



## **Senate Legal and Constitutional Affairs Committee**

### **Inquiry into the current investigative process and powers of the Australian Federal Police in relation to non-criminal matters**

### **Submission by the Australian Federal Police**

March 2014

## Introduction

The AFP welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee as part of its inquiry into the current investigative processes and powers of the AFP in relation to non-criminal matters. The AFP has interpreted the terms of reference for the inquiry to relate to criminal asset confiscation action pursued by the AFP under the *Proceeds of Crime Act 2002* (PoCA 2002) and has framed this submission accordingly.

2. The AFP notes that this inquiry is being conducted against the background of the use of PoCA 2002 powers as part of an investigation into potential literary proceeds action against Schapelle Corby. The AFP acknowledges Justice Jagot's decision in the matter relating to search warrants executed at Seven West Media properties in February 2014. The AFP will now consider its future options, including a possible appeal, following a full review of the judgment. It is not appropriate to comment further on this case in this submission.

## Background

3. Australian legislation to allow for the forfeiture of criminally-derived assets has its genesis in the early 1980s as a result of the efforts of the then Australasian Police Ministers Council (APMC) and the then Standing Committee of Attorneys-General (SCAG). Since that time, this legislation has evolved in response to several subsequent independent and parliamentary committee reviews.

4. Model legislation was developed and broadly implemented in all jurisdictions during the 1980s and 1990s. The fundamental premise of the model laws was that where a person had profited from criminal activity, those profits should be returned to society. Further, lawfully acquired property used in the commission of an offence should also be forfeited.

5. At the Commonwealth level, the *Proceeds of Crime Act 1987* (PoCA 1987) provided a regime for conviction-based confiscation action. The principal objects of the Act (set out in subsection 3(1)) were to:

- deprive persons of the proceeds of, and benefits derived from, the commission of relevant offences
- provide for the forfeiture of property used in or in connection with the commission or such offences, and
- to enable law enforcement authorities effectively to trace such proceeds, benefits and property.

6. In relation to this last objective, PoCA 1987 provided law enforcement agencies with the following information gathering powers: search and seizure; court orders for the production of documents (production orders); and court orders to direct a financial institution to give information about transactions conducted through an account held by a particular person with the institution (monitoring orders).

7. During the 1990s, Australia became a party to the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* and the *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime* (POC Convention). Australia is also a party to the *United Nations Convention for the Suppression of the Financing of Terrorism*, the *United Nations International Convention Against Transnational Organised Crime* and the *United Nations Convention Against Corruption*. As a result, Australia must maintain proceeds of crime laws, to the extent provided for in those Conventions. In particular, the POC Convention requires State parties to ensure that special investigative powers are available to trace proceeds and gather evidence relevant to proceeds action.

8. Throughout 1998, the Australian Law Reform Commission (ALRC) conducted a comprehensive review of PoCA 1987, and made 93 recommendations for reform in its 1999 report *Confiscation that counts: A review of the Proceeds of Crime Act 1987* (the ALRC Report)). The key recommendations for reform were: introducing a scheme for non-conviction based confiscation, introducing literary proceeds orders, and enhancing the information gathering powers available to law enforcement. The Government Response to the ALRC Report was implemented through the *Proceeds of Crime Act 2002* (PoCA 2002).

9. Under PoCA 2002, there are five streams of PoCA action.

- *Conviction based restraint and confiscation*: Restraining orders may be made when a person has been, or will be, charged with a Commonwealth offence. However, restraint is not a precondition to the making of final orders following conviction. Final orders may include pecuniary penalty orders and forfeiture of non-restrained property. Automatic forfeiture applies in respect of restrained property upon conviction for a serious offence.
- *Non-conviction person-directed restraint and confiscation*: Restraining orders may be made when a person is suspected of committing certain serious offences. Final orders may be made where the court is satisfied that the person committed a relevant offence (even though there may have been no conviction for that offence).
- *Non-conviction asset-directed restraint and confiscation*: Restraining orders may be made over property suspected of being the proceeds of certain offences. Final orders may be made where either the court is satisfied that the property is proceeds of a relevant offence, or no claim is made in respect to the property.
- *Literary proceeds*: Literary proceeds orders may be made where the court is satisfied that: the person committed a relevant offence (even though there may have been no conviction for that offence); and the person has derived benefits through the commercial exploitation of his or her notoriety resulting from the commission of the offence.
- *Unexplained wealth orders*: Unexplained wealth provisions enable the restraint and forfeiture of unlawful wealth. Under these provisions a person can be compelled to attend court and prove that his or her wealth was not derived from certain offences.

10. Note that this last stream of action (unexplained wealth orders) was introduced in 2010 through the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (the 2010 Amending Act). The Parliamentary Joint Committee on Law Enforcement (PJCLE) conducted a comprehensive review of unexplained wealth provisions during 2011-2012. The Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (the UEW Bill) was introduced into the House of Representatives on 5 March 2014. The UEW Bill amends the unexplained wealth provisions in PoCA 2002 in order to implement the recommendations of the PJCLE.

11. Removing the proceeds of crime is a complex process which generally follows these steps:

- *Substantiation of links to unlawful conduct and property identification (investigation stage)*: The responsibility for investigating cases and collecting evidence rests with Commonwealth investigative agencies like the AFP. An investigative agency locates and collects the evidence and other material required to pursue the proceeds of crime. This may be done in conjunction with a criminal investigation.
- *Restraint of property*: In many cases, though not all, a court order (restraining order) is required to preserve property pending the outcome of confiscation proceedings. This order prohibits the disposal of property, or ability to deal with property, either absolutely or subject to conditions.<sup>1</sup>
- *Confiscation of property*: Confiscation is the end of the legal process and usually involves a court order that specific property be confiscated or that a suspect pay a pecuniary penalty to 'the Commonwealth'. Confiscation proceedings can be contested and often require that further investigations be conducted by the investigating agency to support the litigation proceedings.
- *Disposal of confiscated property*: Once property has been officially confiscated, the Australian Financial Security Authority will then liquidate the property and bank the proceeds into the Confiscated Assets Account established by PoCA 2002.

12. PoCA 2002 provides more expansive information-gathering (investigative) powers than PoCA 1987. The objects clause in section 5 of PoCA 2002 again reflects that the availability of such powers is necessary in order to enable law enforcement authorities to effectively trace proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts. The information gathering powers, set out in Chapter 3 of PoCA 2002 are: examinations, production orders, notices to financial institutions, monitoring orders and search and seizure powers. These powers are set out in more detail below.

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<sup>1</sup> In some situations PoCA 2002 provides that property cannot be confiscated unless it has previously been subject to a restraining order. In other instances confiscation can proceed without restraining orders previously having been made.

13. In April 2006, Mr Tom Sherman AO, was engaged to conduct a review of PoCA 2002. The review was undertaken in accordance with section 327 of PoCA, which required an independent review of the operation of the Act after three years' operation. *The Report on the Independent Review of the Proceeds of Crime Act 2002* (the Sherman Report) was completed in July 2006 and made 18 major recommendations, and 39 technical recommendations, to increase the effectiveness of PoCA 2002.

14. In addition to introducing unexplained wealth provisions, the 2010 Amending Act: introduced new freezing order provisions; removed the six-year time limit for civil-based confiscation action; permitted non-conviction-based confiscation of instruments of serious offences; and increased information sharing provisions. These amendments implemented several of the Sherman Report recommendations.

15. The *Crimes Legislation Amendment (Serious and Organised Crime) Act (No.2) 2010* (the 2<sup>nd</sup> 2010 Amending Act) also made a range of amendments to PoCA 2002 to implement recommendations of the Sherman Report. Relevant to this inquiry the 2010 Amending Act improved the operation of examination provisions and increased the effectiveness of information-gathering tools.

16. The *Crimes Legislation Amendment Act (No.2) 2011* (the 2011 Amending Act) amended PoCA 2002 to enable the Commissioner of the AFP to commence litigation under the Act. Previously, proceedings under PoCA 2002 could only be commenced by the Commonwealth Director of Public Prosecutions (CDPP). This change supported the establishment of the Criminal Assets Confiscation Taskforce (CACT) – more detail on the CACT is set out below in relation to paragraph (g) of the Terms of Reference for this inquiry. The 2011 Amending Act also amended the production order provisions in Chapter 3 of PoCA 2002.

17. Currently, the information gathering powers set out in PoCA 2002 are as follows.

- *Examinations:* Under Division 3 of Part 3-1 of PoCA, a Court may make an order compelling certain people to attend to answer questions or produce documents relevant to the affairs of a suspect, a person who claims an interest in property that is the subject of a restraining order, and/or the spouse or de facto partner of the aforementioned people. An examination order can only be made once proceedings have been commenced.
- *Production orders:* Under section 202 of PoCA 2002, a magistrate may make an order requiring a person to produce a "property tracking document" to an authorised officer. Production orders can only be made if the magistrate is satisfied, by information on oath, that the person who will be affected by the order is reasonable suspected of having possession or control of a property tracking document. Production orders can only be made in relation to the production of documents that are held by a corporation or that are business records. It is an offence to fail to comply with a production order.

"Property tracking document" is defined in subsection 202(5) and includes documents relevant to identifying, locating or quantifying the property of a suspect or literary proceeds.

- *Notices to financial institutions:* Under section 213 of PoCA 2002, a senior officer of the AFP may issue a notice on a financial institution requiring the institution to provide information in relation to accounts held by the institution. The issuing officer must reasonably believe that the notice is required to determine whether to take action under PoCA 2002, or the notice is required in relation to proceedings under PoCA 2002.
- *Monitoring orders:* Under section 219 of PoCA, a judge may issue a monitoring order requiring a financial institution to provide details of transactions through an account to a law enforcement agency. The order can require the institution to report on transactions for a period of up to three months. In issuing a monitoring order, the judge must be satisfied that there are reasonable grounds for suspecting: that the person who holds the account has committed, is about to commit, or is/was otherwise involved in the commission of a serious offence; or that the person who holds the account has benefited directly or indirectly (or is about to benefit directly/indirectly) from the commission of a serious offence; or the account is being used to commit an offence of money laundering against the *Criminal Code* (Cth).
- *Search and seizure:* Under section 225 of PoCA, a magistrate may issue a warrant to search premises if satisfied by information on oath that there are reasonable grounds for suspecting that there is "tainted property" or "evidential material" at the premises (or will be at the premises within 72 hours).

"Tainted property" is defined as proceeds of certain indictable offences or an instrument of an indictable offence. "Evidential material" means evidence relating to: property in respect of which action under PoCA 2002 has or could be taken; benefits derived from the commission of certain offences; or literary proceeds.

- *Assistance orders:* A magistrate may further order, under section 246 of PoCA 2002, that a person provide assistance to the executing officer to gain access to a computer or to data held on the computer.

18. The UEW Bill includes amendments to ensure that evidence relevant to unexplained wealth proceedings can be seized under a search warrant issued under section 225 of PoCA 2002. The amendments do not change the basis upon which a search warrant can be sought, but allow for things found in the course of executing the search warrant that would be relevant to an unexplained wealth investigation or proceeding. This reform was a specific recommendation of the PJCLE.



## Terms of reference

### **(a) thresholds, including evidentiary thresholds, relating to the obtaining of production orders and search warrants, and in particular whether these reflect the rules applicable to civil litigation discovery rather than coercive search**

19. Proceedings in Australian courts are either criminal or civil. In criminal proceedings, the relevant standard of proof is “beyond reasonable doubt”. In civil proceedings the relevant standard of proof is “on the balance of probabilities”. Proceedings pursuant to PoCA 2002 serve a vital criminal law enforcement function by enabling law enforcement agencies to target the financial underpinnings of serious and organised crime, enabling both the instruments and the proceeds of crime to be restrained and subsequently forfeited subject to orders of a court.

20. For practical and policy reasons the Parliament has determined that the standard of proof which is to apply to proceedings pursuant to PoCA 2002 is the civil standard. However, this does not mean that PoCA 2002 proceedings can therefore be equated with standard inter-party civil litigation disputes.

21. The availability and use of coercive information gathering powers (such as production orders and search warrants) in relation to PoCA 2002 proceedings has strong and longstanding policy justification. Accordingly, in assessing whether production orders and search warrants under PoCA 2002 have been appropriately framed in the legislation, the more appropriate precedents and principles to benchmark them against will be found in the criminal law rather than the rules applicable to civil litigation discovery.

22. The purposes of investigative powers under PoCA 2002 are different to civil litigation discovery. In particular, investigative powers under PoCA 2002 compel third parties to produce information. Further, discovery is only available once proceedings have been commenced, whereas investigative powers under PoCA are available prior to, and during, proceedings.

### PoCA 2002 proceedings are not criminal proceedings

23. Subsection 315(1) of PoCA 2002 provides that proceedings for restraint and confiscation action under the Act (which include literary proceeds action) are not criminal proceedings. Paragraph 315(2)(b) further states that the rules of evidence applicable in civil proceedings apply, and those applicable in criminal proceedings do not apply to restraint/confiscation proceedings under the Act. Further, subsection 317(2) of PoCA 2002 provides that, as a general rule, any question of fact to be decided by a court on application under the Act is to be decided on the balance of probabilities. The ‘balance of probabilities’ is generally referred to as the civil standard of proof; ‘beyond reasonable doubt’ the standard of proof to be discharged by the prosecution in criminal proceedings.

### The availability of enforcement powers for civil action

24. Over time, criminal law enforcement has been complemented by increased regulatory activity, in which breaches of the law are dealt with through civil action. That is to say that in addition to enforcing the law through criminal proceedings, certain unlawful activity is pursued by the State in courts exercising civil jurisdiction, and in accordance with the rules of civil procedure.

25. In most cases, this civil action is in pursuit of civil penalties (fines) which seek to punish the wrongdoing, but which do not lead to criminal sanctions (such as imprisonment) or carry with them the same consequence (ie criminal record). As such, civil penalty enforcement sits in the middle between private civil action at one end and criminal prosecution at the other end.

26. The availability of investigative and enforcement powers in relation to civil regulation regimes is well established. A wide range of regulatory agencies are responsible for civil and administrative penalty regimes across a diverse range of subject matter including: taxation, corporations law, insurance, Customs, immigration, airlines and fishing. Some of these regimes also include criminal offences for more serious breaches of the law. The functions and activities of regulating agencies vary depending on their governing legislation. Some agencies conduct compliance activities, conduct investigation into suspected breaches, and commence court proceedings for the enforcement of civil penalties. In other cases, regulators perform some compliance and/or investigative function, but leave prosecution of criminal offences to the CDPP.

27. The powers available to civil regulators (ie where enforcement action is conducted through civil proceedings) can be found across a wide range of Commonwealth legislation and are generally divided into monitoring powers (to ensure compliance with legislative obligations) and investigation powers (where there is a suspected of a breach of those provisions). Monitoring and investigation powers might include: entry of premises by consent or under warrant, searching premises, operating electronic equipment, compelling the production of documents, and compelling answers to questions.

### Information gathering powers under PoCA

28. The availability of investigative powers under PoCA 2002 is consistent with the approach taken under other legislation where civil proceedings can be taken as a result of evidence obtained following the use of those powers. Evidence to support the proceedings may also come from a related criminal investigation. Further, it is important to note that investigative powers, such as search warrants and production orders, are generally exercised well prior to the decision to take litigation action under PoCA 2002. That is to say, the investigative arm of the CACT would use the powers to gather relevant information which would then form the basis for proceeds of crime proceedings being commenced. However, as noted above, where confiscation proceedings are contested, further investigations may be required to support the litigation proceedings.



29. The need for specific information gathering powers to support the commencement of proceeds of crime action has been well recognised. The Second Reading Speech accompanying the Proceeds of Crime Bill 1987 acknowledged the explicit link between the need for law enforcement to have access to “an appropriate armoury of powers” to enable the primary objectives of the scheme to be achieved (eg the confiscation and forfeiture of the proceeds of crime).<sup>2</sup>

30. The ALRC, in its 1999 Report, considered that the third object of PoCA 1987 (enabling law enforcement authorities to effectively trace proceeds etc) was based on the principle that law enforcement agencies must be given the powers necessary to enable them to ensure that PoCA objectives are achieved.<sup>3</sup>

31. The ALRC considered the information gathering powers available to law enforcement under PoCA 1987 in Ch 19 of its report. As part of its terms of reference, the ALRC was specifically required to enquire into and report on the adequacy of, and any need and justification for expansion of, police powers to obtain information from financial institutions for the purposes of locating proceeds.

32. During the inquiry, the AFP informed the ALRC of the operational difficulties faced in relation to search and seizure powers under PoCA 1987. The ALRC supported the need for reform, and considered that search and seizure powers under PoCA 1987 should be aligned with the provisions governing search and seizure for criminal investigations contained in Part IAA of the *Crimes Act 1914* (recognising those provisions as representing “the state of the art” in relation to search warrants).<sup>4</sup> The ALRC also recommended the introduction of financial institution notices to produce, to complement the utility of search powers, production orders and monitoring orders.

33. Finally, the Sherman Report also recognised the importance of information gathering powers, noting: “It is difficult to conceive how any agency can effectively use the provisions of the Act unless it has access to the investigative powers.”<sup>5</sup>

### Benchmarking PoCA 2002 powers

34. The AFP considers that the appropriate provisions against which to benchmark PoCA 2002 powers (in particular search warrants and production orders) are to be found in the criminal law. The Attorney-General's Department *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) sets out relevant principles and standards for framing provisions in Commonwealth law for coercive powers (such as search and seizure powers). The Guide ensures that such provisions and relevant safeguards are implemented consistently across Commonwealth legislation.

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<sup>2</sup> *Hansard, House of Representatives*, 30 April 1987, p2314.

<sup>3</sup> Australian Law Reform Commission, *Confiscation that counts: A review of the Proceeds of Crime Act 1987* (1999), paragraph 2.61

<sup>4</sup> *ibid*, paragraph 19.27.

<sup>5</sup> Mr Tom Sherman AO, *The Report on the Independent Review of the Proceeds of Crime Act 2002* (2006), paragraph 4.54.

35. The provisions governing search and seizure under Part IAA of the Crimes Act are considered a benchmark.<sup>6</sup>

36. The threshold for issuing a search warrant under section 225 of PoCA 2002 is that there are *reasonable grounds to suspect* that there is at the premises, or will be within the next 72 hours, "tainted property" or "evidential material". This threshold is essentially the same as the threshold in section 3E of the Crimes Act, which governs the issuing of search warrants for criminal investigations. Under section 3E, there must be *reasonable grounds to suspect* that there is, or there will be within the next 72 hours, any "evidential material" at the premises.

37. Although drafted differently, the thresholds for assistance orders under section 246 of PoCA 2002, and section 3LA of the Crimes Act, are the same. That this, the magistrate must be satisfied that there are reasonable grounds for suspecting that there is evidential material held on the computer/device, and that the person to be subject to the assistance order has knowledge of the computer/device and the measures to protect data on the computer/device (eg knowledge of a password).

38. A section 3LA assistance order requires that the magistrate be satisfied that the person to be subject to the order is reasonably suspected of having committed the offence(s) to which the warrant relates. A section 246 assistance order requires that the magistrate be satisfied that the person to be subject to the order is reasonably suspected of possessing, or having under his or her control, tainted property or evidential material. This difference reflects that assistance orders under the Crimes Act are for criminal investigations, while assistance orders under PoCA 2002 are in support of proceeds action.

39. The threshold for issuing a production order under section 202 of PoCA 2002 that a magistrate must be satisfied, by information on oath or affirmation, that the person who will be affected by the order is reasonably suspected of having possession or control of a property tracking document. A comparison can be made to section 3ZQO of the Crimes Act which allows a judge (on application by the AFP) to issue a notice for the production of documents in relation to serious offences. Under section 3ZQO, the judge must be satisfied on the balance of probabilities, by information on oath or by affirmation, that: the person has documents that are relevant to, and will assist, the investigation of a serious offence; and giving the person the notice is reasonably necessary, and reasonably appropriate and adapted, for the purpose of investigating the offence.

**b. procedures preparatory to seeking production orders and search warrants, including taking into account the conduct of the recipient of such orders**

40. For convenience, paragraph (b) of the Terms of Reference is discussed together with paragraph (c).

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<sup>6</sup> Australian Law Reform Commission, *op cit*, paragraph 19.27; Attorney-General's Department, *A Guide to Framing Offences, Infringement Notices and Enforcement Powers* (2011), pages 68-69.

### c. procedures for executing search warrants

41. The AFP tailors its investigative strategy to the individual circumstances of each case. Compliance with a production order does not preclude the use of search warrants under PoCA 2002, nor does the Act require production orders to be used as a pre-requisite to the use of search warrants. This provides the AFP with appropriate flexibility to ensure that evidence is preserved and assets are not dissipated.

42. While PoCA 2002 provides a specific regime for the exercise of coercive information gathering powers (search warrants, production orders), such powers are well established in the criminal law context. Accordingly, guidance material and training on the use of coercive information gathering powers generally (eg those exercisable by the AFP under Part IAA of the Crimes Act) will be relevant to the exercise of PoCA 2002 investigative powers.

43. Resources to support investigators are available on the AFP Intranet, through the *Investigator's Toolkit*. Resources relating to the use of investigative powers under PoCA 2002 draw on the *CDPP Search Warrants Manual* (which provides guidance on general commentary on search warrants). Standard form documents for use by investigators are also available on the Investigator's Toolkit.

44. There are also a range of internal governance instruments and supporting documentation guiding the exercise of coercive information gathering powers by the AFP. These instruments and documents are available to AFP members through the AFP Intranet. Documents relevant to search warrant execution are as follows.

- The *National Guideline on operational planning* outlines the procedures to establish and maintain a common approach as to how the AFP manages operational planning for planned operations (ie an operation where there has been opportunity and time to develop strategies, tactics and contingencies prior to an anticipated operation taking place). The standard planning process may result in the development of a family of related planning documents such as concept of operations, operation orders and, as appropriate, supporting (operation) orders and standard tactical plans.
- The *Australian Federal Police Investigations Doctrine* provides philosophical and procedural guidance on the way an organisation plans, resources and conducts business. The Doctrine is intended to be adapted within the principles, legislation, governance and professional standards to suit each operational situation.
- The *Aide Memoire on Executing Search Warrants* is designed to provide guidance to investigators in preparing for the execution of a search warrant. The Aide Memoire provides an outline for a script to be used during the execution of a search warrant to guide the conversation between investigators and persons present at search premises.

45. General training on the use of coercive information gathering powers is provided to AFP members through recruit courses. Further education on such matters is provided through investigations and specialist training, including the following.

- *Criminal Investigations Workshop* (which provides an update and reinforce essential, contemporary policing powers and legislation including search and seizure powers under the Crimes Act)
- *Detective Training Program – Stage 1 and Stage 2* (which provides specialist investigative training to develop the core skills and knowledge required to successfully conduct and manage criminal investigations, including the collation of evidence and the submission of documentation to appropriate authorities), and
- *Proceeds of Crime Investigators Program* (specialist training to expand on the knowledge and investigative skills of AFP members working in the CACT).
- Further, all members are trained to exercise force in accordance with the *Commissioner's Order on operational safety*, which, among other things, also covers the carrying and use of firearms by AFP officers.

**d. safeguards relating to the curtailment of freedom of speech, particularly in relation to literary proceeds matters**

46. The ALRC concluded as part of its 1999 inquiry that literary proceeds action should not be seen as an unreasonable inhibition on freedom of speech.<sup>7</sup> This is because it is not the speech that is sought to be controlled, but rather the profit it generates. Literary proceeds action does not prevent a person from telling his or her story to the media. The purpose of literary proceeds provisions is to prevent a person from deriving a financial benefit from criminal activity.

47. The decision to make a literary proceeds order is at the discretion of the court. In deciding whether to make a literary proceeds order the court must take into account the nature and purpose of the product or activity; whether supplying the product or carrying out the activity was in the public interest; the social, cultural or educational value of the product or activity; the seriousness of the offence; and how long ago the offence was committed. The court may also take into account any other matter it thinks fit.

48. There is a fundamental difference in the factual matrix which underpins a literary proceeds investigation, compared with investigations undertaken for other applications under PoCA 2002. It is not illegal for a person who has committed a crime to sell their story, nor is it illegal for a publishing or media company to buy that story. As such, investigations in support of literary proceeds actions will inevitably be required to focus on the actions or suspected actions of entities such as publishers or media organisations which are perfectly legal and a normal part of their business activities.

49. Other investigations under POCA 2002 will, however, always focus on the suspected commission of certain offences or property that is suspected of being the proceeds or instruments of certain offences. The difference between literary proceeds orders and other proceeds of crime orders is reflected in the broad discretion given to the court in deciding whether or not to make an order.

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<sup>7</sup> Australian Law Reform Commission, *op cit*, paragraph 18.43.

**e. safeguards for ensuring the protection of confidential information, including journalists' sources, obtained under search warrants, and particularly where that information does not relate to the search warrant**

50. Section 228 of PoCA 2002 governs what can be done under a search warrant, including what things can be seized. This includes: seizing tainted property or evidential material specified in the warrant, and seizing other things that the officer believes on reasonable grounds relate to tainted property or evidential material to which the warrant relates or evidence of an indictable offence and only where the officer believes on reasonable grounds that the seizure of such things is necessary to prevent their concealment, loss or destruction or their use in committing an offence. Where information obtained under a search warrant is not relevant to that warrant (eg contained in computer which was seized) the AFP is very limited as to what it can do with that information.

51. Material seized under a search warrant issued under section 255 of PoCA 2002 must be dealt with in accordance with Division 3 of Part 3-5 of PoCA 2002. Specifically, things seized under a search warrant must be returned in accordance with sections 256 and 259 of PoCA 2002. This includes the return of things where the reason for the thing's seizure no longer exists or the thing is not going to be used in evidence.

52. Section 266A of PoCA 2002 governs the disclosure of information obtained under a search warrant and sets out the authorities to whom disclosures may be made, and the purposes for which disclosure may be made. Recipients are limited to:

- authorities with one or more functions under PoCA 2002 (for the purpose of facilitating the authorities performance of its functions under the Act)
- authorities of the Commonwealth, State or Territory that have a function of investigating or prosecuting offences against the law of a Commonwealth, State or Territory (for the purpose of assisting in the prevention, investigation, or prosecution of an offence carrying a penalty of at least 3 years imprisonment)
- authorities of a foreign country that have a function of investigating or prosecuting offences against a law of the country (for the purpose of assisting in the prevention, investigation, or prosecution of a foreign offence that would also be an offence under Australian law carrying a penalty of at least 3 years), and
- the Australian Taxation Office (ATO) (for the purpose of protecting public revenue).

53. The UEW Bill seeks to amend section 266A to allow disclosures to be made to a State or Territory authority for the purposes of deciding whether to institute proceeds of crime proceedings under State and Territory proceeds of crime laws. The UEW Bill also seeks to amend section 266A to allow disclosure to be made to foreign authorities for the purpose of identifying, locating, tracing, investigating or confiscating proceeds or instruments of



crime under the law of the foreign country. These amendments are necessary in order to ensure that criminal asset confiscation action can be taken at the State/Territory level and by other countries where appropriate (eg where the Commonwealth is unable to pursue proceeds action under its laws).

54. The Bill contains a range of safeguards that limit both the scope of information that can be disclosed and the purposes for which disclosure can occur. With respect to information sharing with foreign law enforcement agencies, the Bill prevents the sharing of information unless the proceeds or instruments of crime concerned would be capable of being confiscated under Australian laws, or if the proceeds/instruments had related to an offence against the law of the Commonwealth, State or Territory.

55. The *Aide Memoire on CACT information disclosure under section 266A* provides guidance to AFP appointees contemplating the disclosure of information obtained by application of the information gathering powers under PoCA 2002. This Aide Memoire complements, and is subordinate to, the *National Guideline on disclosure of information* which requires the AFP to consider relevant circumstances and the inter-related and competing interests, including privacy. Note also that things seized under a search warrant issued under section 3E of the Crimes Act can be made available for the purpose of action under PoCA 2002. This is specifically provided for by section 3ZQU of the Crimes Act.

56. Section 264 of PoCA 2002 specifically provides that the provisions in Part 3.5 (information gathering powers) do not affect the law relating to legal professional privilege. The AFP follows the guidelines contained in the CDP Manual where search warrants are being executed at premises occupied by a lawyer, law society or similar body, or at other premises where it is likely that there will be documents covered by legal professional privilege.

**f. the powers available to the Australian Federal Police to intercept telecommunications in circumstances where the matter being investigated does not involve criminal conduct**

57. The AFP cannot intercept telecommunications for the investigation of non-criminal conduct.

58. The *Telecommunications (Interception and Access) Act 1979* (the TIA Act) prohibits the interception of content of telecommunications unless authorised under warrant. A telecommunications interception warrant can only be sought by particular agencies (such as the AFP) for the investigation of a serious offence as defined in section 5D of the TIA Act.

59. Information obtained under a telecommunications interception warrant (lawfully obtained information) can only be used for purposes that are permitted under the TIA Act. Section 74 of the TIA Act provides that a person may give lawfully obtained information as evidence in "exempt proceedings", which include proceedings under PoCA 2002 where the proceedings relate to a proscribed offence and this can include a hearing relating to POCA if the hearing relates to a prescribed offence. Section 5B of the TIA Act ensures that lawfully obtained information can be used as evidence in the prosecution of a prescribed offence and/or proceedings to recover the proceeds of crime in relation to a prescribed offence.



**g. the priorities of the Serious and Organised Crime Division, and the circumstances under which they should appropriately be deployed in relation to non-criminal matters**

60. The AFP is Australia's international law enforcement and policing organisation and the Australian Government's chief source of advice on policing issues. The role of the AFP is to enforce Commonwealth criminal law, to contribute to combating organised crime and to protect Commonwealth interests from criminal activity in Australia and overseas.

61. Section 8 of the *Australian Federal Police Act 1979* (AFP Act) outlines the functions of the AFP which includes: the provision of police services in relation to the laws of the Commonwealth, and performing functions under PoCA 2002.

62. The Ministerial Direction is issued under 37(2) of the AFP Act and outlines the Government's priorities and expectations for the AFP. Under section 37(1) of the AFP Act, the Commissioner has the general administration, and control of the operations, of the AFP. The current Ministerial Direction (issued in July 2010) sets out the key strategic priorities for the AFP, including supporting the implementation of the Commonwealth Organised Crime Strategic Framework (COCSF) and preventing, deterring, disrupting and investigating serious and organised criminal activities impacting on the interests of the Australian community.

63. One of the key elements of the COCSF is multi-agency responses to develop and deliver operational, policy, regulatory and legislative responses to organised crime. The COCSF set out the five capabilities required to support the response to organised crime and implementation of the Framework. Capability 2 – targeting the criminal economy – is directed at the challenge posed by the profit motive of organised crime.

64. In 2011, the CACT was established in support of the COCSF to take the profit out of crime. The AFP-led CACT is a multi-disciplinary taskforce, bringing together resources from the AFP, the Australian Crime Commission (ACC) and the ATO. The CACT was formed to enhance the identification and pursuit of potential criminal asset confiscation matters and is dedicated to taking the profit out of crime by targeting criminals and their assets derived from criminal activity. Led by the AFP and utilising the resources from the ACC and the ATO, the CACT has stepped up the government's fight against organised crime through a more intensive targeting of criminals' accumulated wealth.

65. The AFP's contributions to the CACT are split across two portfolios. The Criminal Assets Branch, within the Serious and Organised Crime Portfolio, is the investigative arm of the CACT. The Proceeds of Crime Litigation Unit (POCL), within the Operations Support portfolio, conducts proceeds of crime action under PoCA, and provides legal advice concerning all matters related to the proceeds of crime.

66. This split of responsibilities reflects the AFP's Functional Model, in which each function is responsible for major operational activities. There are eight operational functions (including the Serious and Organised Crime portfolio), and six support functions (including the Operations Support portfolio). This split also reflects internal accountability arrangements to ensure that high risk litigation decisions relating to the commencement of proceeds of crime action are made independently to investigative decisions.

67. The 2013-14 Portfolio Budget Statement (PBS) for the AFP sets out the key objectives, deliverables and performance measures for the AFP as determined by the Government.

68. Program 1.3 (Operations – Policing) seeks to reduce criminal threats to Australia's collective economic and societal interests by employing a multi-dimensional, multi-disciplinary approach to the fight against Commonwealth crime. Through this program the AFP will lead Australia's capacity to detect and defeat serious and organised crime through the ongoing implementation of response plans under the COCSF, and continue to deliver the investigative-arm of the CACT. In targeting the criminal economy, the CACT employs a proactive, intelligence-led approach in the identification and pursuit of criminal wealth.

69. Program 1.3 deliverables include: providing multi-agency, multi-disciplinary crime teams to prevent, disrupt, investigate and prosecute serious and organised crime; and to provide the investigative arm of the CACT. The key performance indicators for Program 1.3 include that the level of joint investigations targeting the criminal economy shows alignment with key elements of the COCSF. The impact of the CACT is measured by the value of assets restrained.

70. Program 1.4 (Close Operational Support) encompasses litigation to recover the proceeds of crime as part of the CACT. The deliverables for Program 1.4 in 2013-14 include: fully implementing the AFP proceeds of crime litigation function; providing high-quality, cost effective proceeds of crime litigation services to the Commonwealth; and contribute to targeting the criminal economy by removing the proceeds and instruments of crime. The effectiveness of proceeds of crime litigation services is measured by the value of assets restrained as part of the CACT reported under Program 1.3.

71. The AFP's Annual Report for 2013-14 will be tabled in October 2014 and will measure the AFP's achievements against the Programs outlined above. However, the objectives, key deliverables and performance measures for Program 1.3 in relation to serious and organised crime and the CACT were the same in the 2012-13 PBS as for 2013-14.

72. The AFP's Annual Report for 2012-13 notes that, in relation to Program 1.3, the percentage of serious and organised crime operations conducted under joint agency investigations was 60% (which was the target set in the 2012-2013 PBS). Further, the percentage of cases targeting the criminal economy was 32% (exceeding the 25% target set in the 2012-2013 PBS). Finally, assets restrained in 2012-2013 were \$62.5M (which met the target in the 2012-13 PBS to increase the value of assets restrained above the previous five-year average).

73. While the strategic direction and priorities of the AFP are set through the Ministerial Direction and PBS, the day-to-day administration is the remit of the Commissioner of the AFP. The AFP Operations Committee (AFP-OC) is the AFP's primary operational management forum and provides the conduit to ensure communication between all operational elements of the AFP. The AFP-OC meets on a monthly basis. The AFP-OC considers and implements operational priorities, especially those with cross functional, multi-office considerations and ensures the appropriate allocation of resources to operational priorities. The Weekly Operations Committee (WOC) is a subcommittee of the AFP-OC, the AFP's primary operational management forum. The WOC provides the conduit to ensure communication between all operational elements of the AFP. The WOC meets on a weekly basis.

74. While the AFP has primary responsibility for investigating criminal offences against the Commonwealth, it does not have the resources to investigate all reports. To ensure that limited resources are directed to the matters of highest priority, the AFP evaluates all matters in accordance with its Case Categorisation and Prioritisation Model (CCPM). The CCPM is important in giving effect to Ministerial Directions to the AFP and the AFP's Outcome/Output Statement. The CCPM is also a valuable tool for the AFP in making decisions to accept, reject, terminate, finalise or provide resources to operational matters.

75. In applying the CCPM, the AFP takes into account: incident type and the impact of the matter on Australian society; the importance of the matter to both the client and the AFP in terms of the roles assigned to them by Government and Ministerial direction; and the resources required by the AFP to undertake the matter. In determining whether an investigation is accepted or rejected, no single element of the CCPM is considered in isolation. Instead, the AFP considers a combination of the model's Impact and Priority ratings. This is not based on a mathematical formula and does not supplant the discretion of decision makers.

76. The multi-agency CACT provides a coordinated and integrated approach to identifying and removing the profits derived from serious and organised criminal activity. Employing a proactive and innovative approach, the CACT uses intelligence, operations, legal, policy and other specialist resources from all participating agencies working together to *'take the profit out of crime'*.

77. The CACT is managed from AFP headquarters in Canberra, with regional taskforce investigation and litigation teams located in Sydney, Melbourne, Brisbane, Perth and Canberra. The CACT has the resources and ability to identify and pursue criminal assets and also works in partnership with relevant Commonwealth, State, Territory and international law enforcement agencies to identify, investigate and litigate appropriate asset confiscation matters at the Commonwealth level.

78. Utilising an integrated approach, the CACT focuses on the development of the most effective and appropriate whole-of-government enforcement strategies on a case-by-case basis. These strategies can include criminal asset confiscation action, the referral of matters to the ATO for the application of taxation remedies, other Commonwealth processes such as debt recovery action, or recovery through State and Territory or foreign law enforcement agencies.

79. Referrals for proceeds of crime action come into the CACT through the CACT Case forum (comprised of AFP, ATO and ACC representatives). The referral has generally already been assessed by a regional CACT team and recommendations made as to whether the matter is suitable for proceeds of action or whether other remedies (such as taxation) are more appropriate. The CACT Case forum makes the final decision on acceptance, on referral (eg to the ATO for tax-only action) or rejection. Referrals can come from criminal investigations, participating agencies (ATO and ACC) and external state and commonwealth partners. The CACT Case forum also discusses intelligence and other issues that may lead in future to referrals to the CACT, and importantly identifies intelligence gaps that should be pursued.

80. A decision whether or not to commence litigation pursuant to PoCA 2002 depends, on there being a referral from investigators to POCL. These matters are then assessed in accordance with legislative requirements, the *Proceeds of Crime Litigation Manual* and the *High Risk Matters Matrix*. All decisions on whether to commence proceedings are made by Manager POCL, a Senior Executive Employee with specialist legal qualifications, who holds the delegated authority of the AFP Commissioner as a proceeds of crime authority. However, before commencing proceedings for matters that fall under the High Risk Matters Matrix, Manager POCL will first obtain specific instructions from the Commissioner. Investigative and litigation decisions are made independently from each other.

#### **h. any related matters**

81. At this time, the AFP does not have any further matters to raise in relation to the inquiry's Terms of Reference.