

The Senate

Legal and Constitutional Affairs
References Committee

Current investigative processes and powers
of the Australian Federal Police in relation to
non-criminal matters

May 2014

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Recommendations

Recommendation 1

5.12 The committee recommends that the Australian Federal Police develops and provides mandatory education and training tools to its investigators in relation to the nature of investigations in support of civil action under the *Proceeds of Crime Act 2002*.

Recommendation 2

5.15 The committee recommends that, when making applications for search warrants under section 225 of the *Proceeds of Crime Act 2002*, the Australian Federal Police presents all relevant information to the issuing magistrate, including full details of any other information gathering activities undertaken by the Australian Federal Police in relation to the matter and whether such activities are ongoing.

Recommendation 3

5.17 The committee recommends that the Australian Federal Police implements protocols to ensure that applications made to a magistrate for the granting of search warrants or other associated orders must be accompanied by a copy of the legislative provisions to which the application relates.

Recommendation 4

5.22 The committee recommends that the Commonwealth government investigates options for distinguishing literary proceeds matters from other matters under the *Proceeds of Crime Act 2002* (POC Act) with particular consideration given to:

- retaining literary proceeds matters within the POC Act, and amending the Act to clearly distinguish between literary proceeds matters and other proceeds of crime matters; or
- removing literary proceeds matters from the POC Act altogether and creating standalone legislation to deal with literary proceeds matters.

Recommendation 5

5.28 The committee recommends that the Commonwealth government develops and introduces amendments to the *Proceeds of Crime Act 2002* in order to ensure that, wherever possible during investigations under the Act, information is sought via a production order before a search warrant is granted.

Recommendation 6

5.32 The committee recommends that the Commonwealth government investigates options for introducing enforceable undertakings powers as an option available to law enforcement agencies during literary proceeds investigations.

Recommendation 7

5.36 The committee recommends that the Commonwealth government develops and introduces legally enforceable protocols governing the procurement of information or records from media organisations during investigations by the Australian Federal Police.

5.37 In developing these protocols, the Commonwealth government should consult with relevant stakeholders and have regard to relevant examples from other jurisdictions, including the United States' Government's *Policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media.*

Recommendation 8

5.39 The committee recommends that the Australian Federal Police and relevant media and publishing stakeholders develop guidelines to be observed during the execution of search warrants on the premises of media organisations in circumstances where a claim of journalists' privilege is made.

Recommendation 9

5.44 The committee recommends that the *Proceeds of Crime Act 2002* be amended to ensure that information subject to journalists' privilege cannot be obtained by the Australian Federal Police during proceeds of crime investigations unless the criteria contained in subsection 126H(2) of the *Evidence Act 1995* are met.

CHAPTER 1

Introduction

Terms of reference

1.1 On 6 March 2014, the Senate referred the following matter to the Legal and Constitutional Affairs References Committee for inquiry and report by 15 May 2014:

The current investigative processes and powers of the Australian Federal Police in relation to non-criminal matters, with particular reference to:

- (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;
- (b) procedures preparatory to seeking production orders and search warrants, including taking into account the conduct of the recipient of such orders;
- (c) procedures for executing search warrants;
- (d) safeguards relating to the curtailment of freedom of speech, particularly in relation to literary proceeds matters;
- (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;
- (f) the powers available to the Australian Federal Police to intercept telecommunications in circumstances where the matter being investigated does not involve criminal conduct;
- (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; and
- (h) any related matters.

Conduct of the inquiry

1.2 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to a number of organisations and individual stakeholders inviting submissions by 28 March 2014. Details of the inquiry were made available on the committee's website at www.aph.gov.au/senate_legalcon.

1.3 The committee received eight submissions, which are listed at Appendix 1. A public hearing was held in Canberra on 7 April 2014. A list of witnesses who appeared before the committee at the hearing is at Appendix 2.

Acknowledgment

1.4 The committee thanks all those who made submissions and gave evidence at its public hearing.

Note on references

1.5 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

Structure of the report

1.6 This report is comprised of five chapters.

1.7 Chapter 2 gives a broad outline of the legislative and operational framework for proceeds of crime matters, the area of law under which the Australian Federal Police (AFP) is empowered to investigate non-criminal matters. The chapter also includes background on a recent proceeds of crime investigation involving Seven West Media, which was a key focus of the inquiry.

1.8 Chapter 3 examines in further detail the use of investigative powers by the AFP, the appropriateness of these powers, and some specific issues raised in relation to the conduct of the AFP investigation involving Seven West.

1.9 Chapter 4 discusses issues relating to freedom of speech and freedom of the press that arise in relation to literary proceeds investigations conducted by the AFP.

1.10 Chapter 5 presents the committee's views and recommendations.

CHAPTER 2

Background and overview of the Commonwealth proceeds of crime regime

2.1 The Australian Federal Police (AFP) has statutory powers in relation to non-criminal matters under the *Proceeds of Crime Act 2002* (POC Act). These include investigative powers and powers to commence litigation in relation to proceeds of crime matters.

2.2 This chapter gives an overview of the Commonwealth proceeds of crime regime and the operational framework for dealing with proceeds of crime matters, as well as providing background information on a specific recent proceeds of crime investigation involving Seven West Media that was discussed at length during the inquiry.

Overview of the confiscation scheme in the POC Act

2.3 The POC Act provides for a Commonwealth statutory scheme to confiscate the proceeds of crime.¹ Chapter 2 of the POC Act provides for several types of orders that can be made in relation to proceeds of crime matters, which together constitute the Commonwealth confiscation scheme. These include orders aimed at preventing the dissipation of proceeds, namely freezing orders and restraining orders,² and confiscation orders. There are four types of confiscation orders that can be made:

- forfeiture orders, under which property is forfeited to the Commonwealth;
- pecuniary penalty orders, requiring payment of amounts based on benefits derived from committing offences;
- literary proceeds orders, requiring payment of amounts based on literary proceeds relating to offences; and
- unexplained wealth orders, requiring payment of unexplained wealth amounts.³

1 Australian States and Territories also operate proceeds of crime laws in those jurisdictions. See: *Confiscation of Proceeds of Crime Act 1989* (NSW), *Confiscation Act 1997* (VIC), *Criminal Proceeds Confiscation Act 2002* (Qld), *Criminal Assets Confiscation Act 2005* (SA), *Criminal Property Confiscation Act 2000* (WA), *Crime (Confiscation of Profits) Act 1993* (TAS), *Criminal Property Forfeiture Act 2002* (NT), *Confiscation of Criminal Assets Act 2003* (ACT).

2 Freezing orders can be made by a magistrate, and limit withdrawals from accounts with financial institutions before courts decide applications for restraining orders to cover the accounts. Restraining orders may be issued by a court, and prohibit disposal of or dealing with property.

3 Forfeiture orders, pecuniary penalty orders, literary proceeds orders and unexplained wealth orders are collectively referred to as confiscation orders.

2.4 The AFP explained in its submission that action taken under the POC Act falls into five streams, namely:

- *Conviction based restraint and confiscation:* Restraining orders may be made when a person has been, or will be, charged with a Commonwealth offence, and final orders made upon conviction 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.⁴

Literary proceeds orders

2.5 The investigation of literary proceeds matters under the POC Act was of particular interest to submitters and witnesses during the inquiry, and as such is discussed here in greater detail.

2.6 Part 2-5 of the POC Act deals with literary proceeds orders. Section 152 of Division 1 of Part 2-5 provides that a court may order a person to pay the Commonwealth a specified amount, upon application by a proceeds of crime authority, if the court is satisfied that: the person has committed an indictable offence

or a foreign indictable offence (whether or not they have been convicted of the offence);⁵ and the person has derived literary proceeds in relation to the offence.

Definition of 'literary proceeds'

2.7 The term 'literary proceeds' is defined in section 153 of the POC Act. Subsection 153(1) provides that literary proceeds are any benefit that a person derives from the commercial exploitation of the person's notoriety resulting, directly or indirectly, from the person committing an indictable offence or a foreign indictable offence. It also covers the commercial exploitation of the notoriety of any other person involved in the commission of the offence.

2.8 Subsection 153(2) explains that the 'commercial exploitation' may be by any means, including: the publishing of written or electronic material; any use of media from which visual images, words or sounds can be produced; or any live entertainment, representation or interview.

2.9 Subsection 153(3A) specifies that if the relevant offence is a foreign indictable offence, then a benefit is not treated as literary proceeds unless the benefit is derived in Australia or transferred to Australia. Subsection 153(4) provides that the court may treat as property of the person any property that is subject to the person's effective control, or any property that was transferred to another person at the person's direction.

Considerations in making literary proceeds orders

2.10 Section 154 provides that, in deciding whether to make a literary proceeds order, the court must take into account several factors, including: the nature and purpose of the product or activity from which the literary proceeds were derived; 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; and the seriousness of the underlying offence, and how long ago it was committed. The court may also take into account any other matters as it sees fit.

Uniqueness of literary proceeds orders within the POC Act

2.11 The AFP explained that literary proceeds orders are unique within the POC Act, in that they are the only aspect of the proceeds of crime regime in which an investigation is not looking for assets generated from criminal activity:

There is a fundamental difference in the factual matrix which underpins a literary proceeds investigation, compared with investigations undertaken for other applications under [the POC Act]. 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

5 For the purposes of the POC Act, an indictable offence is any offence against a law of the Commonwealth that is punishable by more than 12 months imprisonment. A foreign indictable offence is defined in section 337A of the POC Act as conduct that constituted an offence against a law of a foreign country, and would have constituted an offence against a law of the Commonwealth, a state or a territory punishable by at least 12 months imprisonment, had the conduct occurred in Australia.

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.

Other investigations under [the POC Act] 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.⁶

2.12 Seven West Media (Seven West) also commented on how the court's discretion in literary proceeds matters distinguishes them clearly from other matters in the POC Act:

[L]iterary proceeds are to be treated very differently to other proceeds of crime which are earned by convicted criminals as a direct result of or in the course of committing an offence. The matters listed for consideration in section 154 in particular suggest that there may be many cases when a Court will determine in the circumstances that it is not appropriate for any Order to be made for the payment to the Commonwealth of literary proceeds. In other words, the Courts may determine that in all the circumstances it is appropriate for a person, notwithstanding the commission by them of a criminal offence, to receive and retain payment for the provision of services which relate to their criminal notoriety.⁷

Are proceeds of crime matters more akin to criminal or civil proceedings?

2.13 Section 315 of the POC Act provides that proceedings on an application for a restraining order or a confiscation order are not criminal proceedings, and that the rules of evidence applicable in civil proceedings apply to proceedings under the POC Act. Section 317 provides that questions before the courts in applications under the POC Act are to be decided on the balance of probabilities (the standard of proof for civil matters).

2.14 While these provisions make it clear that proceeds of crime proceedings are to be conducted before the courts as civil matters, the question of whether proceeds of crime matters generally, and literary proceeds matters specifically, are more akin to criminal proceedings than to normal inter-party civil proceedings was discussed by submitters and witnesses at length.

2.15 The AFP argued that while the civil standard of proof applies in proceedings under the POC Act, this 'does not mean that [these] proceedings can therefore be equated with standard inter-party civil litigation disputes'. It stated:

[I]n assessing whether production orders and search warrants under [the POC Act] have been appropriately framed in the legislation, the more appropriate precedents and principles to benchmark them against will be

6 *Submission 6*, p. 2.

7 *Submission 4*, p. 12.

found in the criminal law rather than the rules applicable to civil litigation discovery.

The purposes of investigative powers under [the POC Act] are different to civil litigation discovery. In particular, investigative powers under [the POC Act] compel third parties to produce information. Further, discovery is only available once proceedings have been commenced, whereas investigative powers under [the POC Act] are available prior to, and during, proceedings.⁸

2.16 The AFP noted that in any case, civil discovery procedures are not generally available for proceeds of crime proceedings, including in literary proceeds matters. The AFP stated that 'where it has been available, the AFP has found discovery to be of limited use in proceeds of crime matters, as a large proportion of respondents don't fully comply with discovery processes'.⁹

2.17 The AFP argued that literary proceeds matters can be more complicated to litigate than other civil matters:

Persons deriving literary proceeds may take professional advice on how to receive the literary proceeds in a way that either attempts to avoid or obfuscate action under [the POC Act] (none of which is unlawful). This can make investigating and litigating literary proceeds matters considerably more difficult than other types of civil litigation.¹⁰

2.18 As such, the AFP considered that civil penalty enforcement, such as occurs under the POC Act, 'sits in the middle between private civil action at one end and criminal prosecution at the other end'.¹¹ The AFP noted that some jurisdictions have drawn a deliberate distinction between proceeds of crime proceedings and ordinary civil proceedings:

For example, the *Civil Procedure Act 2010* (Vic) expressly carves out proceedings under the Victorian *Confiscation Act 1997* and [the POC Act] from the application of the Civil Procedure Act. Additionally, the Victorian County and Supreme Court rules of civil procedure provide that the ordinary rules of civil procedure [do] not apply to proceedings under the Confiscation Act and [the POC Act].¹²

Evolution of Commonwealth proceeds of crime legislation

2.19 Commonwealth proceeds of crime legislation has been in place since the late 1980s, with the introduction of the *Proceeds of Crime Act 1987*. The 1987 Act provided for a conviction-based regime for confiscation of property. It provided law enforcement agencies with the following information gathering powers to facilitate

8 *Submission 6*, p. 7.

9 *Submission 6.1*, pp 3-4.

10 *Submission 6.1*, p. 3.

11 *Submission 6*, p. 8.

12 *Submission 6.1*, p. 3.

this regime: 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).¹³

2.20 In 1998 the Australian Law Reform Commission (ALRC) conducted a detailed review of the 1987 Act, making 93 recommendations for reform, including: introducing a scheme for non-conviction based confiscation, introducing literary proceeds orders, and enhancing the information gathering powers available to law enforcement.¹⁴ The current POC Act (*Proceeds of Crime Act 2002*) was introduced by the government in response to the ALRC's recommendations.

2.21 The POC Act was reviewed in 2006 by Mr Tom Sherman AO, whose report made 18 major recommendations and 36 technical recommendations, some of which were implemented in amending legislation in 2010.

2.22 Several sets of amendments to the POC Act have been made in the last few years. In particular, the provisions introducing unexplained wealth orders were included in the Act in 2010.¹⁵

2.23 The AFP noted that, as a signatory to several international conventions dealing with proceeds of crime or related matters, Australia is obliged to maintain proceeds of crime laws to the extent provided for in those conventions. In particular, the AFP stated that the *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime* requires state parties to ensure that special investigative powers are available to trace proceeds and gather evidence relevant to proceeds action.¹⁶

Operational framework for proceeds of crime matters

2.24 In January 2012 an inter-agency taskforce, the Criminal Assets Confiscation Taskforce (CACT), was established to enhance the identification and pursuit of potential criminal asset confiscation matters. Comprising officers and resources from the AFP, the Australian Crime Commission and the Australian Taxation Office, the CACT is a key element supporting the Commonwealth Organised Crime Strategic Framework.¹⁷

2.25 The AFP explained that its role in leading the CACT is split across two portfolios: the Criminal Assets Branch, which undertakes the investigative work of the CACT, and the Proceeds of Crime Litigation Unit, which conducts proceeds of crime

13 Australian Federal Police (AFP), *Submission 6*, p. 2.

14 AFP, *Submission 6*, p. 3.

15 The Senate Legal and Constitutional Affairs Legislation Committee is currently inquiring into a Bill that seeks to amend the POC Act in relation to unexplained wealth orders, the Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014.

16 *Submission 6*, p. 3.

17 AFP, *Submission 6*, p. 15.

litigation and provides legal advice concerning all matters relating to proceeds of crime.¹⁸

2.26 The AFP has had the ability to commence litigation under the POC Act since 2011; prior to this, only the Commonwealth Director of Public Prosecutions (CDPP) could commence proceeds of crime litigation. This change was made in order to support the establishment of the CACT, to provide for an integrated taskforce that could investigate and prosecute proceeds of crime matters.

2.27 While both the CDPP and the AFP can commence proceeds of crime litigation under the POC Act, in practice the AFP now commences the majority of litigation; the CDPP retains responsibility for taking criminal confiscation action only in matters where the restraint of property is not required to preserve the property for confiscation and the person has been convicted of an offence.¹⁹

Recent literary proceeds investigation involving Seven West Media

2.28 Much attention during the inquiry focused on a recent case involving the AFP and Seven West Media (Seven West), and other related parties, in relation to a potential literary proceeds matter.

2.29 In response to reports that Seven West was going to enter into an agreement to pay Ms Schapelle Corby for exclusive interviews in relation to Ms Corby's imprisonment on drug trafficking charges in Indonesia (referred to as the Corby matter), the AFP instigated an investigation to ascertain whether there may have been grounds to pursue literary proceeds orders under the POC Act in relation to this matter.

2.30 A brief summary of this investigation and subsequent court proceedings are outlined below.²⁰ The issues raised by this incident are discussed further in chapters 3 and 4.

Summary of events

2.31 On 11 February 2014, the AFP obtained a production order in relation to the Corby matter and served this on Seven West, with a 72 hour turnaround period for Seven West to comply.

2.32 On 14 February 2014, following correspondence with Seven West, the AFP agreed for documents to be delivered by Seven West in two tranches: specified documents from the past 2 years to be provided by 4.00pm on 14 February 2014, and all other documents to be provided by 25 February 2014 (14 days from the date of the

18 *Submission 6*, p. 15.

19 CDPP, *Criminal Confiscation*, <http://www.cdpp.gov.au/about-us/criminal-confiscation> (accessed 1 April 2014).

20 For detailed information on the chronology of events and correspondence, see: Seven West Media, *Submission 4*, pp 4-6; AFP, *Submission 6.1*, pp 13-14 and Attachment A; Responses to questions on notice, provided by the AFP on 2 May 2014; *Committee Hansard*, 7 April 2014, pp 9-10 and pp 25-28.

production order). Seven West provided material under the first tranche of documents to the AFP on the afternoon of 14 February 2014.

2.33 On 17 February 2014, the AFP wrote to Seven West's legal representative advising that it did not consider that Seven West had complied with the production order in relation to the first tranche of documents provided. The AFP invited Seven West to reconsider and provide all the documents requested in the order by 5pm that day. The AFP stated that in the event that Seven West did not fully comply with the order, the AFP 'will have no option but to consider further action be taken' under the POC Act.²¹

2.34 Concurrently on the afternoon of 17 February, the AFP applied to a magistrate to obtain a search warrant and associated orders to search five premises in relation to this matter. The search warrant and associated orders were granted at approximately 3.55pm.

2.35 Later on the afternoon of 17 February, Seven West provided a letter in response to the AFP through its legal representative, indicating that it 'is continuing to search for and will produce any additional documents in response to the production order as soon as they are located', and requesting some clarification as to the intended scope of the order. At approximately 5.45pm Seven West provided several additional documents via email to the AFP. At approximately 5.50pm, the AFP made the decision to proceed in executing the warrants the following morning, 18 February 2014.

2.36 On the morning of 18 February 2014, the AFP executed warrants at five premises of Seven West Media and associated entities. A total of 30 AFP officers were involved in executing the warrants across the five locations. The AFP seized various documents and electronic material from the premises, including two key documents presented to the AFP by Seven West representatives during the searches.

2.37 On 21 February 2014, the AFP wrote to Seven West acknowledging that errors had been made in one of the associated orders granted in relation to Seven West's solicitors at the same time as the search warrant. The order stated, among other things, that the solicitor was 'reasonably suspected of having committed the offence stated in the relevant warrant'; the AFP acknowledged that this statement was incorrect and should not have been made. Also on 21 February, Seven West lodged a formal professional standards complaint with the AFP over the conduct of the AFP in applying for and executing the search warrants on Seven West and its solicitors.

2.38 On 22 February 2014, AFP Deputy Commissioner Michael Phelan APM held a press conference in relation to this matter, apologising for the errors in the order and defending the actions of the AFP in proceeding with the execution of the search warrants on 18 February.

21 Document tabled by the Australian Federal Police at public hearing held on 7 April 2014, 'Letter from the AFP to Ms Justine Munsie dated 17 February 2014', p. 2.

2.39 On 24 February 2014, Seven West lodged proceedings against the AFP in the Federal Court of Australia, seeking judicial review of the search warrants and associated orders.

2.40 On 13 March 2014, the AFP announced it had ceased the investigation in relation to the Corby matter, due to changing circumstances regarding Ms Corby's parole in Indonesia which it believed had eliminated the possibility of Ms Corby giving a paid interview to Australian media.

2.41 On 26 March 2014, her honour Justice Jagot handed down her judgement in the Federal Court case in favour of Seven West, with the search warrants and associated orders being quashed as invalid and of no effect.

CHAPTER 3

Use of investigative powers by the AFP under the POC Act

3.1 A key focus of this inquiry was the exercise of investigative powers by the AFP during investigations under the POC Act, and in particular how those powers are utilised during literary proceeds investigations. This chapter examines the legislative framework that governs the AFP's use of investigative powers for proceeds of crime matters, and discusses stakeholders' views on the appropriateness of these legislative powers. It also details how the AFP uses its investigative powers during proceeds of crime investigations, and draws on evidence relating to the recent literary proceeds investigation conducted by the AFP involving Seven West Media.

Information gathering powers in the POC Act

3.2 One of the objects of the POC Act is to 'enable law enforcement authorities effectively to trace proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts'.¹ Chapter 3 of the POC Act provides for information gathering powers and processes in relation to proceeds of crime matters. These are powers relating to: examinations; production orders; notices to financial institutions; monitoring orders; and search and seizure powers. Production orders and search and seizure powers are discussed in detail here as they are of greater relevance to the terms of reference.²

Production orders

3.3 Section 202 of the POC Act enables a magistrate to make a production order requiring production of property-tracking documents to an authorised officer if satisfied by information on oath that the person is reasonably suspected of having possession or control of such documents. Subsection 202(5) defines 'property-tracking document' as various types of documents relevant to the different types of action available under the POC Act. This includes, for example, documents relevant to identifying, locating or quantifying:

- property of any person who has been convicted of, charged with, or whom it is proposed to charge with, an indictable offence; or whom there are reasonable grounds to suspect of having engaged in conduct constituting a serious offence (paragraph 202(5)(a)); and
- literary proceeds in relation to an indictable offence or a foreign indictable offence of which a person has been convicted or which a person is reasonably suspected of having committed (paragraph 202(5)(e)).

1 POC Act, subsection 5(e).

2 For a summary of the other information gathering powers in Chapter 3 (in relation to examinations, notices to financial institutions and monitoring orders), see: AFP, *Submission 6*, pp 5-6.

3.4 Under section 203, production orders must specify (among other things) the nature of documents required and the place at which the documents must be made available. A production order must also specify a timeframe for compliance. Subsection 203(2) provides that this time period must be at least 14 days, unless the magistrate specifically orders an earlier time period (which must be no less than three days after the order is issued).

3.5 Section 211 makes it an offence for a person to fail to comply with a production order, the penalty for which is six months imprisonment or 30 penalty units.

Search and seizure powers

3.6 Part 3-5 of the POC Act provides for search and seizure powers in relation to proceeds of crime matters.

3.7 Section 225 provides that a magistrate may issue a warrant to search premises if the magistrate is satisfied by information on oath that there are reasonable grounds for suspecting that there is at the premises, or will be within the next 72 hours, tainted property or evidential material. A search warrant can only be issued on application by an authorised officer of an enforcement agency.

3.8 Evidential material is defined in section 338 as evidence relating to: property in respect of which action has been or could be taken under the POC Act; benefits derived from the commission of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern; or literary proceeds.³

3.9 Section 227 details contents that must be included in a search warrant, including the kinds of material to be searched for under the warrant and the time during which the warrant may be executed. Section 228 prescribes the things that are authorised by a warrant, including authorisation to enter and search nominated premises and to seize material specified in the warrant.

3.10 Under paragraph 227(1)(h), a warrant authorises the seizure of other things found at the premises in the course of a search where the executing officer or a person assisting believes on reasonable grounds those things to be evidential material in relation to property to which the warrant relates. However, the seizure of such things is only authorised if the officer believes on reasonable grounds that seizure of the things is necessary to prevent their concealment, loss or destruction or their use in committing an offence.

3.11 Section 246 provides that an authorised officer may apply to a magistrate for an order requiring a specified person to provide information or assistance in order to access data or documents from a computer during the execution of a search warrant.

3 The other element in section 225, 'tainted property', is defined as: the proceeds of an indictable offence, foreign indictable offence, or indictable offence of Commonwealth concern; or an instrument of an indictable offence.

Appropriateness of the investigative powers available under the POC Act

3.12 Submitters and witnesses to the inquiry expressed a range of views about the appropriateness of the investigative powers available to the AFP under the POC Act.

3.13 The AFP noted that there are a wide range of other regulatory bodies at the Commonwealth level that exercise investigative and enforcement powers in relation to civil regulation regimes. The AFP contended that the availability of investigative powers under the POC Act 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'.⁴ It further argued that the need for enforcement agencies to have appropriate search and seizure powers to deal with proceeds of crime matters is clear, with the Australian Law Reform Commission review in 1998 and a further review of the POC Act in 2006 both recognising the importance of such powers.⁵

3.14 Some submitters suggested that changes should be made to the information gathering powers available under the POC Act, principally in relation to the evidentiary thresholds and other requirements necessary to obtain production orders and search warrants.⁶

Thresholds for obtaining production orders and search warrants

3.15 Seven West Media submitted that the threshold test for obtaining production orders and search warrants should be raised to require that more than a "reasonable suspicion" regarding the existence of documents evidencing literary proceeds be required before such orders or warrants are issued.⁷ It suggested that the threshold tests applied in "search orders" (known as Anton Piller orders) under the Uniform Civil Procedure Rules 2005 (NSW) provide a useful guide of the tests that could be adopted in civil matters being investigated by the AFP.⁸ Under the NSW civil procedure rules, a court may make a search order if it is satisfied that:

- (a) an applicant seeking the order has a strong prima facie case on an accrued cause of action; and
- (b) the potential or actual loss or damage to the applicant will be serious if the search order is not made; and
- (c) there is sufficient evidence in relation to a respondent that:
 - (i) the respondent possesses important evidentiary material; and

4 *Submission 6*, p. 8.

5 *Submission 6*, p. 9.

6 See: Seven West, *Submission 4*, pp 14 and 17; Rule of Law Institute of Australia, *Submission 1*, pp 6 and 11.

7 *Submission 4*, p. 14.

8 *Submission 4*, pp 14 and 77.

- (ii) there is a real possibility that the respondent might destroy such material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the court.⁹

3.16 The AFP argued that the appropriate provisions against which to benchmark powers under the POC Act, particularly in relation to production orders and search warrants, are to be found in criminal law rather than civil procedure rules.¹⁰ In relation to the use of the "reasonable suspicion" threshold for issuing production orders and search warrants under the POC Act, the AFP noted that this threshold is essentially the same as that governing the issuing of search warrants for criminal investigations under the *Crimes Act 1914* (Crimes Act), and that it is also comparable to the threshold for the issuing of production notices by a judge in criminal investigations under the Crimes Act.¹¹

3.17 Commenting specifically on the appropriateness of using Anton Piller orders in pursuing proceeds of crime matters, the AFP argued that such orders are 'an inappropriate civil procedure tool to perform the function that is performed by both production orders and search warrants' under the POC Act.¹² It noted that the aim of Anton Piller orders is to facilitate discovery in civil litigation, rather than to facilitate investigation that may, but equally may not, result in litigation being commenced.¹³ Further, the AFP argued that the preconditions necessary to be satisfied under an Anton Piller order are not well suited for literary proceeds matters, as:

- the AFP is unlikely to be in possession of a strong prima facie case at the stage of executing a search warrant, as it is not a party to any contractual negotiations, agreements or relationships that may have occurred and have led to the investigation into a literary proceeds matter; and
- it would be difficult, if not impossible, for the AFP to establish that it had suffered or would suffer damage due to the actions of the respondent; and
- evidentiary material in support of literary proceeds action may be held by people who are not party to the litigation (for example media/publishing organisations or lawyers), and may relate to people who may not be directly part of the litigation (for example where the agreement is for literary proceeds to be paid to an agent or other third party).¹⁴

9 Section 25.20, Uniform Civil Procedure Rules 2005 (NSW).

10 *Submission 6*, p. 10.

11 *Submission 6*, p. 10.

12 *Submission 6.1*, p. 4.

13 *Submission 6.1*, p. 4.

14 *Submission 6.1*, p. 4.

Alternate means of information gathering

3.18 Seven West Media also submitted that consideration should be given to whether alternate means of collecting evidentiary material could be applied by the AFP before production orders or warrants are able to be granted:

[T]he application for production orders or search warrants under the [POC Act] should follow procedures equivalent to those for an application for preliminary discovery under Division 7.3 of the Federal Court Rules.

That process generally requires the applicant for such an order first to demonstrate that they have made reasonable inquiries to obtain documents by other means, such as writing to those parties who might have access to such documents and requesting that such documents be made available.¹⁵

Requirements for obtaining a search warrant under the POC Act

3.19 The Rule of Law Institute of Australia (RoLIA) noted that under the *Proceeds of Crime Act 1987*, the precursor Act to the current POC Act, the AFP could only obtain a search warrant if: it had first obtained a production order; or in circumstances where a production order would be ineffective; or where there had been non-compliance with a production order.¹⁶ RoLIA recommended that the POC Act be amended to insert a provision to the same effect as this section of the 1987 Act, namely that a magistrate must not grant a search warrant in respect of evidential material unless:

- the document(s) sought cannot be identified or described with sufficient particularity for the purpose of obtaining a production order; or
- a production order requiring the document has been given but not complied with; or
- there are reasonable grounds to suspect that a production order would not be complied with; or
- the investigation for the purposes of which the warrant is being sought might be seriously prejudiced by seeking a production order if an authorised officer does not gain immediate access to the document without notice to any person.¹⁷

3.20 The Law Council of Australia supported further consideration of this proposal, and stated:

Ensuring that there are requirements to first consider alternative options, or to demonstrate possible serious prejudice to an investigation, before the AFP proceeds to seek more intrusive powers, may assist in highlighting the coercive nature of search warrants and the need to ensure that they are only

15 *Submission 4*, p. 14.

16 *Submission 1*, p. 4.

17 *Submission 1*, pp 6 and 11.

used where reasonably necessary and proportionate to a legitimate purpose.¹⁸

3.21 The AFP considered that the current arrangements in relation to production orders and search warrants provide appropriate operational flexibility:

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 [the POC Act], 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.¹⁹

3.22 As such, the AFP did not support the amendment proposed by RoLIA, arguing that it would not readily translate to the current POC Act, would delay investigations, and would have a serious adverse impact on the AFP's ability to investigate and litigate proceeds of crime matters.²⁰ It noted that the differences between the 1987 POC Act and the current POC Act would make this proposed amendment problematic:

Under [the 1987 POC Act], production orders and search warrants could only be sought for the same kind of documents (property tracking documents). However, under [the current POC Act] production orders are limited to property tracking documents, while search warrants can be used to obtain “tainted property” or “evidential material”. The categories of documents and material that can be obtained under a search warrant are therefore greater than the material that can be obtained under a production order. Production orders can only be served on a body corporate, to obtain documents that are in the possession or control of a person (including body corporates) and that are used (or intended to be used) in the carrying on of a business. Search warrants are not similarly confined and can be issued in relation to any type of premises and can also obtain information from natural persons. Consequently, there are instances where the AFP will not be in a position to apply for a production order or not be able to obtain the material that is required through the use of a production order.²¹

Exercise of investigative powers by the AFP

3.23 The processes and procedures involved when seeking production orders and search warrants during proceeds of crime investigations, and the execution of search warrants themselves, were the subject of extensive discussion during the inquiry.

18 Law Council of Australia, Correspondence to the Senate Legal and Constitutional Affairs References Committee, received 30 April 2014.

19 *Submission 6*, p. 11.

20 *Submission 6.1*, p. 6.

21 *Submission 6.1*, p. 6. See also: Responses to questions on notice, provided by the Attorney-General's Department on 12 May 2014, pp 1-2.

Guidance available to officers involved in investigations

3.24 The AFP explained that while its investigative strategy in pursuing proceeds of crime matters is tailored according to the circumstances of each individual case, specific guidance material and training is provided to officers to assist them in carrying out investigations. This includes:

- resources available through the "Investigator's Toolkit" portal available on the AFP intranet to support officers using investigative powers under the POC Act, including pro-forma template documents for use in proceeds of crime investigations;
- a range of internal governance instruments and supporting documents guiding the exercise of coercive information gathering powers; and
- specialist training modules covering issues including the use of search and seizure powers and proceeds of crime investigations.²²

Processes associated with obtaining search warrants

3.25 AFP representatives at the committee's public hearing explained the processes involved when applying to a magistrate for a search warrant under the POC Act:

[T]he procedures involve the AFP preparing a type written affidavit to take before the magistrate containing all the information that we have available to us which gives rise to the suspicion that there may be [evidentiary] materials at these premises. We must be able to transfer belief to the issuing officer that that is indeed the case...We can apply either during normal business hours to a magistrate, who is an authorised issuing officer...Alternatively, it may be an after-hours application where we would attend in some instances, depending on the urgency of the matter, the home residence of an issuing authority to be able to obtain a warrant [in] urgent circumstances.²³

Accessing electronic information during the execution of search warrants

3.26 Another issue discussed during the course of the inquiry was how the AFP goes about collecting and using information located on computers or electronic devices, including whether the AFP could seize entire computer hard drives that contain material unrelated to the search warrant.

3.27 The AFP clarified that the provisions governing the execution of warrants in sections 243-245 of the POC Act allow an officer to seize the entire hard drive of a computer, even if there is some material which does not fall within the scope of the warrant, so long as the officer has reasonable grounds to believe that there is evidentiary material contained within the hard drive.²⁴ When asked how the AFP

22 *Submission 6*, pp 11-12.

23 Assistant Commissioner Ramzi Jabbour, AFP, *Committee Hansard*, 7 April 2014, pp 30-31.

24 Responses to questions on notice, provided by the Australian Federal Police on 2 May 2014, p. 5.

determines the search terms to be used when accessing a hard drive during the execution of a warrant, the AFP stated:

The search terms are derived from the conditions of the warrant and the information as laid out in the affidavit, as reviewed by the judicial officer when considering signing the warrant. Searches of electronic devices and data occur in accordance with the conditions of the search warrant, in order to identify evidentiary material as authorised by the warrant. The conditions are listed on the search warrant, a copy of which is provided to the occupier upon entry to the premises. The [POC Act] entitles the occupier (or a representative) to be present and observe the search, including of electronic devices.²⁵

Specific issues relating to the recent investigation involving Seven West Media

3.28 Several submitters and witnesses commented on the AFP's processes and use of investigative powers in the recent case involving Seven West. Concerns were raised in relation to several issues, including: the AFP's decision to proceed with a search warrant; errors in the warrant and associated documents; and the conduct of officers during the execution of the warrant.

Decision to proceed with a search warrant

3.29 The decisions made on 17 February 2014 by the AFP to proceed with seeking and then executing search warrants against Seven West were questioned by submitters and witnesses. AFP representatives gave an explanation at the committee's public hearing as to why the decision was taken to proceed with executing the search warrant:

[We] needed to ascertain as best we could whether or not we had the ability to obtain a literary proceeds order and we had to do that as soon as possible, because previous dealings in relation to literary proceeds matter with this family—nothing to do with Channel 7 whatsoever, though—had seen money go offshore and outside the jurisdiction. So we wanted to move quickly in case a deal had been done, and we tried to establish whether or not a deal had been done. I know Channel 7 has said that no deal has been done. I must take that on face value to say that no deal has been done, but at this particular point in time when we executed the warrants and had served production orders we were not aware that that was the case.²⁶

Timing of obtaining the search warrant

3.30 The timing of the AFP's decision to seek a search warrant was queried, given that the warrant was sought early in the afternoon of 17 February, several hours before the 5.00pm agreed deadline for Seven West to provide additional documents to the AFP. Representatives from the AFP acknowledged that it would have been

25 Responses to questions on notice, provided by the Australian Federal Police on 2 May 2014, p. 5.

26 Deputy Commissioner Michael Phelan, *Committee Hansard*, 7 April 2014, p. 14.

preferable to seek out a magistrate after the 5.00pm deadline had lapsed, rather than obtaining a warrant earlier in the day. However, the AFP defended obtaining the warrant on the basis that it was a pre-emptive measure to ensure that it was available, if necessary, for execution the following day:

[The warrant was obtained] with a view to executing it if necessary on the following day. It was purely a logistics exercise. It is not one that I would like to repeat. An instruction has been provided to our officers that in my view it is less than optimal that you apply for a warrant prior to the expiration of the time given to comply with the production order. But at the end of the day nothing changed. The circumstances had not changed. We still were not in receipt of the materials that we believe existed, and indeed we located during the search warrant.²⁷

3.31 Acting AFP Commissioner Andrew Colvin APM OAM emphasised that obtaining a search warrant did not mean that the AFP was obliged to proceed with executing the warrant, and argued that the AFP would not have had to execute the warrant if Seven West had provided the material the AFP expected by the 5.00pm deadline on 17 February.²⁸

3.32 The AFP noted that the timing of seeking the warrant was also influenced by the availability of a magistrate:

It can be quite challenging, particularly in New South Wales, to locate magistrates after hours who can issue warrants. So, it has become practice on some occasions to try to identify magistrates who are available and fit within their schedule. On this occasion, inquiries were made and we were advised that the last possible time available that day for any magistrate was 3.30pm, and if we missed that time frame it would not be available to us until the following day, but they could not confirm a time.²⁹

3.33 Further, the AFP informed the committee that the decision to go ahead with execution of the warrant (on 18 February) was made at 5.49pm on 17 February, after the 5.00pm deadline for the production of information.³⁰

Content of the search warrant, affidavit and section 246 order

3.34 The contents of the search warrant and associated orders obtained by the AFP on 17 February 2014 was canvassed thoroughly in submissions and at the committee's public hearing, with errors in those documents and the omission of other relevant information the primary concerns raised.

Errors contained in the warrants and associated orders

3.35 The AFP acknowledged as early as 21 February 2014 that the section 246 order obtained on 17 February contained an error, being the statement that Seven

27 Mr Ramzi Jabbour, AFP, *Committee Hansard*, 7 April 2014, p. 12.

28 Acting Commissioner Andrew Colvin, *Committee Hansard*, 7 April 2014, p. 12.

29 Mr Ramzi Jabbour, AFP, *Committee Hansard*, 7 April 2014, p. 9.

30 Mr Ramzi Jabbour, AFP, *Committee Hansard*, 7 April 2014, p. 35.

West's legal representative was 'reasonably suspected of having committed the offence stated in the relevant warrant', when this was not the case. At that time the AFP stated that '[i]t is a regrettable error, but it is an innocent word-processing error'. The AFP also stated that it did not consider the error to invalidate the order or warrant its revocation.³¹

3.36 In addition to the section 246 order, the search warrant itself listed various parties as 'suspects, entities or other matters that are the subject of the investigation', when in fact those parties were not suspects. In the Federal Court judgment in relation to this matter, her honour Justice Jagot found that both the section 246 orders and search warrants issued were materially affected by legal error and ruled that the orders and warrants be quashed as invalid and of no effect.³²

3.37 The AFP stated that the errors in the search warrant and associated orders occurred as a result of mistakes made using standard form documents during the drafting process. In relation to the section 246 assistance order, Deputy Commissioner Michael Phelan APM informed the committee:

[T]he people in our office in Sydney had not done a section 246 order before. It is a very similar order to that contained within the Crimes Act section 3LA...They asked Canberra for advice, and that advice was given, but the advice that was provided was wrong. It was off one that had been provided similar to section 3LA of the Crimes Act, which had those provisions in it...[T]he correct document in format is actually in the DPP search warrant manual, which with all those manuals is on our system. I stand to be corrected, but I think section 246 orders are in that manual in the correct format and were in the correct format prior to that day. Had the correct procedures been followed—in other words, officers downloading from the internal system, which they are guided to under all of our guidelines et cetera, doing that one and the supervisors checking it, then arguably the fatal flaw of those words would not have occurred. It would not have changed the substance of anything else; just those [incorrect] words would not have been in there.³³

3.38 Deputy Commissioner Phelan explained that a similar failure to follow established process led to the errors associated with the search warrant:

The other [mistake] is the words that were contained within the affidavit or the search warrant. I believe that it referred to 'entities' as being 'suspects'. That is also a pro forma that sits on our website—on our investigators' toolkit. The correct warrant and affidavit format is in there as well. It contains drafting instructions in terms of filling out bits and pieces: 'If they are suspects, write "the suspects". If they are entities, write "the entities".' And so on. The drafting instructions were not removed from this particular

31 See: Seven West, *Submission 4*, p. 24 (Attachment 2), AFP Letter to Seven West Media dated 21 February 2014.

32 *Seven West Media Limited v Commissioner, Australian Federal Police* [2014] FCA 263, [61].

33 Deputy Commissioner Michael Phelan, AFP, *Committee Hansard*, 7 April 2014, p. 21.

search warrant. Therefore...that was also fatal in terms of the warrant and the affidavit.

The correct documents and the correct pro-formas exist now and existed at the time, as well. They were just not used. When things were vetted they were not picked up [by] supervisors, et cetera. So in terms of practice and procedures, they are there. We have to do some work about making sure that they are followed.³⁴

3.39 The AFP confirmed that it was reviewing its internal processes to ensure such documents are used correctly in the future:

We have taken a fair bit of remedial action over the last six weeks, as you would probably imagine. We will still take some action, going forward, to ensure that supervisors make sure that these properly drafted documents are used properly. These documents have been drafted by the DPP, our own lawyers and everybody else and are correct; we continually update them as the law changes, whether the parliament alters the law or whether it is judge-made law. We are continually updating these and they are the one source of truth for our members when they go ahead and do it. If the documents are wrong that is a fatal mistake for all of us. But, essentially, those documents are correct—and were correct at the time.³⁵

Explaining the legislative framework for literary proceeds matters

3.40 Her honour Justice Jagot held that the AFP did not make it clear to the issuing magistrates that neither the deriving of literary proceeds nor the payment or facilitation of a payment which might give rise to a literary proceeds order is, in itself, an offence.³⁶ Justice Jagot stated that there 'was no cogent explanation' of the literary proceeds scheme in the material made available by the AFP to the issuing magistrates,³⁷ and held that it was likely that the magistrates were led into error by the AFP and assumed that the POC Act created an offence relating to the derivation of literary proceeds.³⁸

3.41 Seven West argued in its submission to the inquiry that it is critical that magistrates are fully informed about the operation of Commonwealth legislation with which they may not be closely familiar when considering applications by the AFP:

It cannot be assumed that a Magistrate would be aware of the way in which the [POC Act] operates and especially not the fact that there is no criminal offence involved or alleged when dealing with the payment of literary proceeds. It is especially necessary in those circumstances that any application for search warrants or section 246 orders involves the full and

34 Deputy Commissioner Michael Phelan, AFP, *Committee Hansard*, 7 April 2014, p. 21.

35 Deputy Commissioner Michael Phelan, AFP, *Committee Hansard*, 7 April 2014, p. 21.

36 *Seven West Media Limited v Commissioner, Australian Federal Police* [2014] FCA 263, [66].

37 *Seven West Media Limited v Commissioner, Australian Federal Police* [2014] FCA 263, [72].

38 *Seven West Media Limited v Commissioner, Australian Federal Police* [2014] FCA 263, [84].

frank disclosure of all material information to the Magistrate, to the same standard required on any ex parte application for civil relief.³⁹

3.42 At the committee's public hearing, it was suggested that AFP officers could be directed to take a copy of relevant provisions in Commonwealth legislation when making an application to a magistrate, to ensure that magistrates are fully informed. Acting AFP Commissioner Andrew Colvin commented:

As a matter of course, there is no guideline that I am aware of that says that our investigators should take the [relevant Act]. Having said that, I know from my own experience that it is commonplace that we would and it is often commonplace that the magistrate would have it as well. The affidavit does go to what needs to be in the magistrate's mind before the warrant, the order or whatever it might be is issued. What they must satisfy themselves of is contained in the affidavit, but of course, if the magistrate wants broader context, then that would come from the [A]ct itself.⁴⁰

3.43 The AFP stated further in a supplementary submission:

The suggestion has also been made through the inquiry that applications for warrants or production orders made under [the POC Act] should be accompanied by relevant extracts of the legislation, or that copies of the Act should be made available to the magistrate as necessary and appropriate (particularly where applications are made outside chambers). The AFP would be happy to consider integrating this suggestion into its practices and procedures for literary proceeds investigations.⁴¹

Scope of the production order and search warrant

3.44 Another point of contention related to the scope of the production order and the subsequent search warrants obtained by the AFP, which were drafted in different terms.⁴² During the execution of the warrant at Channel Seven's Pyrmont office, the AFP was provided with two documents that had not been obtained under the original production order:

There were two documents that were handed to police. One identified a number of draft agreements containing payments to a total of \$550,000, including consideration of accommodation and security. There was an unsigned exclusive agreement by email dated 7 February 2014 to Mercedes Corby as an agent for Schapelle Corby for an interview in consideration for \$550,000 with an attachment detailing accommodation, security and driver services paid by Channel 7.⁴³

39 *Submission 4*, p. 13.

40 Acting Commissioner Andrew Colvin, AFP, *Committee Hansard*, 7 April 2014, p. 31.

41 *Submission 6.1*, p. 9.

42 Copies of the text of the production order and search warrants were tabled by the AFP at the committee's public hearing, and are accessible from the committee's webpage, at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AFP_Inquiry/Additional_Documents.

43 Mr Ramzi Jabbour, AFP, *Committee Hansard*, 7 April 2014, p. 6

3.45 One of the key points of dispute between Seven West and the AFP was whether these 'draft agreement' documents produced under the terms of the search warrant also fell within the terms of the initial production order issued to Seven West, and hence should have been handed over to the AFP on 14 February as part of the initial order for production of documents.

3.46 The production order required production of eight different categories of documents, including any electronic and written records relating to payment arrangements or contractual arrangements entered into in relation to Ms Corby, and electronic and hardcopy communications between Seven West and Ms Corby or any relevant third parties.⁴⁴ The search warrant was drafted in different terms and called for originals or copies of evidential material including: contracts, agreements, payments, bonuses, financial records, emails, hand written notes, and communications, including electronic communications, in relation to the Corby matter.⁴⁵

3.47 AFP representatives agreed that the search warrant was drafted in broader terms than the production order.⁴⁶ It argued, however, that the production order was still drafted widely enough to capture the two 'draft agreement' documents produced under the search warrant:

The AFP believes that the production order covered certain unsigned draft agreements or similar and that the two documents obtained from Seven West in under the search warrant fell within the scope of the original production order...It is our view that relevant drafts of contracts which were actually finally entered into, or drafts of contracts not ever entered into but communicated between Seven West and Ms Corby, would be captured by the terms of the production order, and that the terms of the production order were sufficiently clear to enable Seven West Media to understand the nature of the documents being sought.⁴⁷

3.48 In particular, Deputy Commissioner Michael Phelan highlighted two conditions in the production order that the AFP believed would have captured these documents, namely:

44 For the full schedule of documents contained in the production order, see: Additional information, *Document tabled by the Australian Federal Police at public hearing held 7 April 2014 – 'Production Order issued 11 February 2014'*, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AFP_Inquiry/Additional_Documents.

45 For the full terms of the search warrant, see: Additional information, *Document tabled by the Australian Federal Police at public hearing held 7 April 2014 – 'Search Warrant issued 17 February 2014'*, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AFP_Inquiry/Additional_Documents.

46 Deputy Commissioner Michael Phelan, AFP, *Committee Hansard*, 7 April 2014, p. 36.

47 Responses to questions on notice, provided by the Australian Federal Police on 2 May 2014, p. 1.

- electronic and hard copy records of any other benefit from Seven West Media or other associated companies in relation to [Ms] Corby; and
- electronic and hard copy instructions and/or arrangements relating to [Ms Corby] and/or any other person providing direction for any form of payment or benefit derived from the commercial exploitation of her criminal notoriety to a third party.⁴⁸

3.49 Conversely, Seven West argued that the draft agreements did not fall within the scope of the initial production order:

It is clear that the draft documents which were later supplied to the AFP [during the execution of search warrants] on 18 February 2014, did not fall within the terms of the Production Order as those documents did not relate to or evidence any “payment arrangements”, “electronic and written transfers”, “contractual arrangements”, “trust account payments”, “records of any other benefit”, “electronic and hard copy communications”, or “electronic and hard copy instructions and/or arrangements relating to Corby” as specified in the Production Order.

The draft documents were never signed or otherwise entered into and therefore did not constitute evidence of any payment or benefit or arrangement. At best, those draft documents comprised a proposal or theoretical deal which had not at the time of the raids, and has not since, been confirmed or agreed.⁴⁹

3.50 Seven West continued:

The ongoing assertions by the AFP that Seven had not complied with the Production Order are of serious concern to Seven. They amount to an allegation that Seven has committed a criminal offence in failing to comply with the Production Order.

This is a very serious matter that can have serious implications for Seven in relation to renewal of its broadcast licences and in other areas of its business dealings.⁵⁰

3.51 The Rule of Law Institute also commented on this issue in a response to questions taken on notice. RoLIA stated that 'the debate over this issue shows that whether a production order has been complied with by a respondent should be left to a neutral umpire'. It suggested that its proposed amendment in relation to the granting of search warrants (see paragraph 3.19 above) would require that a magistrate who receives an application for a search warrant must first determine whether or not a production order has been complied with.⁵¹

48 Deputy Commissioner Michael Phelan, *Committee Hansard*, 7 April 2014, p. 36.

49 *Supplementary Submission 4.1*, p. 4.

50 *Supplementary Submission 4.1*, p. 5.

51 Response to a question on notice, provided by the Rule of Law Institute of Australia on 17 April 2014.

Other options for obtaining information that could have been pursued

3.52 Seven West also suggested that the AFP could have sought undertakings from Seven West and its related entities to ensure that any payments made in relation to the Corby matter did not leave Australia:

It is common practice prior to commencement of other civil litigation for one party to request undertakings from another not to engage in particular conduct. In this instance, as the Federal Police indicated that the specific matter of concern was that money may have been paid and moved out of the jurisdiction, the AFP could have requested a written undertaking from Seven not to make any payments to Schapelle Corby or any person acting on her behalf until such time as they had been able to ascertain whether any agreement existed between Seven and Ms Corby.⁵²

3.53 The AFP representatives emphasised that during the investigation the AFP utilised the powers currently available to it under the POC Act, and that the ability to obtain undertakings during literary proceeds investigations could be a useful addition to those powers.⁵³ The AFP made clear in a supplementary submission that it would be supportive of an enforceable undertakings mechanism being introduced in the POC Act only if such a mechanism did not replace the existing investigative powers under the POC Act, but rather gave the AFP another potential course of action for pursuing investigations.⁵⁴

3.54 The AFP noted that a range of factors would need to be considered in framing any enforceable undertakings provisions in relation to literary proceeds matters, including that undertakings: would have to be entered into voluntarily by both parties; would need to override any contractual obligation that the media / publishing organisation may have or intend to have with the individual concerned; and that there would need to be appropriate penalties or action that could be taken in response to breaches of undertakings.⁵⁵

Conduct of officers during the execution of the search warrant

3.55 Seven West argued that the AFP officers responsible for executing the search warrants on 18 February acted in a heavy-handed manner, including by having firearms visible during the execution of the warrants:

The warrants were carried out in an extremely aggressive manner, using over 30 armed police officers from the Serious and Organised Crime division. The raids caused distress to Seven West Media employees and appear in many aspects to have been carried out not in accordance with the AFP Code of Conduct.⁵⁶

52 *Submission 4*, p. 10.

53 Deputy Commissioner Michael Phelan, and Acting Commissioner Andrew Colvin, AFP, *Committee Hansard*, 7 April 2014, pp 43 and 44.

54 *Submission 6.1*, p. 7.

55 *Submission 6.1*, p. 7.

56 *Submission 4*, p. 2.

3.56 It was noted that Seven West had lodged a formal professional standards complaint with the AFP over the conduct of its officers relating to the application for and execution of the search warrants on Seven West and its solicitors.⁵⁷ Acting AFP Commissioner Andrew Colvin told the committee:

[A]s soon as these matters came to light, [AFP Commissioner Tony Negus] referred it to our professional standards area, who are looking at that, including claims that firearms were visible and that people were overly aggressive. We will take that matter and we are taking that matter very seriously.⁵⁸

Cost of the investigation

3.57 A further issue raised was whether the execution of the warrants on Seven West and associated entities was a proper use of AFP resources within the Serious and Organised Crime Division. Seven West argued that the actions of the AFP were 'completely disproportionate' to the stated objectives of the search warrants, and that the deployment of over 30 AFP officers on this matter amounted to a 'clear misuse of Commonwealth resources'.⁵⁹

3.58 In relation to the number of officers involved in this investigation, Acting Commissioner Colvin stated:

[O]ur officers make judgements, about what manpower they require to execute [a] search warrant. Search warrants, by their nature, require us to search and require us to do certain things. We will use, and we should always use, the minimum force required to get the job done. Obviously, that is a point of conjecture in this matter.⁶⁰

3.59 In response to a question on notice about the cost of the investigation, the AFP informed the committee that, as at 24 February 2014, 'the cost of the time of officers involved in the raid execution of search warrants and associated investigations, including work on [the] production order before the warrant' was estimated at \$88,143.⁶¹

Actions initiated by the AFP as a result of this investigation

3.60 The AFP noted that several reviews had been initiated as a result of the errors made during the investigation involving Seven West, namely:

- an internal review in relation to how the factual errors occurred in the search warrant, affidavit and section 246 order;

57 Response to a question on notice, provided by Seven West Media on 16 April 2014: 'Correspondence between Seven West Media and the AFP in relation to an AFP Professional Standards Complaint'.

58 *Committee Hansard*, 7 April 2014, p. 22.

59 *Submission 4*, p. 7.

60 Acting Commissioner Andrew Colvin, AFP, *Committee Hansard*, 7 April 2014, p. 22.

61 *Submission 6.1*, p. 13.

-
- an internal 'end-to-end' process review examining the errors that occurred during this investigation, including 'the practices and procedures about why that happened, general supervision issues, briefings to senior officers and the circumstances around the search warrants'; and
 - a review by the Australian Commission for Law Enforcement Integrity (ACLEI) into allegations from Seven West relating to the conduct of AFP officers during execution of the search warrants, with the AFP professional standards unit providing assistance to ACLEI in its review.⁶²

3.61 In a supplementary submission, the AFP also noted the recent introduction of a new Investigations Standards and Practices (ISP) mechanism 'to promote, implement and maintain quality and best practice for all AFP investigators':

Established on 8th April 2014, the ISP includes a team of investigative advisers (RIA) located in each of the major regional offices. These RIA members provide real time tactical mentoring and coaching of team leaders to ensure regulatory compliance, best practice and national consistency. The RIA will be supported by a centralised team at AFP HQ who develop and maintain Doctrine, Policy, guidelines and investigative process documentation.⁶³

3.62 The AFP also acknowledged that there is a need to ensure 'that general investigators have a better understanding of the differences between criminal investigations and investigations in support of civil action under [the POC Act].' The AFP stated that it is considering how additional education for relevant functional areas may be delivered, including updating the Investigators Toolkit and including a specific component in the Proceeds of Crime Investigation Program.⁶⁴

62 Deputy Commissioner Michael Phelan, AFP, *Committee Hansard*, pp 28-29.

63 *Submission 6.1*, p. 9.

64 *Submission 6.1*, p. 9.

CHAPTER 4

Literary proceeds matters and safeguards for freedom of speech and of the press

4.1 A prominent issue raised during the inquiry, particularly in relation to literary proceeds investigations under the POC Act, was how such investigations could be undertaken without inappropriately curtailing freedom of speech and the freedom of the press.

4.2 The lack of any clearly stated protocols around the protection of journalists' confidential sources during such investigations was a key concern raised by media organisations and other submitters to the inquiry.

Literary proceeds matters and freedom of speech

4.3 The AFP noted that the Australian Law Reform Commission, in its 1999 review of proceeds of crime legislation, recommended the introduction of a Commonwealth literary proceeds regime, and held that confiscation of literary proceeds should not be viewed as an unreasonable inhibition on freedom of speech, as it is not speech itself that is sought to be controlled through such orders, but rather the profit generated from that speech.¹ The AFP argued:

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.²

4.4 Two submitters to the inquiry contended that literary proceeds matters do impede free speech. Blueprint for Free Speech argued that literary proceeds orders represent an express limitation on the right to freedom of expression and can unfairly punish offenders:

It is an absurd situation where a media commentator can make comment on an accused's case or personal history and the person about whom that comment is made cannot answer that commentary on equal terms...

[W]hilst from a policy perspective [the literary proceeds regime] is clearly borne of a wish not to normalise and popularise crime, it is doubtful that in most cases a publishing of an account of that crime will encourage others to do the same...The embargo on literary proceeds seeks therefore only to further punish the person who committed the crime, and it is a punishment that falls outside of sentencing principles normally imposed by a Court following conviction.³

1 *Submission 6*, p. 12.

2 *Submission 6*, p. 12.

3 *Submission 7*, p. 5.

4.5 Mr Bruce Arnold, Assistant Professor at the University of Canberra Law School, argued that offenders should not be the subject of literary proceeds orders if they have already been convicted and punished for an offence committed:

It is appropriate for courts to order seizure of assets gained in the course of crime. Once people have been duly convicted for breaking the law and paid the penalty, in particular through time in prison, their punishment in principle should be complete...[W]e should not seize wealth that is created *post-conviction* on the basis of notoriety.⁴

Discretion of the courts in literary proceeds matters

4.6 The AFP emphasised that a court has a wider discretion in deciding whether to make a literary proceeds order than for other orders under the POC Act, allowing various factors and individual circumstances to be taken into account. The factors a court may take into account are: 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; how long ago the offence was committed; and any other matter the court thinks fit.⁵

4.7 Seven West noted that while a court may take into account public interest and related matters when determining whether to make a literary proceeds orders, there is currently no similar consideration required before applications for production orders or search warrants are made under the POC Act. It argued that this 'is likely to result in a chilling effect upon freedom of speech as media organisations are less likely to enter into agreements to interview persons convicted of crimes and report on those stories'.⁶ Seven West argued that public interest factors, such as those in section 154 of the POC Act, should be taken into account before a production order or search warrant is granted in relation to a literary proceeds investigation.⁷

4.8 The AFP argued that public interest factors should be taken into account in determining final literary proceeds orders, as is currently the case, rather than earlier in the investigative process:

The focus for the magistrate at the investigative stage should be on whether the threshold for the use of information gathering powers has been met, not whether the ultimate literary proceeds action should be determined in a particular way. At the time of making the production order or issuing a search warrant, many of the public interest factors present in section 154 would not be known as the publication or interview may not have been produced.⁸

4 *Submission 2*, p. 4.

5 *Submission 6*, p. 12. The list of factors to be taken into account by a court when deciding whether to make a literary proceeds order are found in section 154 of the POC Act.

6 *Submission 4*, p. 16.

7 *Submission 4*, p. 16.

8 *Submission 6.1*, p. 8.

Protocols for AFP investigations involving media organisations

4.9 In addition to the question of whether literary proceeds investigation inherently represent a limitation on free speech, submitters and witnesses discussed in some detail how the AFP interacts with media organisations during investigations, what protocols (if any) govern such interactions, and whether incidents like the recent Seven West matter have the effect of limiting press freedoms by inappropriately exposing confidential information including journalists' sources.

Existing conventions between the AFP and media organisations

4.10 Representatives from the ABC noted that, in their experience, most requests for information made by the AFP are made on an informal basis, and there are no express protocols for dealing with media organisations when subpoenas or other investigative powers are used:

[T]he ABC's dealings with the AFP have been quite cooperative over the years. We acknowledge that there has usually been an understanding of the ABC's position in relation to confidential sources by the AFP—and other police forces, for that matter—and a willingness to demonstrate flexibility in finding a balance between our ethical obligations and their own investigations. That said, this flexibility is at the moment solely dependent on informal engagement by individuals case by case. Should a more heavy-handed approach ever be taken...the issue of due consideration for the protection of sources has no formal status whatsoever in investigative processes of this kind[.]⁹

4.11 Representatives from Seven West also stated that their relationship with the AFP in general terms had been cooperative and productive, and that informal arrangements are often made with the AFP in relation to information.¹⁰ Mr Ross Coulthart highlighted that the recent execution of search warrants at Seven West premises by the AFP was conducted in stark contrast to this approach, and argued that this episode has had a 'chilling effect' on journalists both within and outside Seven West:

[A]ll of us are just taken aback at the fact that the premier law enforcement agency in the country decided to raid a media organisation in order to find out information that they could have found out by other means, in a more gentle way. I do not think anybody is seriously proposing, now that the dust has settled, that we would have in any way tried to evade answering their questions. We have a very good working relationship with the Federal Police, often on very sensitive issues. There are things that we routinely decide not to publish, because we do not want to jeopardise ongoing investigations that we know the feds are involved in. So, yes, it has had a deadening effect for a lot of journalists[.]¹¹

9 Mr Alan Sunderland, ABC, *Committee Hansard*, 7 April 2014, p. 58.

10 Mr Ross Coulthart, Seven West Media, *Committee Hansard*, 7 April 2014, pp 48 and 55; Mr Bruce McWilliam, Seven West Media, *Committee Hansard*, 7 April 2014, p. 51.

11 Mr Ross Coulthart, Seven West Media, *Committee Hansard*, 7 April 2014, p. 55.

4.12 The ABC agreed that the use of investigative powers can have a deleterious effect on press freedoms if not managed carefully:

[T]he exercise of search warrants and other investigative powers (such as interception of telecommunications) against media organisations, and even the risk and fear that a search warrant may be exercised, has the potential of adversely affecting freedom of speech and the freedom of the media... strong protections for confidential sources are vital to ensuring that media organisations can publish stories that are in the public interest that would otherwise never be published.¹²

Seizure or exposure of material unrelated to an investigation

4.13 Seven West expressed concern that confidential material unrelated to the terms of a search warrant could be located by the AFP during the execution of a warrant, and that this had occurred during the recent incident involving warrants being executed in relation to Seven West:

Whilst on Seven West's premises, the AFP had access to and were able to observe a range of documents and email communication relating to past, current and future news and current affairs stories unrelated to Schapelle Corby or the Corby family, some of which involve confidential information and confidential sources.¹³

4.14 Mr Ross Coulthart from Seven West noted that this concern is particularly acute in relation to the retrieval of digital information under a search warrant:

With technology these days it is now possible to copy entire databases. So, on the day [the warrants were executed], we had computer forensics people coming into the building with computer forensics equipment which allowed them to copy entire computer databases. Indeed, a hard drive was copied, scanned and gone through. At any one time in that office there are numerous confidential sources. The particular hard drive that was copied, of the executive producer of the program, is very much the mother lode of all story ideas for potential programming. It is a huge concern for us that there needs to be some kind of assurance...that there will not be a scatter-gun approach to accessing data when Federal Police raid a journalist's office.¹⁴

4.15 Seven West stated that while the AFP had informed it that all documents seized during the recent execution of search warrants had been returned, Seven West 'has no knowledge of whether any confidential material has been accessed or copied prior to being returned'.¹⁵ It argued for the establishment of a protocol concerning how documents obtained through a search warrant are stored and accessed in cases where a

12 *Submission 3*, pp 2-3.

13 *Submission 4*, p. 7.

14 Mr Ross Coulthart, Seven West Media, *Committee Hansard*, 7 April 2014, p. 48.

15 *Submission 4*, p. 9.

party claims that documents are of a confidential or sensitive nature and are unrelated to the subject matter of the search.¹⁶

4.16 The AFP submitted that there are clear legislative rules governing what materials can be seized under a search warrant, and that the AFP 'is very limited as to what it can do' with information obtained under a warrant that is not relevant to the warrant (for example, unrelated information contained on a computer that was seized under a warrant).¹⁷ The AFP noted that Division 3 of Part 3-5 of the POC Act governs how material seized under a search warrant must be dealt with, and includes requirements that things seized under a warrant must be returned where the reason for the thing's seizure no longer exists or the thing is not going to be used in evidence. Further, section 266A of the POC Act specifies the circumstances in which the AFP may disclose information obtained under a search warrant to other authorities.¹⁸

4.17 Representatives from the AFP also noted that under section 126H of the *Evidence Act 1995* (Cth) (Evidence Act), journalists are not compelled in any court proceedings to disclose the identity of confidential informants, and that the AFP works with this in mind when exercising investigative powers.¹⁹

4.18 Seven West noted, however, that this does not prevent the disclosure of confidential information to the AFP itself, notwithstanding the inability of such information to be used in later court proceedings:

[T]he mere existence of section 126H of the Evidence Act is not an answer to the concerns raised by Seven West Media and others in their submissions to the Inquiry. This is because the existence of that section does not act as a basis for refusing to provide documents in response to a section 202 Production Order or a section 225 search warrant, nor is it a basis to object to the AFP reading such material once it has been seized.

Had confidential source material been read or seized by the AFP from Seven West Media, there is nothing which could have protected the disclosure of those documents to the AFP apart from a claim for legal professional privilege.²⁰

Protection of legally privileged information

4.19 Submitters noted that there is a clear protocol in place to deal with material identified during the execution of a search warrant by the AFP over which legal professional privilege is claimed. This protocol was agreed to by the AFP and the Law Council of Australia in a set of guidelines dealing with the execution of

16 *Submission 4*, p. 16.

17 *Submission 6*, p. 13.

18 *Submission 6*, p. 13.

19 Assistant Commissioner Ramzi Jabbour, AFP, *Committee Hansard*, 7 April 2014, p. 19.

20 *Supplementary Submission 4.1*, p. 6.

search warrants on lawyers' premises, law societies and like institutions in circumstances where a claim of legal professional privilege is made.²¹

4.20 The effect of these guidelines is that where the lawyer or Law Society is prepared to co-operate with the AFP, no member of the police team executing a warrant will inspect any document identified as potentially within the warrant until the lawyer or Law Society has been given the opportunity to claim legal professional privilege in respect of any of the documents identified. Where a claim is made, no member of the police search team will inspect any document that is the subject of the claim until the claim is either abandoned or dismissed by a court.²² The guidelines set out detailed procedures for how this process is managed to ensure the confidentiality of such documents until a determination is made.

4.21 The AFP noted that there are clear procedures followed in cases where legal professional privilege is claimed:

Section 264 of [the POC Act] 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 CDPP 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.²³

Options for strengthening protocols between the AFP and media organisations

4.22 There was consensus among stakeholders that better protocols could be developed to deal with AFP investigations involving media organisations and journalists.

General guidelines for investigations involving media organisations

4.23 The ABC argued that the AFP's current investigative processes and powers should be revised so as to ensure that 'they do not interfere with the newsgathering, current affairs and investigative operations of media organisations' and that investigative powers including search warrants 'are rarely (if ever) exercised in order

21 Law Council of Australia, *General Guidelines between the Australian Federal Police and the Law Council of Australia as to the Execution of Search Warrants on Lawyers' Premises, Law Societies and Like Institutions in Circumstances where a Claim of Legal Professional Privilege is Made*, p. 2, <http://www.lawcouncil.asn.au/lawcouncil/index.php/library/policies-and-guidelines> (accessed 17 April 2014).

22 Law Council of Australia, *General Guidelines between the Australian Federal Police and the Law Council of Australia as to the Execution of Search Warrants on Lawyers' Premises, Law Societies and Like Institutions in Circumstances where a Claim of Legal Professional Privilege is Made*, p. 2, <http://www.lawcouncil.asn.au/lawcouncil/index.php/library/policies-and-guidelines> (accessed 17 April 2014).

23 *Submission 6*, p. 14.

to force a journalist or his or her media employer to breach their ethical obligations'.²⁴ Further:

[T]he ABC supports the introduction of a higher evidentiary threshold which must be overcome before the AFP can exercise its investigative powers against a media organisation, and believes that this threshold should be particularly stringent in situations where the AFP might require a media organisation to disclose, against its will, information identifying a confidential source.²⁵

4.24 The ABC referred to regulatory requirements recently introduced in the United States in circumstances where law enforcement agencies seek to obtain information or records from members of the news media as a potential model to consider in the Australian context.²⁶ ABC representatives noted that these requirements include:

- that there should be reasonable grounds, based on non-media sources, to believe that the information sought is essential to the successful completion of investigation or litigation;
- that subpoenas not be used to obtain peripheral, non-essential, cumulative or speculative information;
- that the authorities should first have made all reasonable attempts to obtain the information from alternative sources; and
- that there should have been negotiations pursued with the affected member of the news media unless there is a compelling and significant reason to do otherwise.²⁷

Specific protections for confidential journalists' sources under the POC Act

4.25 Seven West argued that, in relation to proceedings under the POC Act, there is a clear imperative for building some protection of journalists' sources into the legislation. It submitted that this could be accomplished by subjecting the obligation to produce documents in response to a production order, or the powers of the AFP to seize documents pursuant to a search warrant, to the provisions of section 126H of the Evidence Act:

The onus would then shift, appropriately, to the AFP to demonstrate that the public interest in the disclosure of evidence of the identity of an informant outweighs any likely adverse effect on the disclosure of the informant.

24 *Submission 3*, p. 3.

25 *Submission 3*, p. 3.

26 *Submission 3*, p. 3. See: Federal Register, §50.10 'Policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media', 79 FR 10989, <https://federalregister.gov/a/2014-04239> (accessed 22 April 2014).

27 Mr Alan Sunderland, ABC, *Committee Hansard*, 7 April 2014, p. 58.

Such a change would give appropriate priority to the public interest in the communication of facts and opinions to the public by the news media. Such a procedure would also allow a media organisation to make a claim over any documents and not produce those documents and would prevent any inadvertent or accidental disclosure of journalists' sources in circumstances where material produced by a media organisation comes into the possession of the AFP or other third parties.²⁸

Guidelines to be observed during the execution of search warrants

4.26 It was suggested during the inquiry that protocols for dealing with the execution of search warrants where journalists' privilege is claimed over material could be developed in similar terms to the current agreement between the AFP and the Law Council of Australia in relation to material subject to a claim of legal professional privilege (LPP).

4.27 Representatives from the AFP indicated that it would be willing to explore options for creating guidelines to deal with this issue, possibly along similar lines to the existing LPP Guideline.²⁹ In a supplementary submission it made several points in relation to the possible development of such guidelines, including that the journalists' source to be protected under any guidelines must be distinct from the subject of the investigation.³⁰ The AFP considered that it would not be possible to simply replicate the existing LPP Guideline in relation to journalists' privilege:

[This] would give journalists the right to claim a privilege over information that they do not currently have and which is not currently recognised by law (or the courts). Legal professional privilege can be distinguished from journalists' privilege, as the latter has not been recognised at common law. Section 126H of the *Evidence Act 1995 (Cth)* (Evidence Act) gives legislative effect to journalists' privilege, but only in relation to giving evidence or producing documents; it does not cover the seizure of documents. The privilege in section 126H requires the journalist to have promised to keep the identity of the informant confidential and the court determines whether the privilege applies after taking into account public interest grounds.³¹

4.28 The AFP also noted that while the LPP Guideline was negotiated with the Law Council of Australia, there is 'no peak representative body that independently represents all media organisations and publishing companies that the AFP could negotiate an agreement with'.³²

28 *Submission 4*, p. 16.

29 Mr Jabbour, *Committee Hansard*, 7 April 2014, pp 39 and 40.

30 *Submission 6.1*, p. 10.

31 *Submission 6.1*, p. 10.

32 *Submission 6.1*, p. 10.

4.29 The AFP indicated, however, that it was willing to consider a basic set of principles to be observed during the execution of search warrants in literary proceeds investigations at premises where journalists' sources may be held, covering:

- taking a cooperative approach in relation to the search, in the context of literary proceeds matters, where journalists' source information may be held at premises at which a section 225 search warrant is being executed;
- keeping search team member numbers to the lowest number possible; and
- sealing the premises until an appropriate representative is present (for example, a person who can advise of any potential sensitive journalists' sources considered irrelevant to the investigation into the literary proceeds matter).³³

4.30 The AFP stated that beyond this, 'any further protection, such as preventing enforcement agencies from even seeing such information when executing their lawful powers, is a policy matter for government'.³⁴

33 *Submission 6.1*, pp 10-11.

34 *Submission 6.1*, p. 11.

CHAPTER 5

Committee views and recommendations

5.1 This inquiry examined a range of issues concerning the investigative processes and powers of the Australian Federal Police (AFP) in relation to non-criminal matters under the *Proceeds of Crime Act 2002* (POC Act). At the outset, the committee expresses its support for the Commonwealth proceeds of crime regime as a crucial part of law enforcement efforts to disrupt serious and organised crime in Australia. It is right and appropriate that proceeds of crime matters are investigated and litigated in order to deprive criminal individuals and organisations of the material proceeds of their unlawful activities. It is a matter of substantial importance that Australia's proceeds of crime regime operates efficiently and effectively, both in terms of the legislative framework established by the POC Act, and in the way that matters are investigated and litigated.

5.2 The inquiry focused largely on the way in which the AFP deals with literary proceeds investigations, which are one stream within the broader proceeds of crime regime. The evidence received by the committee highlighted several issues arising from the AFP's processes relating to proceeds of crime matters which the committee believes need to be addressed.

5.3 The committee heard a range of evidence in relation to the legislative framework for literary proceeds matters under the POC Act and the differences between literary proceeds investigations and other investigations under the POC Act. Investigative powers available to the AFP under the POC Act drew much commentary from submitters, and the committee considers some changes in this area are justified. Finally, the committee believes that several measures in relation to investigations specifically involving media and publishing organisations are also worth pursuing.

AFP processes and procedures during proceeds of crime investigations

5.4 This inquiry has highlighted various aspects of the processes and procedures followed by the AFP during proceeds of crime investigations, demonstrated in particular by the recent literary proceeds investigation involving Seven West Media (Seven West).

5.5 In relation to this particular matter, it is clear that serious errors were made by the AFP at several stages during the investigation. This raises questions regarding whether the AFP had the requisite competencies, training and oversight in place to deal with such matters. It is the committee's view that, in this instance, the investigative approach taken by the AFP was unreasonable and caused unnecessary damage to the reputation of a media organisation which is part of a major Australian public company. In particular, the decision to obtain search warrants while a process for the production of documents was still underway was a significant error of judgement in circumstances where Seven West had been communicative and cooperative. The errors made in the text of the search warrants and associated orders are concerning, as are the allegations of unprofessional conduct by AFP officers during the execution of the search warrants.

5.6 The committee is aware that the AFP has acknowledged a number of failings in relation to the preparation and execution of the search warrants and other orders. The committee welcomes both the AFP's internal review and that being currently undertaken by the Australian Commission for Law Enforcement Integrity, and expects that these reviews will result in remedial action where appropriate.

5.7 However, the committee offers the following specific comments in relation to several issues arising from the investigation of Seven West.

Scope of the production order and search warrant

5.8 A key point of disagreement between the AFP and Seven West was whether two draft agreements produced by Seven West during the execution of search warrants on Seven West premises fell within the scope of the initial production order, and accordingly should have been produced by Seven West at that earlier stage of the investigation. This is a technical question that hinges on the definitions of 'electronic and written records' and 'draft agreements', and about which the AFP and Seven West contested opposing views (see Chapter 3).

5.9 It is not the committee's role to define the terms of production orders or search warrants. However, the committee is concerned about the differing interpretations of the terms of the production order arrived at in this particular case. It highlights the need for production orders to be drafted as clearly as possible to ensure that parties to those orders cannot misinterpret their terms and so that relevant documents are produced to law enforcement agencies in response to such orders. The committee is of the view that responsibility for any lack of clarity in the production orders rests with the AFP. The committee is also of the view that the AFP has not justified its decision to apply for search warrants.

The need for greater awareness about the nature of proceeds of crime investigations

5.10 The AFP told the committee that the errors contained in the search warrant and section 246 assistance orders in the Seven West case arose due to the use of incorrect templates during the drafting of those documents. This subsequently resulted in a form of words being used that was appropriate for criminal investigations, but not investigations in support of civil recovery action under the POC Act. The AFP recognised the need for its general investigators to have a better understanding of the differences between criminal investigations and investigations under the POC Act, and in particular literary proceeds investigations.

5.11 The committee welcomes the AFP's comments about improving the education of its officers and strengthening its training tools relevant to investigations under the POC Act. The committee believes that such education and training should be mandatory for AFP investigators and urges the AFP to implement these changes in a timely manner.

Recommendation 1

5.12 The committee recommends that the Australian Federal Police develops and provides mandatory education and training tools to its investigators in relation to the nature of investigations in support of civil action under the *Proceeds of Crime Act 2002*.

Making all relevant information available to magistrates granting orders and warrants

5.13 Both the judgment of the Federal Court and evidence presented to this inquiry suggest that the AFP failed to communicate all relevant information to the magistrates responsible for granting search warrants and associated orders in the Seven West investigation. In the Federal Court judgment, her honour Justice Jagot found that the AFP had misled the issuing magistrates by stating that the AFP was not satisfied that Seven West had complied with the initial production order, when a consensual regime was in place for continuing compliance with that order.¹

5.14 The committee considers it essential that in future investigations, the AFP places all relevant information before a magistrate when applying for a search warrant under the POC Act, including the details of any other information gathering activities related to the matter and whether such activities are ongoing.

Recommendation 2

5.15 The committee recommends that, when making applications for search warrants under section 225 of the *Proceeds of Crime Act 2002*, the Australian Federal Police presents all relevant information to the issuing magistrate, including full details of any other information gathering activities undertaken by the Australian Federal Police in relation to the matter and whether such activities are ongoing.

5.16 Further, it appears likely that in this case the issuing magistrates wrongly assumed that the POC Act created a criminal offence relating to the derivation of literary proceeds. This matter highlights the need for magistrates to have full access to all relevant Commonwealth legislation when granting search warrants and associated orders. The committee recommends that the AFP implements protocols to ensure that its officers always provide magistrates with the relevant Commonwealth legislation in order to ensure that fully informed decisions are made.

Recommendation 3

5.17 The committee recommends that the Australian Federal Police implements protocols to ensure that applications made to a magistrate for the granting of search warrants or other associated orders must be accompanied by a copy of the legislative provisions to which the application relates.

Literary proceeds matters under the POC Act

5.18 Literary proceeds orders are designed to prevent individuals who have committed an offence from deriving financial benefit through the commercial exploitation of their criminal notoriety. The AFP and other submitters to the inquiry agreed that literary proceeds matters are unique within the POC Act, as the actions that give rise to a literary proceeds order (that is the selling of a story by a criminal on

1 *Seven West Media Limited v Commissioner, Australian Federal Police* [2014] FCA 263, para 110.

the basis of their notoriety, and the purchase of that story by a publishing or media organisation) are not illegal acts.

5.19 The committee also heard evidence that the types of organisations the AFP is likely to be dealing with in literary proceeds investigations are potentially more likely to be cooperative than other groups the AFP deals with during other types of proceeds of crime investigations. As such, the investigative powers necessary for other types of action under the POC Act may be more intrusive than is required in a typical literary proceeds matter.

5.20 The POC Act confers on the AFP the same investigative powers for literary proceeds matters as for all other matters under the POC Act. It was suggested by several stakeholders that, due to the differences between literary proceeds matters and other matters under the POC Act, literary proceeds matters should be clearly distinguished from other types of matters under the POC Act, or excised from the POC Act altogether and located in standalone legislation. Acting AFP Commissioner Andrew Colvin APM OAM informed the committee that there is potential to revisit the way literary proceeds matters are treated:

[T]here are clearly deficiencies within the legislation insofar as the way literary proceeds and normal proceeds are dealt with. To the extent that the committee is minded to want to make legislative reform, we certainly welcome working with the committee on that...If the committee wish to do that, I think there is some work that could be done around clearly distinguishing literary proceeds and other proceeds matters. What form that took would require some work, I would suggest.²

5.21 The committee considers that clearly distinguishing literary proceeds matters from other types of matters under the POC Act would give clarity to the AFP, the courts, and media and publishing organisations likely to be involved in such investigations. The committee also considers the impact on organisations such as Seven West, given that the name of the Act gives rise to the impression that any company investigated under its provisions must be involved in criminal activity. This obviously has a significant impact on an international media organisation that relies on having a good reputation. The committee has not formed a definitive view on whether this would best be accomplished by excising literary proceeds provisions from the POC Act altogether and placing them in standalone legislation, or by amending the POC Act in other ways to clearly separate literary proceeds matters from the remainder of the regime. As such, the committee recommends that the government consider these options.

2 *Committee Hansard*, 7 April 2014, pp 19-20.

Recommendation 4

5.22 The committee recommends that the Commonwealth government investigates options for distinguishing literary proceeds matters from other matters under the *Proceeds of Crime Act 2002* (POC Act) with particular consideration given to:

- retaining literary proceeds matters within the POC Act, and amending the Act to clearly distinguish between literary proceeds matters and other proceeds of crime matters; or
- removing literary proceeds matters from the POC Act altogether and creating standalone legislation to deal with literary proceeds matters.

Possible changes to the investigative powers available under the POC Act

5.23 While numerous changes were proposed to the investigative powers available to the AFP and other enforcement agencies under the POC Act, the committee considers that two particular proposals warrant further comment, namely: changes to the requirements for obtaining search warrants under the POC Act; and the possible introduction of an enforceable undertakings mechanism in relation to literary proceeds matters. These are discussed below.

Requirements for obtaining a search warrant under the POC Act

5.24 During the inquiry, some stakeholders argued that the requirements for obtaining a search warrant under the POC Act should be amended to ensure that coercive search powers are only exercised where reasonably necessary and proportionate to a legitimate purpose. It was argued that wherever possible, other less intrusive means of information gathering should be pursued before coercive search warrants are granted.

5.25 In particular, the Rule of Law Institute of Australia suggested that magistrates should not be able to grant a search warrant in respect of evidential material unless:

- the document(s) sought cannot be identified or described with sufficient particularity for the purpose of obtaining a production order; or
- a production order requiring the document has been given but not complied with; or
- there are reasonable grounds to suspect that a production order would not be complied with; or
- the investigation for the purposes of which the warrant is being sought might be seriously prejudiced by seeking a production order if an authorised officer does not gain immediate access to the document without notice to any person.

5.26 The AFP did not support this proposal, on the grounds that there are instances in which the AFP would not be in a position to apply for a production order, or would not be able to obtain the material required through the use of a production order. The AFP stated that this is because search warrants can be granted in respect of a wider range of material, and in relation to a wider range of premises and people, than production orders. The AFP argued that such an amendment would have a serious

adverse impact on the AFP's ability to investigate and litigate proceeds of crime matters.³

5.27 The committee agrees in principle that, where it is possible for the AFP to seek information via a production order before progressing to a more intrusive search warrant, it should do so. The committee sees no problem with enshrining this principle within the POC Act, provided that the AFP is not unduly prevented from bypassing the requirement to seek a production order in the first instance in cases where this is genuinely warranted. In order to ensure this, the committee considers that the Rule of Law Institute's proposed amendment should include an additional provision allowing a warrant be granted if the evidential material sought could not otherwise be obtained via a production order (for example, when material is held by an individual rather than a body corporate). The Commonwealth government should develop and introduce amendments to the POC Act with these principles in mind.

Recommendation 5

5.28 The committee recommends that the Commonwealth government develops and introduces amendments to the *Proceeds of Crime Act 2002* in order to ensure that, wherever possible during investigations under the Act, information is sought via a production order before a search warrant is granted.

Allowing for enforceable undertakings in relation to literary proceeds matters

5.29 In relation to the recent literary proceeds investigation involving Seven West, the committee heard that it would have been helpful if there had been a mechanism in place that allowed the AFP to reach an undertaking with Seven West in relation to payments or potential payments to be made to Schapelle Corby. It was argued that the ability to reach such an undertaking would have obviated the need for more intrusive measures to be taken, including the execution of search warrants.

5.30 The committee notes that enforceable undertakings regimes exist in other areas of Commonwealth regulation, for example the civil regulatory regime administered by the Australian Securities and Investments Commission. The committee considers that a similar regime may be useful in the specific context of literary proceeds investigations. It is the view of the committee that creating a clear legislative basis for such undertakings is preferable to the AFP or other agencies entering into informal undertakings with organisations during literary proceeds investigations. The committee also agrees with the AFP that an enforceable undertakings mechanism should supplement, not replace, other investigative powers available in relation to literary proceeds investigations.

5.31 The committee acknowledges the various factors outlined by the AFP that would need to be considered in developing any legislative enforceable undertakings mechanism for literary proceeds investigations,⁴ and considers that the government

3 *Submission 6.1*, p. 6.

4 *See: Supplementary Submission 6.1*, p. 7.

should be mindful of these factors in developing any amendments to the POC Act to introduce such a mechanism.

Recommendation 6

5.32 The committee recommends that the Commonwealth government investigates options for introducing enforceable undertakings powers as an option available to law enforcement agencies during literary proceeds investigations.

Protecting press freedoms during AFP investigations

5.33 Evidence presented to the committee during the inquiry indicated that clearer guidelines and protocols are needed in relation to the conduct of AFP investigations involving journalists and media organisations. These issues are particularly relevant to literary proceeds investigations under the POC Act; however, the inquiry also highlighted broader issues in relation to the way the AFP and media organisations interact during criminal investigations.

5.34 Several options for reform were proposed by submitters, including: introducing overarching guidelines to be observed by police when seeking information from media organisations; developing specific protocols to be observed during the execution of search warrants where journalists' privilege is claimed over material; and amending the POC Act to provide protection for material containing confidential journalists' sources. The committee's view is that these proposals would give greater clarity to how the AFP and media organisations should interact during investigations, and create more appropriate protection for confidential journalists' sources.

Guidelines to be observed when dealing with media organisations

5.35 The committee considers that the introduction of clear protocols governing the circumstances in which the AFP can procure information or records from media organisations during investigations would assist in protecting the freedom of the press, while still allowing information that is critical to the success of an investigation to be made available to law enforcement. These protocols should be developed by the government in consultation with relevant stakeholders, and have regard to mechanisms of this kind in other jurisdictions, particularly the model adopted in the United States (which was favoured by submitters to this inquiry).

Recommendation 7

5.36 The committee recommends that the Commonwealth government develops and introduces legally enforceable protocols governing the procurement of information or records from media organisations during investigations by the Australian Federal Police.

5.37 In developing these protocols, the Commonwealth government should consult with relevant stakeholders and have regard to relevant examples from other jurisdictions, including the United States' Government's *Policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media.*

Guidelines to be observed during the execution of search warrants

5.38 The committee also sees merit in the development of a set of guidelines—including independent adjudication—to be followed during the execution of search warrants where journalists' privilege is claimed over material, similar to the existing procedures in place where claims of legal professional privilege are made. This would help to protect confidential journalists' sources during AFP investigations, and allow an independent adjudicator to make final decision about whether a claim of journalists' privilege should be upheld.

Recommendation 8

5.39 The committee recommends that the Australian Federal Police and relevant media and publishing stakeholders develop guidelines to be observed during the execution of search warrants on the premises of media organisations in circumstances where a claim of journalists' privilege is made.

Amending the POC Act to provide protection for material containing confidential journalists' sources

5.40 Establishment of the above guidelines would be strengthened by clearer protections for confidential journalists' sources being introduced into the POC Act itself. The committee heard that provisions in the *Evidence Act 1995* (Evidence Act) are instructive in relation to possible amendments in this area.

5.41 Section 126H of the Evidence Act provides protection for confidential journalists' sources during court proceedings, and ensures that journalists and their employers cannot be compelled to identify a confidential informant. Under subsection 126H(2), this protection does not apply if the court determines that the public interest in the disclosure of evidence of the identity of the informant outweighs any likely adverse effect of the disclosure on the informant or any other person; and outweighs the public interest in the communication of facts and opinion to the public by the news media and the ability of the news media to access sources of facts.

5.42 The AFP indicated during the inquiry that it adheres to the spirit of the protection of journalists' confidential sources found in section 126H of the Evidence Act when conducting proceeds of crime investigations.⁵ Other submitters and witnesses argued that the same protection offered in the Evidence Act in relation to court proceedings should be formally introduced into the POC Act to provide clear protection for material containing journalists' confidential sources during proceeds of crime investigations. This could operate by subjecting the powers of the AFP to seize documents pursuant to a search warrant to the criteria outlined in the Evidence Act (that is, documents revealing the identity of confidential sources could not be seized unless the public interest criteria outlined in subsection 126H(2) were met). The question of whether those criteria were met in relation to specific documents would need to be determined by an independent third party, preferably the magistrate responsible for issuing the search warrant.

5 Mr Ramzi Jabbour, AFP, *Committee Hansard*, 7 April 2014, p. 19.

5.43 The committee agrees that this is a worthwhile change that would accord with the stated existing practice of the AFP and offer more formal protection for journalists' confidential sources, while ensuring that documents containing confidential sources can still be provided to the AFP if a judicial officer determines it is in the public interest to do so.

Recommendation 9

5.44 The committee recommends that the *Proceeds of Crime Act 2002* be amended to ensure that information subject to journalists' privilege cannot be obtained by the Australian Federal Police during proceeds of crime investigations unless the criteria contained in subsection 126H(2) of the *Evidence Act 1995* are met.

Senator Penny Wright
Chair

Additional Comments

Nick Xenophon, Independent Senator for South Australia

1.1 At the outset, it is important to note the crucial role proceeds of crime legislation can play in the Australian legal system. This report should not be seen as a criticism of these provisions in theory, but instead how they have been applied by the AFP in this particular situation and, in respect of literary proceeds, the need to clearly distinguish them from the general proceeds of crime provisions. The AFP's Seven West investigation, however, demonstrates the need for urgent discussion and reform in two areas: firstly, the structure and application of the current *Proceeds of Crime Act 2002* by the AFP, with particular reference to the civil matters contained in the Act (the literary proceeds provisions); and secondly, the need for specific protections for journalists and their sources in relation to law enforcement investigations.

1.2 In my view, the actions taken by the AFP against Seven West in this instance are not just unreasonable, but ill-considered and harmful. Seven West has been forced to defend itself against false and arguably snide imputations of criminal activity, which have had a significant impact on its reputation both domestically and overseas. The response from the AFP has been confused and weak at best, and its continued unsubstantiated assertions that Seven West has breached a production order have caused further damage to Seven West's reputation. It is vital to note that despite these assertions, the AFP has not charged Seven West with the criminal offence of breaching a production order, which calls the AFP's position into further doubt. It is also important to note that this continued assertion by the AFP may have a long-term impact on Seven West, in the context of the *Broadcasting Services Act 1992*. This is clearly unfair and unacceptable, given all the circumstances.

1.3 This is particularly relevant given that no final judgement has been made on whether Seven West did indeed breach the production order. The AFP has based their case on the view that the order should have captured draft documents, a view that does not appear to be supported by the wording of the order and, it should be noted, seems to be contrary to that of their own legal counsel.¹

"Could I just pause there and say this is the extra material presumably under the warrant. I don't know this. The AFP doesn't know this because they haven't been able to access it, yet:

All you got was an unsigned draft that was your extra material. But you didn't ask –

and this is about a reference to the production order:

...you didn't ask for unsigned drafts. You only asked for agreements.

1 *Committee Hansard*, 7 April 2014, p. 50.

*That's quite right. If your Honour goes right back – I won't take you to it now – but the production order itself spoke of agreements. And a good lawyer had read it and said, "Well, that doesn't capture drafts of agreements". Well, that's the nature of the production, and that's the nature of argy bargy in this kind of litigation. It's also the case that a search warrant which is a completely separate process does separate things and it acquires information which could be helpful including a draft."*²

Given this admission by Mr Watson SC, the AFP should withdraw their assertions regarding the production order and apologise to Seven West.

1.4 I am also of the view that the AFP has not adequately explained why it chose to execute search warrants against Seven West rather than amend the production order or to seek an undertaking in order to resolve the matter. This seems inconsistent with the AFP's general approach to literary proceeds matters, as exemplified by their response to a paid interview between Channel Ten and convicted drug trafficker Renae Lawrence for an interview regarding Schapelle Corby. When questioned during the hearing, Mr Colvin stated that he was 'not aware' of the situation,³ despite the interview having been widely promoted by Channel Ten. Further, an article from *The Australian* on 21 April states that the AFP was satisfied with 'taking Ten at its word' and not conducting further investigation. The article continues:

The Australian can reveal the AFP is taking Ten at its word that Ebeli has not passed on money to Lawrence or her family, and it is not conducting any further investigations. The AFP confirmed it "is satisfied with the information that Channel 10 has provided and as such the AFP has assessed that no further action is warranted."

A spokesman refused to say why the AFP was so thorough in its investigations with Seven, but is not checking whether Lawrence received any money.

"The AFP is satisfied with the information that Channel 10 has provided and has determined that there is no breach of literary proceeds provisions as outlined within the act, and as such has assessed that no further action is warranted," the spokesman said.

*"The AFP considers this matter to be finalised. By finalised we mean that at this stage, there is no further requirement for AFP action."*⁴

1.5 Both Seven West and the ABC provided evidence to the committee stating that their relationships with the AFP had generally been very cooperative and balanced. This further highlights the AFP's unexplained decision to take the

2 Mr G M Watson SC, *Seven West Media v Commissioner, Australian Federal Police* [2014] FCA 263, transcript p. 80.

3 Acting Commissioner Andrew Colvin, *Committee Hansard*, 7 April 2014, p. 44.

4 Michael Bodey, 'AFP clears Ten over Bali Nine claims about Corby', *The Australian*, 21 April 2014, p. 22.

significant and unjustified step of accelerating the investigation and obtaining search warrants to carry out a raid on Seven West.

1.6 The committee's report has discussed at length the errors made by the AFP during the warrant application process, and I support the committee's comments in this regard. It is clear that these errors reflect poorly on the AFP, and I strongly recommend the AFP be as open and transparent as possible in their review process. These events, while unfortunate, have provided the AFP with the opportunity to improve its internal procedures and training, and to develop specific protocols for dealing with civil matters under the *Proceeds of Crime Act*. If reasonable protocols are not developed, consideration should be given to legally enforceable rules being developed and implemented.

1.7 Further, given the resources used by the AFP in the raid, and the significant legal costs that have been incurred, it appears that in all the circumstances there has been an egregious misuse of public resources on the part of the AFP.

1.8 In my view, it is not appropriate to retain the literary proceeds provisions within the *Proceeds of Crime Act*, which otherwise relates to criminal offences. The Act's current structure has left the provisions open to misuse or even abuse, which is clearly unacceptable.

1.9 In particular, the structure and name of the Act gives the impression that any investigation under its provisions must relate to criminal matters. This has impacted on Seven West in this particular case, and has potentially caused significant damage to its reputation.

1.10 In my view, the best outcome would be to separate the literary proceeds provisions from the Act and enshrine them in separate legislation. Ideally, this legislation would also include specific information-gathering and investigative powers and processes for relevant authorities to ensure these circumstances are not repeated.

Recommendation 1

1.11 That the Government, as a matter of urgency, introduce legislation to establish the literary proceeds provisions as an independent Act, including requirements relating to information-gathering and investigative powers for law enforcement agencies under the Act.

1.12 This inquiry has also revealed the urgent need for specific protections relating to journalists' sources. While I support the committee's comments regarding this, I believe the committee should go further and recommend specific legislative change. These protections should be enshrined in legislation to ensure they are enforced.

1.13 It is particularly concerning to see the extent of the information that can be accessed by the AFP under search warrants, including the seizure of entire hard drives. While the AFP has stated that it adheres to the spirit of the provisions in section 126H of the *Evidence Act 1995*, this is manifestly inadequate. It would be naive to think that information accessed as part of an investigation may not be used to 'point the way' for further investigation in another matter, even if it cannot be used as evidence.

1.14 Whistleblowers and confidential sources are vital for the public interest. Greater protection for journalists' sources will be a significant contribution to strengthening free speech and public accountability.

Recommendation 2

1.15 That the Government, as a matter of urgency, introduce legislation based on the United States' Government's *Policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media.*

1.16 Ultimately, the AFP's investigation of Seven West has been a chilling example of serious failures in Australia's law enforcement processes. While specific errors can be laid at the feet of the AFP, it cannot be denied that the current legislative framework has contributed to these poor outcomes. Further, this raises an important question: if the AFP acts in this manner towards an organisation with the resources and reputation of Seven West, how are they acting towards smaller organisations or individuals? These are matters that must be dealt with urgently to ensure the effective operation of both the legislative framework and law enforcement agencies.

Senator Nick Xenophon

Appendix 1

Public submissions

- 1 Rule of Law Institute of Australia
- 2 Mr Bruce Arnold
- 3 Australian Broadcasting Corporation
- 4 Seven West Media
- 5 The Hon Diana Bryant AO, Chief Justice, Family Court of Australia
- 6 Australian Federal Police (AFP)
- 7 Blueprint For Free Speech
- 8 Confidential

Appendix 2

Public hearings and witnesses

Monday 7 April 2014—Canberra

COLVIN, Mr Andrew APM OAM, Acting Commissioner, Australian Federal Police

COULTHART, Mr James, Reporter, Seven West Media

DAVIDSON, Mr Graeme, Deputy Director, Director of Public Prosecutions

FAIR, Ms Bridget, Group Chief, Corporate and Regulatory Affairs, Seven West Media

GRAY, Mr David, Manager, Proceeds of Crime Litigation, Australian Federal Police

JABBOUR, Assistant Commissioner Ramzi, National Manager, Australian Federal Police

McAVANEY, Mr Grant, Senior Lawyer, Australian Broadcasting Corporation

McWILLIAM, Mr Bruce, Commercial Director, Seven West Media

MUNSIE, Ms Justine, Partner, Addisons Lawyers

PHELAN, Mr Michael APM, Deputy Commissioner, Australian Federal Police

STEWART, Mr Malcolm, Vice-President, Rule of Law Institute of Australia

SUNDERLAND, Mr Alan, Head of Editorial Policy, Australian Broadcasting Corporation

Appendix 3

Tabled documents, answers to questions on notice and additional information

Monday 7 April 2014 – Canberra

Answers to questions on notice

1. Response to a question on notice, provided by Seven West Media on 16 April 2014: Correspondence between Seven West Media and the AFP in relation to an AFP Professional Standards Complaint
2. Response to a question on notice, provided by the Rule of Law Institute of Australia on 17 April 2014
3. Responses to questions on notice, provided by the Australian Federal Police on 2 May 2014
4. Response to questions on notice, provided by the Attorney-General's Department on 12 May 2014

Additional information

- 1 Document tabled by Seven West Media at public hearing held 7 April 2014 - 'Affidavit for a search warrant issued 17 February 2014'
- 2 Document tabled by Australian Federal Police at public hearing held 7 April 2014 - 'Production Order issued 11 February 2014'
- 3 Document tabled by Australian Federal Police at public hearing held 7 April 2014 - 'Search Warrant issued 17 February 2014'
- 4 Document tabled by Australian Federal Police at public hearing held 7 April 2014 - 'Order to provide information or assistance issued 17 February 2014'
- 5 Document tabled by the Australian Federal Police at public hearing held 7 April 2014 – 'Letter from the AFP to Ms Justine Munsie dated 17 February 2014'

Correspondence received

- 1 Australian Lawyers for Human Rights (ALHR) - Correspondence received 24 March 2014
- 2 Law Council of Australia - Correspondence received 30 April 2014

