19]–[21]], the ABC contends that the search warrant was invalid on its face.

C.1 No real and meaningful perimeter / Conclusionary, vague and uncertain

27. By its second and third grounds [OA [19]–[20]], the ABC contends that the search warrant was invalid because it failed to provide a real and meaningful perimeter to the evidential matters the search warrant purportedly authorised to be searched for and seized, and the suspected offences in the third condition of the warrant were expressed in a conclusionary, vague and uncertain manner.

28. The principles relevant to the determination of these grounds are well established.[18] A search warrant must state the offence to which the warrant relates, and the kinds of evidential material that are to be searched for under the warrant.[19] The purpose of these requirements is to set bounds to the area of the search that the execution of the warrant will involve.[20] If the offence and the evidential material are described in a way that is ambiguous or uncertain, the search warrant may be invalid because it fails to set "real and meaningful perimeters" to the area of search.[21] In determining whether a warrant is invalid for that reason, the relevant question is whether the warrant enables the executing officer and those assisting to decide if the things seized come within the terms of the warrant.[22] The precision required in a given case:[23]

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18 See, eg, *Beneficial Finance Corporation v Commissioner, AFP* (1991) 31 FCR 523, 533–43 (Burchett J; Sheppard J agreeing); *Caratti v Commissioner, AFP* (2017) 257 FCR 166, 180–3 [35]–[42]; *Randlab Australia Pty Ltd v Australian Pesticides and Veterinary Medicines Authority* [2019] FCA 1472, [21].

19 Crimes Act, s 3E(5).

20 *Beneficial Finance* (1991) 31 FCR 523, 533 (Burchett J); *Corbett* (2007) 230 CLR 606, 630–1 [99] (Callinan and Crennan JJ); *Caratti* (2017) 257 FCR 166, 181 [37(1)].

21 *Zhang v Commissioner, AFP* [2009] FCA 1170, [13].

22 *Beneficial Finance* (1991) 31 FCR 523, 539 (Burchett J); *Caratti* (2017) 257 FCR 166, 182 [37(4)]. Specificity is also required to allow the occupier of the premises and the issuing officer to know the boundaries of the search: see *Beneficial Finance* (1991) 31 FCR 523, 542–3 (Burchett J); *Corbett* (2007) 230 CLR 606, 632–3 [105]–[106] (Callinan and Crennan JJ). For convenience, references below will be to the executing officer.

23 *Beneficial Finance* (1991) 31 FCR 523, 543 (Burchett J).

> may vary with the nature of the offence, the other circumstances revealed, the particularity achieved in other respects, and what is disclosed by the warrant, read as a whole, and taking account of its recitals.

29. Here, the search warrant was in the familiar three condition format. Neither the first condition nor the second condition meaningfully limited the scope of the search authorised by the warrant. The first condition was "[t]hings which are originals or copies of any one or more of the following", and set out a list that included almost every type of document that might be found at the ABC's premises. The second condition was that the things described in the first condition must "relate to any one or more of the following" and set out a wide-ranging list of topics that included, for example, "Australian Broadcasting Corporation (ABC)". The words "relating to" are words of the "widest ambit".[24] As the warrant was executed at the ABC's premises, every thing at those premises "relate[d] to" the ABC.

30. The third condition was thus the only means by which the scope of the search authorised by the warrant was confined.[25] It was imperative for the third condition to describe the suspected offences in a way that would enable the executing officer to decide if the things seized came within the terms of the warrant.[26] It did not do so.

31. The first two suspected offences described in the third condition of the search warrant were that, between 14 April 2016 and 1 October 2016, David McBride (**McBride**) gave Oakes "military information" contrary to s 73A(1) of the *Defence Act 1903* (Cth) (**Defence Act**), and Oakes unlawfully obtained "military information" contrary to s 73A(2) of the Defence Act. The term "military information" introduced such a degree of ambiguity and uncertainty that it was not possible for the executing officer to decide if things seized came within the scope of the warrant, with the result that the warrant did not set bounds to the area of the search that it purported to authorise.

32. The term "information" is capable of referring to a broad range of matters, and is "capable of different shades of meaning, depending on the context".[27] In its ordinary meaning, the term "information" includes hearsay, matters of opinion, actual or likely intention or assumption,[28] as well as untested assertions,[29] matters of supposition, and matters that are

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24 See *Williams v Keelty* (2001) 111 FCR 175, 212 [158], citing *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602, 620 (Taylor J).

25 Cf *Caratti* (2017) 257 FCR 166, 192 [67].

26 See *Caratti* (2017) 257 FCR 166, 182–3 [41], 192 [67].

27 *Win v Minister for Immigration and Multicultural Affairs* (2001) 105 FCR 212, 217 [18]; *R v Mansfield* (2011) 251 FLR 286, 309 [105]–[106] (Buss JA).

28 *R v Mansfield* (2011) 251 FLR 286, 290 [10] (McLure P).

29 *Win* (2001) 105 FCR 212, 217 [18], 218 [22]; *Minister for Home Affairs v Ogawa* [2019] FCAFC 98, [94] (Davies, Rangiah and Steward JJ).

false.[30] The term "military" also has a range of meanings. It can refer to a country's armed forces, or to a country's army, or more broadly to any matter relating to soldiers, war, or defence.

33. The combination of those words in the expression "military information" provides no guidance about which of the many possible meanings of "military" and "information" are intended to apply. In particular, the term provides no guidance to the executing officer about whether the information must be recent or credible, whether it must originate from the military, whether it must relate to the military of a particular country, or whether even a tenuous or distant connection between the information and the military will suffice. Its meaning is entirely ambiguous. It may or may not include, for example, a documentary about Australia's involvement in World War Two, a newspaper article about the Soviet–Afghan War, or a photograph of the Royal Military College, Duntroon.

34. The terms of the warrant provided no context to enable the executing officer to determine whether any particular item constituted "military information". There were no recitals to the warrant. As noted in [29] above, the first and second conditions imposed no relevant limit. The list of topics in the second condition included the topic "Daniel (Dan) OAKES". Any information given to Oakes, or that Oakes obtained, would "relate to" that topic, and therefore satisfy the second condition. Other topics in that list, such as "Australian Defence Force (ADF)" and "Afghanistan" were similarly open-ended. There was no restriction as to recency, credibility, source, or the degree of connection required for a thing to constitute "military information".

35. Given the ambiguity and uncertainty introduced by the term "military information", it was not possible for the reader of the warrant to "understand the object of the search and appreciate the boundaries of the authorisation to enter, search and seize" such that "there could be no mistake about the object of the search or about the boundaries of the search warrant".[31] The description did not enable "an assessment to be made as to whether there [were] sufficient grounds to induce in a reasonable person the belief that the thing seized fell within the class … described".[32] It follows that, subject to any question of severance (which the ABC will address in reply), the warrant was invalid.

C.2 Description of s 73A(1) and (2) of the Defence Act

36. By its fourth ground [OA [21]], the ABC contends that the search warrant is invalid because it purported to authorise the seizure of material that could not afford evidence as

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30 See *Mansfield v The Queen* (2012) 247 CLR 86, 102–3 [59]–[65] (Heydon J), and the cases cited there.

31 *Corbett* (2007) 230 CLR 606, 633 [106]–[107] (Callinan and Crennan JJ).

32 *Jeremiah v Lawrie* (2016) 315 FLR 134, 138 [13] (Kelly J), 144–5 [37] (Hiley J).

to the commission of the first and second of the suspected offences referred to in the third condition of the warrant; that is, the offences under s 73A of the Defence Act.

37. The offences in s 73A of the Defence Act may be committed where a person communicates or obtains "any plan, document, or information relating to any fort, battery, field work, fortification, or defence work, or to any defences of the Commonwealth, or to any factory, or air force aerodrome or establishment or any other naval, military or air force information".

38. On their proper construction, the general words "other naval, military or air force information" in s 73A(1) and (2) of the Defence Act are governed by the *ejusdem generis* rule of statutory construction — that is, they are limited to information of the same genus as the specific kinds of information referred to in s 73A.[33] The relevant genus is clear:[34] the words "fort", "battery", "field work", "fortification", "defence work", "defences", "factory" and "aerodrome or establishment" all refer to physical buildings or installations. On their proper construction, the words "other naval, military or air force information" in the context of s 73A mean information about naval, military or air force buildings or installations.

39. There is nothing in the relevant text or context to indicate that the *ejusdem generis* rule should not apply to s 73A of the Defence Act.

40. *First*, as noted above, s 73A establishes a clear genus, indicating that the Parliament intended for the rule to apply.

41. *Second*, the drafting of s 73A supports the proposition that the Parliament intended for the rule to apply. If s 73A had been intended to apply to *any* "naval, military or air force information", then all of the more specific words in the provision would be otiose. A construction that renders words otiose was unlikely to have been intended,[35] and should be avoided.[36] Further, this is not a case where the general words precede the specific.[37]

42. *Third*, nothing in the statutory context indicates that the rule should not apply. Since its introduction, s 73A has been located in a Part of the Defence Act headed "Offences",

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33 See, eg, *Attorney-General v Brown* [1920] 1 KB 773, 796–9; *In re Latham* [1962] Ch 616, 635–7; *Canwan Coals Pty Ltd v Federal Commissioner of Taxation* [1974] 1 NSWLR 728, 733–4.

34 Before the *ejusdem generis* rule can be applied, it must be possible to identify a particular genus: see *Tillmanns & Co v SS Knutsford Ltd* [1908] 2 KB 385, 395 (Vaughan Williams LJ), 403 (Farwell LJ), 409 (Kennedy LJ); *R v Regos and Morgan* (1947) 74 CLR 613, 623–4 (Latham CJ); *Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629, 648–9 (Dixon J); *Canwan Coals* [1974] 1 NSWLR 728, 733–4.

35 See *Attorney-General v Brown* [1920] 1 KB 773, 798; *In re Latham* [1962] Ch 616, 636.

36 See *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffiths CJ); *Beckwith v R* (1976) 135 CLR 569, 574 (Gibbs J).

37 See *R v Regos and Morgan* (1947) 74 CLR 613, 623 (Latham CJ); *Dean v Attorney-General (Qld)* [1971] Qd R 391, 403–4.

which has always dealt with a range of different types of conduct — thus, the immediate statutory context provides no aid to the construction of s 73A. Further, the clause of the Defence Bill 1917 (Cth) that introduced s 73A to the Defence Act was not mentioned in the second reading speeches for that Bill.[38]

43. *Fourth*, nothing in the subject matter of s 73A indicates that the rule should not apply. Section 73A creates criminal offences triable on indictment and potentially punishable by imprisonment for life.[39] In construing such a provision, the ordinary rules of statutory construction — including the *ejusdem generis* rule — should be applied, and any remaining ambiguity or doubt should be resolved in favour of the subject — that is, in favour of a narrower construction.[40] It cannot be said that the ABC's construction of s 73A would leave a gap in the law in relation to the protection of sensitive defence-related information. At all relevant times, there have been other offences dealing with the disclosure and receipt of such information.[41]

44. By referring only to "military information", and divorcing those words from their context in s 73A, the third condition of the warrant set out a misleading statement of the offences in s 73A. It cannot be assumed that the words "military information" would have been understood by the reader of the warrant as having their correct, limited, meaning.[42] Those words did not assist the reader to understand the offences in s 73A, but instead gave an erroneous impression of the nature and scope of those offences. By describing the offences in such a misleading way, Kane failed to state the offences to which the warrant related,[43] and purported to authorise the seizure of material that could not afford evidence as to the commission of the offences in s 73A of the Defence Act. It follows that, subject to any question of severance (which the ABC will address in reply), the warrant was invalid.

45. Further, in forming the state of satisfaction required by s 3E(1) of the Crimes Act, Kane was required to proceed "on a correct understanding and application of the applicable law".[44]

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38 Commonwealth, *Parliamentary Debates*, Senate, 8 September 1917, 815–9; Commonwealth, *Parliamentary Debates*, House of Representatives, 18 September 1917, 2175–88.

39 See Defence Act, s 73F.

40 *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J). See also *Waugh v Kippen* (1986) 160 CLR 156, 164 (Gibbs CJ, Mason, Wilson and Dawson JJ).

41 See, eg, Crimes Act (as in force before 29 June 2018), s 79; Criminal Code (Cth), Part 5.6.

42 See *Dunesky v Elder* (1994) 54 FCR 540, 557.

43 Crimes Act, s 3E(5)(a).

44 *Hossain v Minister for Immigration and Border Protection* (2018) 92 ALJR 780, 789 [34] (Kiefel CJ, Gageler and Keane JJ). See also *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 30 [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Wilkie v Commonwealth* (2017) 263 CLR 487, 537 [109]. Cf *Polley v Johnson* [2015] NSWCA 256, [47]–[51] (Simpson JA; Beazley P and McColl JA agreeing).

46. The applicable law included s 73A of the Defence Act.[45] Section 3E(1) required Kane to be satisfied that there were reasonable grounds for suspecting that there was, or would be, "evidential material" at the ABC's premises. "Evidential material" relevantly means a "thing relevant to an indictable offence",[46] which is relevantly defined as:[47]

> anything as to which there are reasonable grounds for suspecting that it will afford evidence as to the commission of [an indictable offence against any law of the Commonwealth or of a Territory].

Thus, in order to form the relevant state of satisfaction, it was necessary for Kane to proceed on a correct understanding of the law creating the relevant indictable offence.

47. To the extent that the words "military information", as they appear in the warrant, have any certain meaning, they are far broader than information about military buildings or installations. In these circumstances, the only available inference is that, in deciding to issue the warrant, Kane proceeded on an incorrect understanding of s 73A of the Defence Act. There is a realistic possibility that, if Kane had proceeded on a correct understanding of s 73A of the Defence Act, he would not have issued the warrant (or would not have issued it in its terms). Thus, for this separate reason, the warrant is invalid.

D. INVALIDITY OF SECTION 73A(2) OF THE DEFENCE ACT

48. The ABC no longer presses its fifth ground [OA [22A]].

E. LEGAL UNREASONABLENESS

49. By its sixth and seventh grounds [OA [23]–[24]], the ABC contends that Kane's decision to issue, and the Commissioner and Brumby's decisions to seek, the search warrant were legally unreasonable.

50. Like other discretions conferred on administrative decision-makers, the discretions to seek and to issue a search warrant under s 3E of the Crimes Act must be exercised reasonably.[48] If the exercise of that discretion is legally unreasonable, it will be invalid.

51. Legal unreasonableness can follow from a jurisdictional error in the decision-making process. Alternatively, however, and relevantly here, legal unreasonableness can be "outcome focused", without the need to identify a particular jurisdictional error.[49] That is because:[50]

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45 See *Hossain* (2018) 92 ALJR 789 [34] (Kiefel CJ, Gageler and Keane JJ).

46 Crimes Act, s 3C(1).

47 Crimes Act, s 3(1).

48 See, generally, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 349 [24], 350 [26], 351 [29] (French CJ), 362 [63] (Hayne, Kiefel and Bell JJ), 370–1 [88]–[92] (Gageler J); *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 3 [4] (Allsop CJ).

49 See *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, 445 [44].

50 *Singh* (2014) 231 FCR 437, 446 [45]. See also *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 359-360 (Dixon J).

> [W]here no reasons for the exercise of power, or for a decision, are produced, all a supervising court can do is focus on the outcome of the exercise of power in the factual context presented, and assess, for itself, its justification or intelligibility bearing in mind that it is for the repository of the power, and not for the Court, to exercise the power but to do so according to law.

52. The question for the Court is whether, having regard to all the circumstances, the exercise of the discretion had an "evident and intelligible justification",[51] and whether it "[fell] within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law".[52] In undertaking this analysis, it is necessary to:[53]

> [attend] to the terms, scope and policy of the statute and the values drawn from the statute and the common law that fall to be considered in assessing the decision. The terms, scope and policy of the statute and the fundamental values that attend the proper exercise of power — a rejection of unfairness, of unreasonableness and of arbitrariness; equality; and the humanity and dignity of the individual — will inform the conclusion, necessarily to a degree evaluative, as to whether the decision bespeaks an exercise of power beyond its source.

53. The ABC submits that, having regard to all the circumstances of this case, the decisions to seek and to issue the search warrant were legally unreasonable. Several aspects of the factual circumstances are relevant to that conclusion.

54. ***The terms of the warrant***. The terms of the warrant were not narrowly confined, but purported to authorise a very broad search. *First*, as explained at [29] above, neither the first condition nor the second condition meaningfully limited the scope of the search authorised by the warrant. Nor did the suspected offences described in the third condition. As explained in Parts C.1 and C.2 above, the first two suspected offences used the term "military information", which was uncertain and ambiguous, and significantly broader than the kinds of information to which s 73A of the Defence Act applies. *Second*, none of the suspected offences identified the particular "information", "property", or "fact[s] or document[s]" that were the subject of the suspected offences with any particularity. Further, the second and fifth suspected offences failed to identify, respectively, from whom the relevant "information" was obtained, and to whom the relevant "fact or document" was disclosed.

55. ***The state of the investigation***. The breadth of the search that the warrant purported to authorise was unnecessary and inexplicable, given what must have been known to the AFP at the time of the issue of the warrant. By the time the warrant was sought and issued, the AFP knew with particularity the documents that were the subject of the suspected offences described in the third condition of the warrant. *First*, by March 2019, McBride had been charged with offences against s 131.1 of the Criminal Code (Cth), s 73A(1) of the Defence Act and s 70(1) of the Crimes Act — that is, the first, third and fifth suspected

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51 *Li* (2013) 249 CLR 332, 367 [76] (Hayne, Kiefel and Bell JJ).

52 *Li* (2013) 249 CLR 332, 375 [105] (Gageler J), citing *Dunsmuir v New Brunswick* [2008] 1 SCR 190, 220–1 [47].

53 *Stretton* (2016) 237 FCR 1, 5 [9] (Allsop CJ).

offences described in the third condition of the warrant [SAFI [66]–[69]]. *Second*, by the end of May 2019, McBride had been committed to stand trial in respect of those offences [SAFI [71]]. *Third*, in March, May and June 2019, McBride made public statements about the charges against him, including statements to the effect that he had handed over documents to the media [SAFI [73]]. *Fourth*, in April 2019, the AFP requested the consent of Oakes and Clark to a forensic procedure, being the copying of finger and palm prints — stating that it wished the finger and palm prints in order to compare them to forensic evidence drawn from materials already in the AFP's possession [SAFI [78]].

56. ***The risk that the warrant posed to the protection of the identity of confidential sources***. The breadth of the search that the warrant purported to authorise was also inexplicable in light of the risk that such a broad and unconfined search would pose to the protection of the identity of confidential sources. That risk was obvious, in circumstances where: (a) the warrant purported to authorise a search of the premises of a news organisation; (b) the material described in the second condition of the warrant included articles stated to have be based on information provided by confidential sources [SAFI [64]]; (c) the offences described in the third condition of the warrant related to the disclosure of information by a person who the respondents can be inferred to have understood to be a confidential source; (d) the warrant was not subject to any express condition that would operate to protect the identity of other confidential sources; and (e) the execution of the warrant involved the inherent likelihood that the identity of confidential sources would be disclosed, rendering for practical purposes nugatory the source protection provisions in the *Evidence Act 1995* (Cth) (**Evidence Act**). As explained in Part B above, the warrant imposed a burden on the implied freedom of political communication. The importance of the protection of the identity of confidential sources is reflected in: (a) the existence of s 126K(1) of the Evidence Act; (b) the policies of the ABC and other news organisations [SAFI [41]–[52]]; (c) judgments of the courts;[54] and (d) the contribution that publication of investigative journalism makes to bringing public malfeasance, abuse of power, neglect and corruption to the attention of electors [SAFI [53]–[55]].

57. When the decisions to seek and to issue the search warrant are considered in their full factual context, the ABC submits that those decisions lack an evident and intelligible justification. There was no need to seek or to issue a warrant in such broad and unconfined terms, given the information available to the AFP, and the risk that the warrant posed to the protection of the identity of confidential sources.

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[54] See *Cojuangco* (1988) 165 CLR 346, 354. See also *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 205 (Lord Nichols of Birkenhead); *Madafferi v The Age Company Ltd* (2015) 50 VR 492, 528 [122].

F. CLAIMS RELATING TO DOCUMENTS

58. By its proposed eighth and ninth grounds [PFAOA [24A], [24B]], the ABC contends that the search warrant did not authorise the seizure of particular documents.

F.1 Legal professional privilege

59. A search warrant issued under s 3E of the Crimes Act does not authorise the seizure of documents subject to legal professional privilege.[55] Thus, the warrant did not authorise the seizure of the documents identified in paragraph 7 of the affidavit of Michael Rippon affirmed on 24 September 2019.

F.2 Source protection

60. Section 126K(1) of the Evidence Act provides that, "[i]f a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained". Although s 131A of the Evidence Act does not expressly extend the application of s 126K(1) to the seizure of material under a warrant issued under s 3E of the Crimes Act,[56] the application of s 126K(1) is impliedly extended in that way because, if it were not, s 126K(1) would be deprived of effective operation. As Wilson J observed in an analogous context:[57]

> [T]o deny the relevance of a valid claim to legal professional privilege in the face of a search warrant would effectively deny the availability of the privilege in any prosecution that followed … The very existence of the privilege as providing any significant protection and thereby making its contribution to the public welfare must be threatened unless as a matter of principle the protection extends to all forms of compulsory disclosure[.]

61. The ABC submits that the warrant did not authorise the seizure of the documents identified in paragraph 11 of the affidavit of Michael Rippon affirmed on 24 September 2019 because those documents have the capacity to identify informants to whom a journalist employed by the ABC made a promise not to disclose the informants' identity. If the AFP were able to identify those informants by inspecting the documents, that would render effectively nugatory any attempt by a journalist or his or her employer to rely on s 126K(1) of the Evidence Act in any future legal proceedings.

Date: 4 October 2019

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55 See *Baker v Campbell* (1983) 153 CLR 52.
56 Cf *Evidence Act 2008* (Vic), s 131A(2)(g).
57 *Baker v Campbell* (1983) 153 CLR 52, 95–6.