

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 19/08/2019 6:34:14 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:	Submissions
File Number:	NSD989/2019
File Title:	AUSTRALIAN BROADCASTING CORPORATION v MARTIN KANE & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Dated: 19/08/2019 6:34:20 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.

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.



**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' FURTHER SUBMISSIONS
(for directions hearing on 19 August 2019)**

1. At 4:53pm on Friday 16 August 2019, the applicant served reply submissions (**ARS**) and a further proposed Amended Originating Application (**AOA**). These submissions respond to those documents.
2. The second and third respondents oppose the court granting leave for the applicant to make the additional amendments to its Originating Application, on the basis that those amendments are not genuine, but reflect an impermissible attempt to obtain discovery.
3. On 9 August 2019 the applicant filed and served an amended Originating Application. Neither it, nor the Originating Application of 24 June 2019, were filed in circumstances of urgency, and both were settled by Counsel and Senior Counsel. Those documents may be taken to reflect the considered view of the applicant and its advisers of the grounds the applicant wished to advance in support of its challenge to the warrant.
4. In their 14 August 2019 submissions (**RS**), the second and third respondents outlined why the applicant's Originating Application, with the amendments proposed on 9 August 2019, did not entitle the applicant to the discovery it sought.
5. **ARS** and the further proposed **AOA** implicitly accept the force of that submission. It is clear that the applicant has recognised that the documents sought are not relevant to the determination of the issues the applicant has raised. The further proposed **AOA** is an eleventh-hour attempt to reverse-engineer an application that would entitle the applicant to the documents it wants.

6. The proposed further amendments add three further grounds of review (proposed paragraphs 20A, 23A and 24A). Contrary to ARS[3]-[4], those new grounds cannot be characterised as merely clarificatory or formal. Instead, the new grounds mirror precisely the claims that the second and third respondents' submissions demonstrated had not been made.
7. RS[12] submitted that the applicant had put forward no ground of review alleging that "*the search permitted by the search warrants (sic) exceeded what was justified by the material before the first respondent*". Those are the terms now put forward in [20A] of the further proposed AOA.
8. RS[18] submitted that the applicant had put forward no ground of review alleging that the respondents had failed "*to take into account considerations that were required to be taken into account*". Paragraphs 23A and 24A of the further proposed AOA now seek to raise grounds of that exact kind.
9. The applicant bears the onus of satisfying the court that leave should be granted to file the further proposed AOA.¹ In this case, the Court should readily draw the inference that the new grounds are being advanced solely for the impermissible purpose of bolstering the applicant's discovery application. Where an application to amend is "*really directed to meeting the difficulty of obtaining discovery of documents that the plaintiff may wish to see but which are not material to the case*", the Court should not regard the amendment application as genuine.²
10. The applicant is, instead, engaged in a fishing expedition of the most transparent kind. The proposed new grounds are, if anything, more speculative than those advanced in the applicant's Originating Application. In circumstances where a party makes allegations in a pleading based on suspicion, it is not entitled to discovery on those suspicions, for to do so is the clearest example of fishing.³
11. In those circumstances, neither the amendment, nor the discovery sought, will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible. Both ought to be refused. Even if the Court were minded, contrary to this submission, to permit the amendment, it should not order discovery in these circumstances, especially given the entirely speculative nature of the grounds. There is simply no material to support the applicant's suggestion that the first respondent, who authorised a search of ABC premises for evidence relating to stories published by journalists, failed to

¹ *University of Sydney v ObjectiVision Pty Ltd* [2016] FCA 1199 at [62] per Burley J; *Domino's Pizza Enterprises Ltd v Precision Tracking Pty Ltd (No 6)* [2018] FCA 910 at [7] per Robertson J.

² *Mulley v Manifold* (1959) 103 CLR 341 at 349 per Menzies J.

³ *Austral Ships Pty Ltd v Incat Australia Pty Ltd (No 3)* [2010] FCA 795 at [10]; *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 169 at 173-174 per Toohey J, 181-182 per Brennan J, and 190-191 per Lockhart J.

appreciate that this might involve for example 'intrusion into privacy', sources, or 'investigative journalism'. The applicant is trawling.

Dated: 18 August 2019

Neil Williams SC

Alison Hammond
Sixth Floor Selborne Chambers