

**SENATE STANDING COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS**

SUBMISSION BY



28 MARCH 2014

Senate Standing Committee on Legal and Constitutional Affairs

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

Submission by Seven West Media

28 March 2014

EXECUTIVE SUMMARY

- The Australian Federal Police executed search warrants on the premises of Seven West Media and its lawyers Addisons on 18 March 2014.
- This has resulted in significant damage to the reputation of Seven West Media, its parent company Seven Group Holdings, their legal representatives and various individuals employed by these companies.
- These warrants have subsequently been quashed in the Federal Court and the AFP has abandoned its investigation into Seven West Media.
- Her Honour Justice Jagot found that the AFP materially misled the Magistrates who were asked to issue 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.
- The matter being investigated by the AFP was whether an exclusive media deal had been entered into between Seven West Media and Schapelle Corby. No such deal has ever existed.
- This is not a criminal matter. Even if there had been an agreement to pay Schapelle Corby for her story, there was never, and could not be, any allegation or suspicion that a criminal offence had been committed by Seven West Media or any other person in relation to such an agreement.
- The AFP investigation was based solely on media speculation. No requests were ever made of Seven by the AFP as to whether such a deal existed.
- The AFP did not consider use of any alternative means to address its concerns that money might leave this jurisdiction, such as seeking undertakings from Seven West Media and its related entities.
- Serious questions arise in relation to the proper use of public resources in this matter.
- The powers of the AFP in relation to non-criminal matters are inconsistent with due process and should be consistent with comparable search powers available to civil litigants.
- There is a lack of adequate protections and protocols around journalists sources and confidential material in relation to material obtained through a search warrant. This should be rectified.

PROPOSALS FOR REFORM OF PROCEEDS OF CRIME ACT (2002)

Seven West Media submits that the following amendments be considered to the *Proceeds of Crime Act* or similar legislation where powers normally associated with criminal investigations are used in non-criminal matters.

1. Literary proceeds are clearly distinguished from other proceeds of crime in the PoCA.
2. The AFP is no longer involved in applications under sections 202 and 225 of the PoCA.
3. The threshold test of 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. Threshold tests similar to Anton Piller (civil search) orders should be adopted in civil matters under the PoCA.
4. The likely effect on and inconvenience to third parties, especially media organisations, should specifically be taken into account before issuing such orders and warrants.
5. Consideration be given to whether alternate means of collecting evidentiary material from media organisations and similar third parties, such as the Federal Court preliminary discovery procedure.
6. Search warrants must be carefully drafted so that they relate only to specific categories of documents, within a specific time period, which the available evidence suggests with a degree of certainty may exist.
7. An opportunity be given to the occupier of any premises being searched to perform the relevant searches, especially of material stored on computers, and provide those to the AFP, together, if necessary with an undertaking that no documents will be destroyed.
8. Public interest factors, such as those contained in s154 of the PoCA, be taken into account before a court will issue a production order or a search warrant under s202 or s225 of the POCA.
9. Privilege claims may be made over legally privileged material with the owners shifting to the AFP to disprove any privilege claims.
10. 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 be made subject to section 126 (h) of the Evidence Act 1995 (Cth).
11. The Serious and Organised Crime division no longer be involved in undertaking search and related functions in relation to literary proceeds orders.
12. Protocols for protection of confidential material and journalists sources should be implemented.

Senate Standing Committee on Legal and Constitutional Affairs

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

Introduction

Seven West Media is the leading, listed national multi-platform media business based in Australia. We comprise the Seven Network, Australia's highest rating television network; Pacific Magazines, the country's second largest magazine group by readership; Yahoo!7, one of the nation's most successful internet platforms, as well as Western Australia's leading newspaper, the West Australian and associated WA regional newspapers and radio stations.

Seven West Media welcomes this opportunity to participate in the Senate Inquiry into the current investigative processes and powers of the Australian Federal Police in relation to non-criminal matters (**Inquiry**).

We would very much hope that the Inquiry will result in recommendations to improve processes and procedures around the exercise of civil powers by the Australian Federal Police.

1. Background to Search Warrants executed in relation to Seven West Media in March 2014

In the lead-up to the release of Schapelle Corby from a Balinese prison in early February 2014, there was significant speculation that Ms Corby would sell her story to an Australian media outlet on an exclusive basis. All Australian media organisations are believed to have been engaged in negotiations with members of the Corby family to obtain Ms Corby's first interview.

Following Ms Corby's release this speculation centred on whether such an arrangement had been made between Seven West Media and Ms Corby for her to provide an exclusive interview to Seven's Sunday Night program. In subsequent Federal Court proceedings, it was acknowledged that the Australian Federal Police commenced an investigation into Seven West Media based on a number of news reports and commentary which suggested that a deal had been struck between Seven and Schapelle Corby rumoured to be worth \$2-3 million for an exclusive interview.

It is important to note that the investigation by the Australian Federal Police was not in relation to any criminal conduct by Seven or any other person. It is **not** a criminal offence for a convicted criminal to give an interview to the media. It is **not** a criminal offence for a media organisation to publish such an interview. And importantly, it is **not** a criminal offence to pay for such an interview or to receive payment in relation to it.

Even if there had been an agreement to pay Schapelle Corby for her story, there was never, and could not be, any allegation or suspicion that a criminal offence had been committed by Seven West Media or any other person in relation to such an agreement.

Under the *Proceeds of Crime Act 2002 (Cth)* (**PocA**), the power of the Australian Federal Police is to apply to a court for orders to confiscate any literary proceeds paid to persons convicted of certain crimes. This is a discretionary civil remedy. Under the Proceeds of Crime Act, the AFP may commence civil (not criminal) proceedings to stop such payments being made. The Court may grant the application, having taken into account various factors including the length of time since the crime was committed and the public interest in payments for interviews being made.

Despite this, Seven West Media and its representatives were treated in the same manner as one might expect in relation to serious criminal conduct. This has resulted in serious damage to the reputation of Seven West Media, its parent company Seven Group Holdings, and various individuals employed by these companies and their legal representatives.

It is extremely disappointing that the Attorney General Senator George Brandis and the Minister for Justice Michael Keenan did not make more substantial independent enquiries as to what had occurred before indicating their support for the AFP's actions. The public endorsement of the treatment of Seven by senior political figures significantly added to the damage inflicted on Seven West Media and Seven Group Holdings in this process.

The subsequent failure to follow up clear errors and poor judgment as they came to light seems extremely difficult to explain. In stark contrast to the immediate aftermath of the search warrants, there has been no public statement from any Government representative since Justice Jagot's ruling on 26 March to quash the search warrants and her finding that the AFP had materially misled the Magistrates who had issued them.

2. Chronology of Events

A full Chronology of all relevant events since 10 February 2014 is contained in **[Attachment 1]** to this submission.

The key dates are:

- 10 February Schapelle Corby released from Kerobokan Prison in Bali.
- 11 February Production Orders issued on Seven West Media. These orders requested material to be produced within 3 days.
- 14 February First set of documents provided to the Australian Federal Police by Seven West Media. Clarification of scope of Production Order sought from AFP but no clarification was received.
- 17 February AFP extends time for compliance with Production Order to close of business that day. Seven provides further documents and indicates it is still searching for any additional documents. A repeated request to clarify scope following the 14 February request was made. Again there was no response from the AFP.

AFP approaches the Local Court to seek a Search Warrant to be issued against Seven West Media, despite the fact that the time for compliance with the Production Order has not expired. It also seeks associated Orders under section 246 of the PoCA against Justine Munsie and a Seven West Media employee.
- 18 February AFP executes Search Warrants at various premises of Seven West Media and its lawyers Addisons. Over 30 armed police from Serious and Organised Crime are involved
- 21 February AFP writes to Seven **[Attachment 2]** admitting that allegations contained in a Section 246 Order that Ms Munsie, a respected partner with the law firm Addisons, was suspected of committing a criminal offence was a "word processing error".

Attorney General Senator George Brandis says in a statement that the dispute was a matter for the AFP but he was concerned "about how this

appears to have been handled" and that "I will be seeking to establish how this error was apparently made by the AFP."

22 February AFP Deputy Commissioner Phelan holds a press conference in Canberra to again apologise to Ms Munsie but persists in asserting the conduct of the AFP was fully justified because Seven had not complied with the Production Orders served on it.

Deputy Commissioner Phelan also maintains it was necessary to execute a search warrant in order to prevent funds leaving the jurisdiction.

24 February Seven West Media, Addisons and Justine Munsie commence proceedings in the Federal Court seeking judicial review of the search warrants and associated orders.

Commissioner Tony Negus and Deputy Commissioner Phelan appear before Senate Estimates and are questioned about the Seven West Media search warrants. They again maintain that the warrants were necessary because Seven had not complied with Production Orders.

Attorney General Senator George Brandis says at Senate Estimates that he "has no criticism to offer of the AFP, having heard the account that has been given tonight to this Estimates Committee and having...heard from Commissioner Negus on Tuesday afternoon of last week and received a written briefing the following day. Also, I should add for completeness, having had discussed the matter with my junior minister, Mr Keenan, who I know has had several conversations with Commissioner Negus in the last several days, I do not offer any criticism at all."

Senator Brandis makes no mention of the concerns he expressed only 3 days previously about how the matter had been handled or the steps he had taken to establish how the errors made by the AFP occurred.

7 March Federal Court hearing before Her Honour Justice Jagot.

13 March AFP abandons its investigation **[Attachment 3]**

26 March Justice Jagot hands down her judgment in favour of Seven West Media, Addisons and Justine Munsie. The search warrants are quashed and Jagot J finds that the AFP had materially misled the Magistrates who issued the warrants.

A report from the West Australian reporting the result is **[Attachment 4]**. The judgment is annexed at **[Attachment 5]**.

3. Execution of the Search Warrants

The search warrants were executed at Seven West Media's Pyrmont headquarters, the offices of Pacific Magazines and the Sunday Night program and Addisons on Tuesday, 18 February 2014. The execution of the search warrants involved more than 30 Australian Federal Police agents from Serious and Organised Crime, many of them armed and deliberately and overtly displaying their weapons, in an exercise which began before 9am and lasted well into the evening.

The AFP seized documents from computer hard drives, including material which fell well outside the scope of material referred to in the search warrant. For instance, a copy of the

entire hard drive of our solicitor from 1 December 2013 was made and seized from our solicitor's premises.

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.

No material existed or was seized which evidenced an agreement by Seven West Media to pay Schapelle Corby for a media interview.

The conduct of the AFP during the execution of the warrants must be viewed in light of the previous dealings between the AFP and Seven/Addisons identified in the timeline referred to above.

Given the way in which Seven had rendered assistance to the AFP, including by making its solicitor available at her home to take delivery of a single letter and the fact that the matter did not concern criminal conduct of any kind, the actions taken by the AFP in applying for and executing the warrants were on any reasonable view entirely unnecessary and completely disproportionate to the stated objectives of the warrants.

Serious questions surely arise about the manner in which decisions were taken in this matter and whether scarce public resources, both human and financial, have been used appropriately.

In particular:

- (a) Why was it necessary to deploy over 30 Federal Agents, many of them armed and with their firearms plainly visible, to search the commercial premises of Seven and Addisons? This seems to amount to a clear misuse of Commonwealth resources. The AFP knew from documents produced on the Production Order and explanations given by Ms Munsie of the nature of Seven's dealings with the Corby family throughout the time of Schapelle Corby's incarceration.

Seven had produced two recent agreements with members of the Corby family as well as several historical agreements pursuant to the Production Order. Seven then volunteered production of another draft letter agreement (not the subject of the Production Order) soon after the commencement of the execution of the Seven Warrant. The use of large numbers of armed agents in these circumstances to search for hours for evidence of arrangements which simply do not exist is unjustifiable.

- (b) The presence of such a contingent of armed Federal Agents unsurprisingly caused distress to Seven's staff, including heavily pregnant women. Photos of clearly armed officers are at **[Attachment 6]**. We understand that the AFP Commissioner's Order on operational safety (CO3) requires agents to carry all issued munitions and equipment while on operational duty except in limited circumstances. Should the AFP's operational guidelines prohibit the carriage of firearms in relation to non-criminal matters? If firearms are carried in these circumstances, should there be operational guidelines to recommend that they are not displayed?
- (c) Why did the agents in attendance at Seven's premises seek to execute the warrants, including in relation to documents held by Seven's in house lawyers (in the offices of those lawyers) in the face of objection made by Seven and the request that the search not commence until Seven's independent solicitor had arrived to provide advice? Such conduct is in breach of basic protocol and

specifically in breach of the General Guidelines between the AFP 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;

- (d) 8 Agents were sent to execute the warrant at Addisons where they spent 7 hours searching two small offices and the hard drive of Ms Munsie who informed them precisely where they could find any documents which related to Seven and any member of the Corby family and the date range of such documents. Despite this assistance, the AFP removed the entirety of Ms Munsie's hard drive from 1 December 2013 including personally sensitive, confidential and privileged information unrelated to the action in any way. Is this appropriate?
- (e) Why did AFP agents suggest to a Seven News reporter and a Seven West senior executive that filming the warrant was not permitted and that legal consequences would flow if Seven News continued to do so? Deputy Commissioner Phelan subsequently admitted in his press conference on 22 February that filming of the execution of search warrants is not illegal [**Attachment 7 – Seven News story, 18 February 2014**].

4. Federal Court Proceedings

On 24 March 2014, Seven West Media, Pacific Magazines, Addisons and Addisons partner, Justine Munsie, commenced proceedings in the Federal Court of Australia seeking judicial review of the search warrants and associated orders which had been issued at the AFP's request. The review application was heard by Her Honour Justice Jagot on Friday, 7 March 2014 and judgement was delivered on 26 March 2014¹.

The applicants argued that the decision to issue the warrants ought to be set aside because of the misleading and prejudicial nature of the information placed before two Local Court Magistrates by the AFP. That information included:

- Statements contained in the search warrants that certain persons, including Ms Munsie were "suspects" in an investigation, when it was common ground that none of those persons, other than Schapelle Corby, was or had ever been a "suspect";
- Statements contained in section 246 orders that Ms Munsie and another Seven West Media employee were "reasonably suspected of having committed a criminal offence" when it was again accepted that none of those persons was or had ever been so suspected. Although counsel for the AFP described these statements as mere "errors" and the AFP Commissioner and Deputy Commissioner had previously described them as "typos", Justice Jagot rejected the submission that the errors were trivial or inconsequential, holding instead that the errors had materially misled the Magistrates who issued the warrants.
- Assertions made on affidavit by the AFP that Seven West Media had not complied with the Production Order when in fact we were complying and the AFP had granted an extension for compliance in any event.

Jagot J found that the decisions made by the Magistrates to issue the search warrants and section 246 orders were materially affected by legal error and should be quashed, with the effect that they are taken not to have existed.

Her Honour 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

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

give rise to a literary proceeds order, is an offence. This ambiguity, together with the making of the erroneous statements referred to in paragraphs (a) and (b) above in the urgent circumstances in which the applications for search warrants were made, meant that it was likely that the Magistrates incorrectly assumed that there was some offence relating to literary proceeds in the PoCA which would justify issuing the warrants.

Jagot J concluded at [80] that *“it is not all difficult to see how and why the [Magistrates] were led into error by the AFP”*.

It was acknowledged by AFP Counsel during the hearing and noted by Jagot J that the scope of the search warrants was wider than the Production Orders.

Her Honour further found that the AFP had materially misled the Magistrates who issued the warrants by:

- (a) stating that the AFP was not satisfied that Seven had complied with the production order when a consensual regime was in place for continuing compliance; and
- (b) failing to disclose to the Magistrates the evidence of Seven’s compliance with the production order.

However, her Honour was bound by authority not to rely on those factors in support of her decision to quash the warrants as she could not say that there was fraud involved.

5. What was achieved and what else could have been done?

5.1 What was achieved?

At the end of the searches well into the evening of 18 February, the AFP had seized a swathe of irrelevant documents, including privileged legal advices and copies of computer hard drives taken from our offices and those of our solicitor which contain documents well outside those authorised in the warrants. None of these show any payment by Seven West to Schapelle Corby for an interview.

Seven West volunteered to the AFP a draft (unsigned) agreement with Mercedes Corby which proposed payment to Schapelle Corby but this agreement was never entered into and the AFP has admitted that Seven West was not required to produce draft documents under the original Production Order.

The AFP abandoned its investigation on 13 March 2014. Significant amounts of time and resources had by this time been wasted by the AFP, Seven and Addisons on an entirely unnecessary and excessive operation.

The AFP has informed Seven that all documents seized have now been returned to Seven and Addisons respectively. However Seven has no knowledge of whether any confidential material has been accessed or copied prior to being returned to it. We understand that there is no protocol that governs the manner in which sensitive and confidential material is to be handled once it has been removed pursuant to a civil search warrant. This is in contrast to procedures in relation to material where privilege is claimed where a protocol does exist.

We would submit that given the potential for highly sensitive material such as journalists sources to be collected in matters such as these, a clear protocol to ensure these materials are not inappropriately accessed is clearly needed.

5.2 What else could the AFP have done?

Serious questions arise as to why the Australian Federal Police did not consider other less intrusive means to address its concerns in relation to the payment of any literary proceeds to Ms Corby.

Firstly, why did the AFP not directly ask Seven West Media whether any deal existed or was being negotiated with Schapelle Corby and request any supporting documentation before having recourse to Production Orders?

Secondly, the terms of the search warrant were acknowledged by the AFP in Federal Court to be wider than the original Production Orders. Why did the AFP not simply ask for the additional documents it appears to have omitted from its original documentation? On presentation of the search warrant, the single document (an unsigned draft agreement) that satisfied the wider search criteria was offered up by Seven.

Thirdly, AFP Commissioner Nugent and Deputy Commissioner Phelan have both stated that a key driver for the actions of the AFP was to ensure that monies were not paid to Ms Corby in Bali where they may not be able to be recovered.

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.

Why did the AFP not make a simple request of Seven to undertake not to make any such payments? Such a request would have been very difficult for a company in Seven's position to refuse.

It is an offence under Section 211 of PoCA not to comply with a Production Order issued under section 202. Seven has a longstanding record of full compliance with the numerous Production Orders, Subpoenas and other legal requests for information that are regularly received from the AFP and State police by all media outlets.

Seven West Media is a publicly listed company and holds a number of commercial television and radio licences issued under the *Broadcasting Services Act 1992* (BSA). Clause 7(1)(h) of Schedule 2 of the BSA stipulates that it is a condition of a commercial broadcasting licence that "the licensee will not use broadcasting services in the commission of an offence against another Act or a law of a State or Territory".

In addition, section 41 of the BSA requires that a company holding a commercial broadcasting licence must be a "suitable licensee". In determining whether a licensee is "suitable" the ACMA must take into account a number of factors set out in subsection 45(3) including:

- (b) *the company's record in situations requiring trust and candour; and*
- (c) *whether the company, or a person [in a position to control the company] ...has been convicted of an offence against this Act or the regulations.*

It follows that non-compliance with a Production Order or indeed failure to provide or comply with an undertaking in relation to the PoCA, could reasonably be considered to

place at serious risk the ability of Seven West Media to hold commercial broadcasting licences.

It is inconceivable that a corporate citizen of Seven's standing, with additional requirements under its broadcasting licences, would jeopardise its reputation and the licences that are central to its business operations by risking non-compliance with a Production Order.

6. Relevant provisions of Proceeds of Crime Act

The PoCA establishes procedures by which the DPP or the AFP may investigate and seek to confiscate payments of proceeds of crime. Since 2002, proceeds have included "literary proceeds" in addition to the traditional proceeds of criminal offences or benefits derived from criminal offences.

Section 153 of the PoCA provides that:

(1) "Literary proceeds are any benefit that a person derives from the commercial exploitation of:

- (a) the person's notoriety resulting, directly or indirectly, from the person committing an indictable offence or a foreign indictable offence;*
- (b) the notoriety of another person involved in the commission of that offence resulting from the first mentioned person committing that offence.*

(2) The commercial exploitation may be by any means, including:

- (a) publishing any material in written or electronic form;*
- (b) any use of media from which visual images, words or sounds can be produced; or*
- (c) any live entertainment, representation or interview.*

...In determining whether:

- (a) a person has derived literary proceeds;*
- (b) the value of the literary proceeds that a person has derived;*

the court may treat as property of the person any property that, in the court's opinion:

- (b) is subject to the person's effective control;*
- (c) was not received by the person, but was transferred to, or (in the case of money) paid to, another person at the person's discretion."*

A Court has power under section 152 of the POCA to make an Order requiring a person to pay an amount to the Commonwealth if the AFP or the DPP applies for such an Order. Before making an Order the Court must be satisfied that the person has committed an indictable offence or a foreign indictable offence and that the person has derived literary proceeds in relation to the offence.

Under section 154 of the POCA in deciding whether to make a literary proceeds order, the Court must take into account:

- (i) The nature and purpose of the product or activity from which the literary proceeds were derived;
- (ii) Whether supplying the product or carrying out the activity was in public interest;
- (iii) The social, cultural or educational value of the product or activity;
- (iv) The seriousness of the offence to which the product or activity relates;
- (v) How long ago the offence was committed; and

may take into account such other matters as it think fit.

It is clear from the matters referred to above that literary 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.

Prior to legislative amendments made in 2011, a literary proceeds order could only be applied for by the Commonwealth DPP. However, in 2011, the AFP also became empowered to apply for such an Order.

In order to obtain information regarding the possibility of payment of any proceeds of crime, including literary proceeds, the AFP has various additional powers, including the power to apply for Production Orders (section 202 of the PoCA) and search warrants (s225 of the PoCA). The AFP exercises these powers as it would do in the discharge of its normal criminal functions. In our submission, it is unjustifiable as a matter of law and policy for such powers to be exercised by the AFP in relation to literary proceeds where no criminal activity is alleged or involved by the payment or receipt of literary proceeds.

7. Submissions in relation to Committee's Terms of Reference

- (a) Thresholds, including evidentiary thresholds, relating to the obtaining of production orders and search warrants, and in particular whether these reflect the rules;**

and

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

These terms of reference relate to the rules and procedures in place when the AFP seek production orders and search warrants under Sections 202 and 225, respectively, of the PoCA.

The recent judgment of Jagot J in *Seven West Media's action against the AFP* illustrates the problems which arise from the involvement of the AFP in making applications for such warrants and orders in the course of gathering information in relation to a civil matter, being the possible payment of literary proceeds.

Such applications should be undertaken with great care, given that the warrants and section 246 orders "*authorise actions which would otherwise constitute trespass and, insofar as searches of the person are concerned, an assault. They represent serious incursions into private and property rights*"²

It cannot be assumed that a Magistrate would be aware of the way in which the PoCA 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 frank disclosure of all material information to the Magistrate, to the same standard required on any ex parte application for civil relief.

Seven West Media submits that the procedures currently in place in so far as literary proceeds are concerned require amendment so that:

- Literary proceeds are clearly distinguished from other proceeds of crime in the PoCA; and
- the AFP is no longer involved in applications under sections 202 and 225 of the PoCA; and
- any applications are made as a matter of last resort, after other avenues of information gathering have been exhausted

These amendments are necessary in order to ensure that:

- Commonwealth police resources are appropriately managed and used;
- An appropriate level of priority is given to the obtaining of production orders and search warrants for literary proceeds matters relative to the importance and likelihood of ever obtaining any literary proceeds order;
- The objects of the PoCA are best achieved and the public interest properly served;

² Jagot J at [75]

- As far as possible, that parties unrelated to any person who has committed a relevant crime, are treated with appropriate respect, especially taking into account the civil nature of any literary proceeds proceeding which may result following the issuing of a production order or search warrants and the fact that media organisations likely are to be involved which gives rise to issues of concerning freedom of speech as well as confidential sourced materials.

In particular, Seven West Media submits that:

1. The threshold test of 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.

The threshold tests applied in Anton Piller orders, or “search 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. These orders have the object of preserving evidence necessary to an applicant’s claim which is at imminent risk of destruction, tampering or removal from the jurisdiction.

[Attachment 8] provides more detail of the criteria applied by the courts in such matters.

2. The inconvenience to third parties, especially media organisations, should specifically be taken into account before issuing such orders and warrants.
3. Consideration be given to whether alternate means of collecting evidentiary material from media organisations and similar third parties. For example, Seven West Media submits that the application for production orders or search warrants under the PoCA 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. If such a procedure had been implemented in the recent case of Seven West Media, Seven West Media would have been able to provide in a timely fashion information to the AFP which confirmed that:

- A payment had been made to Mercedes Corby for her agreement to provide an interview with New Idea magazine in January 2014, but that no such interview was provided by and no payment given to Schapelle Corby in relation to that article.
- Sunday Night had entered into an agreement with Mercedes Corby under which Mercedes Corby would provide the Seven Network’s Sunday Night program with an exclusive television interview but that no fee was payable either to Mercedes Corby or Schapelle Corby under that agreement.
- Rumours in the media, in particular by Seven’s commercial competitors, that an agreement had been reached for payment to Schapelle Corby of \$2-3 million, were entirely false.

In the absence of any basis for disbelieving the information provided by Seven, it is likely in those circumstances that the AFP would not have proceeded to have issued the production orders or the search warrants and would have saved the

considerable resources expended on the investigation which has now been abandoned. Similarly, the time and cost to Seven West Media, in relation to a matter which does not involve the commission of a criminal offence or the allegation of such a criminal offence, including the time of its own staff and its lawyers, would also have been saved.

(c) Procedures for executing search warrants

On the assumption that the present system allowing for search warrants to be issued at some stage in the process of an investigation into literary proceeds matters be continued, Seven West Media would recommend changes to the practice of execution of those search warrants, in so far as they are executed on media companies and agents of media companies, including legal representatives.

We believe that changes are required to this procedure in order to reflect the fact that neither the media organisations nor their agents are suspected in any way of being involved in the commission of a crime and that, at best, information may be obtained on the execution of a warrant which may lead eventually to the payment of money, in a civil proceeding, to the Commonwealth. Given the notional benefit which might be involved eventually as a result of the execution of a search warrant, compared to the degree of inconvenience to the media organisation and its agents and the potential for confidential information, including journalists' sources and legally privileged material to be disclosed, observed or seized, under the current search warrant procedure, Seven West Media submits that such restrictions are clearly warranted. We submit in particular that the following restrictions be introduced to the PoCA in relation to the execution of search warrants on media organisations and their agents:

- Search warrants must be carefully drafted so that they relate only to specific categories of documents, within a specific time period, which the available evidence suggests with a degree of certainty may exist;
- An opportunity be given to the occupier of the premises being searched to perform the relevant searches, especially of material stored on computers, and provide those to the AFP, together, if necessary with an undertaking that no documents will be destroyed;
- Privilege claims may be made over legally privileged material with the onus shifting to the AFP to disprove any privilege claims.
- Protection should also be given to material over which a claim of journalist privilege is made and that no such documents are made available for inspection by the AFP. This is discussed further below.

(d) Safeguards relating to the curtailment of freedom of speech, particularly in relation to literary proceeds matters;

Seven West Media submits that due consideration be given to the effect on freedom of speech which is likely to result from the use of current procedures under the PoCA in relation to literary proceeds matters.

There exists presently some degree of legislative acknowledgment given to the public interest in the freedom of speech in section 154 of the PoCA which sets out the factors which a court must take into account in deciding whether to make a literary proceeds order for the payment of money to the Commonwealth. Those factors include whether supplying the "product" (eg interview or story) was in the public interest and the social, cultural or educational value of such a product.

However, there is currently no similar consideration required to be given before applications for production orders or search warrants are made in literary proceeds matters under the PoCA. 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. Important stories exposing such matters as the realities of criminal life, Australia's law enforcement system and the redemption and rehabilitation of criminals may go untold in the circumstances.

To counteract that risk, Seven West Media recommends that public interest factors, such as those contained in section 154 of the PoCA, be taken into account before a court will issue a production order or a search warrant under s202 or s225 of the PoCA.

(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.

There is currently nothing in the PoCA which provides for the protection of confidential information, including journalists' sources, from disclosure in circumstances where a production order or a search warrant has been issued, including to a media organisation.

In the case of a production order, the issue is dealt with specifically in section 206 (1) of the PoCA which provides that a person is **not** excused from producing a document or making a document available under a production order on the grounds that to do so would breach an obligation of the person not to disclose the existence or contents of the document. Whilst there is no equivalent provision in relation to provision of a search warrant, there is no explicit protection for such documents from seizure.

Seven West Media believes there is a clear imperative for building into the PoCA some protection of journalists' sources which is consistent with shield laws which have already been enacted in the Commonwealth Evidence Act, as well as similar provisions which now exist at a state level in New South Wales, Victoria, Western Australian and the ACT to protect journalists' confidential sources. This could be dealt with in the relatively simple way of 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 section 126 (h) of the Evidence Act 1995 (Cth). 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.

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.

Consideration should also be given to the establishment of a protocol that documents the manner in which documents obtained through a search warrant are

- stored;
- accessed; and
- how such access is recorded

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

(f) Powers available to the AFP to intercept telecommunications in circumstances where the matter under investigation does not involve criminal conduct

Seven West Media is not aware of any order being made for the interception of its telecommunications as part of the AFP's recent investigation.

It is however crucial in our submission that no powers be made available to the AFP to intercept the communications of any media organisation or related third party in the absence of any allegation of 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

In August 2009, the Parliamentary Joint Committee on the Australian Crime Commission recommended that the Australian Government examine an integrated model of asset recovery in which investigation and prosecution of criminal proceeds matters would be undertaken. With the introduction of the Crimes Legislation Amendment Bill (No. 2) 2011, the PoCA was amended to enable the commissioner of the AFP to exercise powers and functions relating to confiscation litigation which had until then been exercised only by the DPP, and for the AFP to delegate those powers. At the same time as those amendments were made, the Government established the Criminal Assets Confiscation Task Force to take responsibility for litigating all proceeds of crime matters relevant to the investigation undertaken by the task force.

The Criminal Assets Confiscation Task Force forms part of the AFP's Serious and Organised Crime portfolio. A description of the AFP's serious and organised crime portfolio is found on the AFP's website at <http://www.afp.gov.au/jobs/graduate-program/areas-you-can-work-in/crime-program.aspx> as follows:

“Serious and Organised Crime conducts investigations into complex organised criminal activity including the importation and manufacture of illicit substances, money laundering and economic crime, fraud, identity crime and corruption. In order to target the threat posed to Australia's national security by organised crime, serious and organised crime investigations focus on mitigating the key vulnerabilities that are exploited by criminal enterprises, including supply chain logistics on the waterfront, in the airstream and across transnational borders.

Investigations are also focused on increased industry engagement within the banking and financial sector. The AFP has developed key task forces and a systematic approach to working with industry in order to combat organised crime activity within this area. Serious and organised crime also incorporates the AFP's international network which cooperates with other Australian government agencies domestically and abroad to ensure a whole of government approach to fighting crime offshore at its source.”

It is Seven West Media's submission that it is inappropriate and a serious drain on limited public resources to direct the attention of the AFP's Serious and Organised Crime portfolio to the investigation of literary proceeds matters where no crime is suspected or alleged to be involved in the payment or receipt of such literary proceeds on no threat to Australia's security interests is involved.

Seven West Media submits that it is not in the public interest for the resources of a portfolio with functions as outlined above to be involved in undertaking search functions in relation to literary proceeds orders, especially when dealing with media organisations. It

is an entirely disproportionate use of resources, coupled with an undesirable and intimidating effect on corporate and other citizens such as media organisations, to be involving the Serious and Organised Crime portfolio in this way.

8 SUMMARY

Seven West Media submits that the following amendments be considered to the *Proceeds of Crime Act* or similar legislation where powers normally associated with criminal investigations are used in non-criminal matters.

1. Literary proceeds are clearly distinguished from other proceeds of crime in the PoCA.
2. The AFP is no longer involved in applications under sections 202 and 225 of the PoCA.
3. The threshold test of 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. Threshold tests similar to Anton Piller (civil search) orders should be adopted in civil matters under the PoCA.
4. The likely effect on and inconvenience to third parties, especially media organisations, should specifically be taken into account before issuing such orders and warrants.
5. Consideration be given to whether alternate means of collecting evidentiary material from media organisations and similar third parties, such as the Federal Court preliminary discovery procedure.
6. Search warrants must be carefully drafted so that they relate only to specific categories of documents, within a specific time period, which the available evidence suggests with a degree of certainty may exist.
7. An opportunity be given to the occupier of any premises being searched to perform the relevant searches, especially of material stored on computers, and provide those to the AFP, together, if necessary with an undertaking that no documents will be destroyed.
8. Public interest factors, such as those contained in s154 of the PoCA, be taken into account before a court will issue a production order or a search warrant under s202 or s225 of the POCA.
9. Privilege claims may be made over legally privileged material with the owners shifting to the AFP to disprove any privilege claims.
10. 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 be made subject to section 126 (h) of the Evidence Act 1995 (Cth).
11. The Serious and Organised Crime Portfolio no longer be involved in undertaking search and related functions in relation to literary proceeds orders.
12. Protocols for protection of confidential material and journalists sources should be implemented.

ATTACHMENT 1

Detailed Chronology of Events

- 10 February** Schapelle Corby is released from prison in Bali.
- There followed several incorrect media reports that Seven had secured an exclusive interview with Ms Corby for which it would pay millions of dollars.
- At no stage is Seven contacted by the AFP to inquire about those reports.
- 11 February** On the basis of the reports of a rumoured deal, the AFP approached a Local Court Magistrate on 11 February 2014 who issued a Production Order under Section 202 of the PoCA.
- The time for responding to the Production Order was abridged from the usual 14 days to less than three business days, with the documents returnable to the AFP by 4pm on 14 February 2014.
- 14 February, 12.30pm** Seven's solicitor, Justine Munsie, telephones Agent Jeff Kokles at the AFP to seek clarification of the documents sought in the order, especially on the basis that the categories were unlimited as to time and some were ambiguous in their terms.
- Agent Kokles asks Ms Munsie to put her requests in writing which she did at 12.42pm.
- Agent Kokles responds by email at 1.52pm. Requires production of documents dating back two years by 4pm and other documents up to ten years old by 25 February 2014.
- 14 February, 3.50pm** Justine Munsie personally attends the AFP in Goulburn Street to produce documents in response to the Production Order.
- Ms Munsie spends approximately 10-15 minutes explaining to Agent Kokles and two of his colleagues what documents Seven has located in the time available and what other types of documents, especially historical documents, Seven believes it may have but for which it is still searching.
- Ms Munsie informed the AFP that:
- (a) it had produced documents in relation to an agreement between Seven Network's Sunday Night program and Mercedes Corby for an exclusive television interview (**Sunday Night agreement**);
 - (b) it had produced documents relating to a recent agreement between New Idea magazine and Mercedes Corby dated 24 January 2014 for an exclusive interview with New Idea in return for payment, but it had not yet found documents which evidenced the payment having been made (**New Idea agreement**);
 - (c) it had located a number of other agreements between Pacific Magazines and members of the Corby family as well as unrelated third parties in relation to articles about Schapelle Corby which had appeared in Pacific Magazine's publications since the time of Schapelle Corby's arrest in 2005. Ms Munsie noted that the agreements with third parties could not give rise to any issue in relation to proceeds of crime and asked whether the AFP had intended the Production Order to capture such documents; and

- (d) Pacific Magazines was likely to have other documents going back several years, which evidenced payments to people who had provided photos of Schapelle Corby or her family since the time of her arrest in 2005. Ms Munsie asked the AFP agents if it was intended that those documents be produced pursuant to the Production Order, particularly where the documents related to payments to third parties, such as paparazzi, and therefore did not evidence any payment to Schapelle Corby.

The AFP told Ms Munsie that it was not able to answer her questions at that time.

**17 February,
11.30am**

AFP Officers attend the premises of Addisons to serve Ms Munsie with a letter. As Ms Munsie is working from her home that day and the AFP insist that the letter be served personally, Ms Munsie invites the officers to her home to hand her the letter.

Three AFP officers arrive at Ms Munsie's home shortly before midday and hand her a letter signed by Det Superintendent Stephen Dametto, Serious & Organised Crime.

The letter alleged that Seven West Media had not complied with the Production Order and extended the time for compliance to the close of business that day, in particular to provide:

- Documents relating to funds payable under the Sunday Night agreement; and
- Documents evidencing payment to Mercedes Corby under the New Idea agreement.

**17 February,
4.24pm**

Letter from Addisons to Det Superintendent Stephen Dametto informing the AFP that:

- It was still searching for documents in relation to the New Idea payment;
- There were no funds payable under the Sunday Night agreement and therefore no such documents could be produced;
- It was continuing to search for documents as it had indicated previously and repeated its earlier requests for clarification over the extent of the Production Orders.

No response was received from AFP.

**17 February,
5.46pm**

Telephone call from Justine Munsie to Adam Sandon AFP to inform him that Seven has further documents to produce and she will send them immediately by email.

Email from Justine Munsie to AFP attaching further documents in response to the Production Order, being remittance notices for payments made by New Idea for stories published between 2011 and 2014. This includes one document which did not come into existence until sometime on 14 February 2014.

17 February

Notwithstanding that the AFP had allowed Seven West Media until the close of business on 17 February to provide a response to its questions and knew that actions to provide documents were ongoing, the AFP nevertheless approached the Local Court with an application that search warrants be issued against Seven West Media and others. The warrants

were issued by 3:55pm on Monday 17 February.

The information placed before the Local Court Magistrate by the AFP in support of its application included:

- An affidavit sworn by an Australian Federal Police agent which stated that Seven West Media had not provided certain information to the AFP but did not state that the AFP had allowed Seven West Media an extension of time in which to provide that information;
- Draft search warrants which named as “suspects” in a criminal investigation a number of Seven West Media staff and external solicitors;
- An Order under Section 245 of the PoCA addressed to Justine Munsie in which it was stated that the Magistrate was satisfied that there were reasonable grounds for suspecting that Ms Munsie had committed a criminal offence.

18 February

The AFP applied for a further search warrant together with a further affidavit which again stated that Seven West Media had not provided certain information to the AFP, even though that information had been provided the previous afternoon

AFP executes the warrants at Seven West Media's corporate headquarters in Pyrmont, the offices of Sunday Night and New Idea and Seven's solicitors, Addisons.

21 February

AFP issues a statement acknowledging that the statement contained in the Section 246 Order that Justine Munsie was reasonably suspected of committing a criminal offence was incorrect and apologises, blaming a “word processing error”

Attorney General Senator George Brandis says the dispute was a matter for the AFP but he was concerned “about how this appears to have been handled.” and “I will be seeking to establish how this error was apparently made by the AFP.”

22 February

AFP Deputy Commissioner Michael Phelan conducts a press conference to apologise for the error in relation to Ms Munsie but repeats claims that Seven had not complied with the Production Orders served on it and that this was the basis on which search warrants were sought.

24 February

Commissioner Tony Nugent and Deputy Commissioner Michael Phelan appear before the Legal and Constitutional Affairs Senate Estimates Committee hearing. They repeat their claims of non-compliance by Seven and their view that the manner in which this matter has been handled is standard operating procedure.

Seven West Media, Addisons and Justine Munsie commence proceedings in the Federal Court seeking judicial review of the search warrants and associated orders.

Attorney General Senator George Brandis says at Senate Estimates that he “has no criticism to offer of the AFP, having heard the account that has been given tonight to this Estimates Committee and having...heard from Commissioner Negus on Tuesday afternoon of last week and received a written briefing the following day. Also, I should add for completeness, having had discussed the matter with my junior minister, Mr Keenan, who I know has had several conversations with Commissioner Negus in the last several days, I do not offer any criticism at all.”

Senator Brandis makes no mention of the concerns he expressed only 3 days previously about how the matter had been handled or the steps he had taken to establish how the errors made by the AFP occurred.

7 March

Federal Court hearing. The AFP is represented by 5 lawyers from top tier Sydney law firm Ashursts as well as Senior and Junior Counsel.

13 March

The AFP informs Seven West Media that it has discontinued its investigation.

26 March

Her Honour Justice Jagot hands down her decision in favour of Seven, Addisons and Justine Munsie.



PROCEEDS OF CRIME LITIGATION
Locked Bag A3000 Sydney South NSW 1232

www.afp.gov.au
ABN 17 864 931 143

21 February 2014

Atanaskovic Hartnell
Lawyers – Corporate, Finance & Taxation
75-85 Elizabeth Street
SYDNEY NSW 2000

Attention: John Atanaskovic

BY EMAIL

Dear Mr Atanaskovic

Order under Section 246 of the Proceeds of Crime Act 2002 (Cth)

We refer to your letter dated 19 February 2014 to Federal Agent Jeffrey Kokles.

We act for the Commissioner of the Australian Federal Police (**Commissioner**) in respect to matters arising under the *Proceeds of Crime Act 2002 (Cth)* (**the Act**). Please direct all future correspondence to the writer and to Lynne Booth, Principal Litigation Lawyer

Section 246 Order

As you have noted, the Section 246 Order addressed to "Justine Munsie or any other employee, Addisons Lawyers" states that the issuing Magistrate, His Honour Magistrate Graeme Curran, is satisfied that "you are reasonably suspected of having committed the offence stated in the relevant warrant...". We accept that this statement was incorrect and it should not have been made. It is a regrettable error, but it is an innocent word-processing error.

The Commissioner and the Australian Federal Police regret any hurt, embarrassment or offence which this error has caused.

As you have noted, Federal Agent Gerard made clear to Ms Munsie on 18 February 2014 that "she was not suspected of any offence" and we are instructed that this was and has always remained the position.

The only reference to any offence having been committed, in the section 225 search warrant, is to the indictable offence for which Ms Corby has been convicted. There is no reference to any offence or any suspicion of any offence having been committed in the material before Magistrate Curran in support of the application for the warrant. In these circumstances, we do not think there can be any real suggestion that a reasonable person would think that it was alleged that Ms Munsie was suspected of having committed an offence.

In relation to the other matters raised by you:

We do not intend to seek revocation of the s 246 Order. In our view, the Section 246 Order is not invalidated by reason of the error and hence there is no basis for revocation of the order. The Commissioner considers that the error is capable of being addressed by His Honour, Magistrate Curran, pursuant to the slip rule and, if you agree, we will take steps, as soon as practicable, to bring the matter before His Honour for this purpose and provide you with a corrected order as soon as possible thereafter.

Atanaskovic Hartnell

2

21 February 2014

In all the circumstances we do not intend to provide you with any of the materials relating to the application for the Section 246 Order, or any other of our investigative material.


Address for service

Please note that our address for service is as follows:

The Commissioner of the Australian Federal Police
110 Goulburn Street
SYDNEY NSW 2000

Electronic service will also be accepted

Yours faithfully

 Penelope Kelton
Deputy Counsel – New South Wales
Proceeds of Crime Litigation



DEPUTY COMMISSIONER OPERATIONS

GPO Box 401 Canberra City ACT 2601

www.afp.gov.au
ABN 17 864 931 143

13 March 2014

Channel 7
Media City,
8 Central Avenue,
Eveleigh, NSW, 2015

As detailed below, the circumstances relating to the Australian Federal Police (AFP) investigation into whether Schapelle Corby can be pursued under the literary proceeds provisions of the *Proceeds of Crime Act 2002* (POCA) have significantly changed.

The AFP has been advised by the Regional Correctional Services Division Bali (RCSD), that the parole conditions as provided to Ms Corby on her release from prison remain the same. There has not been any additional written condition/s of parole included since her release from prison. However, the Minister for Law and Human Rights in Jakarta has verbally instructed that Ms Corby is not to conduct any interviews with media during her parole period.

Furthermore, RCSD advised the AFP that if Ms Corby conducts a media interview without consultation with the office of the Minister for Law and Human Rights, she will be in violation of her parole conditions, which could result in her parole being revoked and her being returned to prison to complete the remainder of her sentence.

Given this instruction from RCSD, any agreements with Ms Corby, which may have involved her receiving benefits or money to date, are superseded due to Ms Corby's inability to be involved in an interview.

Enquiries also reveal that Ms Corby has moved from the Sentosa Seminyak Villas to reside at private premises.

In light of the above, and particularly given the significance of the Indonesian authorities' recent decision to prohibit Ms Corby from giving any interview whilst on parole, the AFP has determined that continuing an investigation is no longer warranted.

- 2 -

It is the change in circumstances which has resulted in the AFP reaching this position. The decision is based on these new matters having resulted in there no longer being any prospect that any payment will actually now be made to Ms Corby, not on any conclusion that initial concerns which initiated the investigation were not well founded.

Lawyers representing the AFP will facilitate the return of materials seized under warrant at a mutually agreed time.

The AFP will issue a short press statement advising of the outcome of this matter today.

Yours sincerely

Michael Phelan APM



DEPUTY COMMISSIONER OPERATIONS

GPO Box 401 Canberra City ACT 2601

www.afp.gov.au
ABN 17 864 931 143

13 March 2014

Pacific Magazines
Media City
8 Central Avenue
Eveleigh NSW 2015

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Yours sincerely

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West Australian, Perth
27 Mar 2014, by Steve Pennells Sydney

General News, page 1 - 427.00 cm²
Capital City Daily - circulation 166,468 (MTWTF--)



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ID 245855152

PAGE 1 of 1

AFP HUMILIATED

False, misleading statements were 'threat to free speech'

Steve Pennells
Sydney

Seven West Media is considering suing the Australian Federal Police for trespass and false imprisonment of staff after the Federal Court ruled its botched raids on the company were invalid.

The court's decision is humiliating for Australia's top police force, which was found yesterday to have misled two magistrates to get unprecedented approval for more than 30 armed officers to raid Australia's biggest diversified media company last month.

The judgment ends a dramatic six-week legal tussle between the AFP and the media giant and the family of Schapelle Corby, whose rumoured interview was the basis for the operation.

The AFP might also have to pay the costs the company incurred during the raids and for legal action both Seven West and Corby's sister Mercedes took because of the raids.

The AFP refused to comment on the court's decision, which Seven West hailed as a victory for free speech. The damning ruling raises serious questions about methods used to get warrants that should never have been

granted. Federal Court judge Jayne Jagot said the AFP gave the two magistrates who authorised the operation false information.

She said they were misled into approving actions "which would otherwise constitute trespass and, insofar as searches of a person are concerned, an assault".

"They represent serious intrusions into private and property rights ... and should not have been issued lightly," she said.

The court battle centred on claims that documents the AFP used to get the go-ahead for the raids were misleading and made

false allegations that Seven West Media and one of its senior lawyers were suspected of committing a crime.

The court found none of the 33 people, entities or things listed as "suspects" in documents the AFP gave the magistrates were or had ever been suspects.

Last week, as criticism of its operation grew, an embattled AFP said it would drop the investigation and return material seized.

But it said this did not mean "original concerns that initiated the investigation were not well founded".

But Justice Jagot found against the AFP and that the magistrates

were misled and the police wrongly suggested that individuals were suspected of a crime.

Affidavits from two AFP officers also created the false impression that Seven West failed to comply with an order to hand over any evidence of a deal the network might have signed for a paid interview with Corby.

"This was not a true position," Justice Jagot said.

Crucially, the AFP also failed to explain to the magistrates the workings of the Proceeds of Crime Act used as the basis for

► CONTINUED P9

AFP raids invalid

◀ FROM P1

the raids and that neither Corby nor Seven West would have com-

mitted a crime even if a deal for a paid interview had been signed.

She said the two magistrates relied on the AFP's erroneous, ambiguous and "materially misleading" statements.

In the urgency of the AFP's application and without getting more detail, the magistrates wrongly assumed the police statements were correct and there was an offence that would justify the raids.

Seven West chief executive Tim Worner thanked the company's legal team and staff affected by the police operation.

He said the court decision was a victory for free speech given the network's award-winning news and public affairs teams and people at *The West Australian* and *Pacific Magazines* were only reporting on a matter of public interest.

"We abhor the notion that it is apparently fine to seize journalists' correspondence, notes or contact lists," he said.

Mr Worner was glad any implied mark against Seven had been removed "given at all times we were co-operating with the AFP in providing material".

"This has now been accepted," he said. "Additionally, a number of staff members were directly affected and we as a company are sorry they were upset in this unreasonable way."

"We thank them also for their ongoing commitment to Seven."

"We are all pleased by the result, although unfortunately it has been a painful distraction."

Outside court, Ms Corby's lawyer Sue Chrysanthou phoned her client in Bali to break the news: "Mercedes. We've won." She said Ms Corby was delighted.

The AFP released a three-line statement saying it would consider its options, including a possible appeal. "It is not appropriate to comment further," it said.

FEDERAL COURT OF AUSTRALIA

Seven West Media Limited v Commissioner, Australian Federal Police [2014]

FCA 263

Citation: Seven West Media Limited v Commissioner, Australian Federal Police [2014] FCA 263

Parties: **SEVEN WEST MEDIA LIMITED, ADDISONS, JUSTINE MUNSIE, PACIFIC MAGAZINES PTY LIMITED ACN 097 410 896, MERCEDES PEARL ESMA CORBY and VASILIOS KALANTZIS v COMMISSIONER, AUSTRALIAN FEDERAL POLICE, HIS HONOUR MAGISTRATE GRAEME CURRAN and HIS HONOUR MAGISTRATE CHRISTOPHER O'BRIEN**

File number: NSD 201 of 2014; NSD 207 of 2014

Judge: **JAGOT J**

Date of judgment: 26 March 2014

Catchwords: **ADMINISTRATIVE LAW – warrants – *Proceeds of Crime Act 2002* (Cth) ss 225, 246 – *Administrative Decisions (Judicial Review) Act 1997* (Cth) s 5 – *Wednesbury* unreasonableness – decision so unreasonable no reasonable person could make – failure to consider statutory question – decision based on innocent but material misrepresentation – decision based on non-existent fact – decision based on irrelevant consideration or failure to take account of relevant consideration – search warrants and s 246 orders issued by magistrates in respect of “literary proceeds” – applicants wrongly listed as “suspects” on warrant – addressees wrongly described in s 246 orders as “reasonably suspected” of committing offence – no evidence applicants ever suspected of any offence – productions order previously issued under *Proceeds of Crime Act 2002* (Cth) s 202 – decision maker materially misled as to extent of compliance with s 202 order – whether innocent but material misrepresentation basis for quashing warrants and orders**

Legislation: *Administrative Decisions (Judicial Review) Act 1977* (Cth)
Criminal Code Act 1899 (Qld)
Federal Court of Australia Act 1977 (Cth)

- 2 -

Federal Court Rules 2011 (Cth)

Judiciary Act 1903 (Cth)

Proceeds of Crime Act 2002 (Cth)

Cases cited:

Firearm Distributors Pty Ltd v Carson (2001) 2 Qd R 26;
[2000] QSC 159

George v Rockett (1990) 170 CLR 104

*Hu v Minister for Immigration and Multicultural and
Indigenous Affairs* [2004] FCAFC 63

Jilani v Wilhelm (2005) 148 FCR 255; [2005] FCAFC 269

Lego Australia Pty Ltd v Paraggio (1994) 52 FCR 542;
[1994] FCA 1286

Majzoub v Kepreotis [2009] NSWSC 1498

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986)
162 CLR 24; [1986] HCA 40, at 40

*Minister for Immigration and Ethnic Affairs v Wu Shan
Liang* (1996) 185 CLR 259

*Minister for Immigration and Multicultural Affairs v
Rajamannikam* (2002) 210 CLR 222; [2002] HCA 32

Ousley v The Queen (1997) 192 CLR 69

Rashid v Minister for Immigration and Citizenship [2007]
FCAFC 25

Williams v Keelty (2001) 111 FCR 175; [2001] FCA 1301

Date of hearing: 7 March 2014

Date of last submissions: 7 March 2014

Place: Sydney

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 119

In NSD 201 of 2014:

Counsel for the Applicants: AS Bell SC, G Jones, DFC Thomas and Z Heger

- 3 -

Solicitor for the Applicants: LG Wright of Atanaskovic Hartnell

Counsel for the Respondents: GM Watson SC and NJ Owens

Solicitor for the
Respondents: J Bird of Ashurst Australia

In NSD 207 of 2014:

Counsel for the Applicants: S Chrysanthou

Solicitor for the Applicants: V Kalantzis of Kalantzis Lawyers

Counsel for the Respondents: GM Watson SC and NJ Owens

Solicitor for the
Respondents: J Bird of Ashurst Australia

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 201 of 2014

**BETWEEN: SEVEN WEST MEDIA LIMITED
First Applicant**

**ADDISONS
Second Applicant**

**JUSTINE MUNSIE
Third Applicant**

**PACIFIC MAGAZINES PTY LIMITED ACN 097 410 896
Fourth Applicant**

**AND: COMMISSIONER, AUSTRALIAN FEDERAL POLICE
First Respondent**

**HIS HONOUR MAGISTRATE GRAEME CURRAN
Second Respondent**

**HIS HONOUR MAGISTRATE CHRISTOPHER O'BRIEN
Third Respondent**

JUDGE: JAGOT J

DATE OF ORDER: 26 MARCH 2014

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The following search warrants issued under s 225 of the *Proceeds of Crime Act 2002* (Cth) (the **search warrants**) be quashed as invalid and of no effect:
 - (a) CMO 14/035 in relation to the premises of Seven West Media Limited;
 - (b) CMO 14/037 in relation to the premises of "Pacific Magazines (New Idea), Media City";
 - (c) CMO 14/039 in relation to the premises of Addisons Lawyers;
 - (d) CMO 14/043 in relation to the premises of Justine Munsie, each issued on 17 February 2014; and

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- (e) CMO 14/045 in relation to the premises identified as “Media City”, issued on 18 February 2014.
- 2. The following orders issued under s 246 of the *Proceeds of Crime Act 2002* (Cth) (the s 246 orders) be quashed as invalid and of no effect:
 - (a) CMO 14/036 to “Seven West Media Ltd (Seven Network)”;
 - (b) CMO 14/038 to “### or or any other employee, Pacific Magazines (New Idea)”;
 - (c) CMO 14/040 to “Justine Munsie or any other employee, Addisons Lawyers”; and
 - (d) CMO 14/044 to Justine Munsie or any other resident, ###.
- 3. In the event of any request by a non-party to access to documents filed in the proceedings, all parts of documents filed in the proceedings (including pleadings, affidavits and submissions) which identify the names of:
 - (a) the natural persons identified as suspects in condition two of the search warrants; or
 - (b) the natural persons the recipient of a s 246 order,other than the names Justine Munsie, Vasilios Kalantzis, Schapelle Corby and Mercedes Corby, not be disclosed other than to the parties and their legal representatives.
- 4. The proceedings be listed for further hearing in respect of consequential orders, and orders for costs, on a date to be nominated in consultation with the parties, such date to be vacated if the parties file consequential and costs orders by consent beforehand.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 207 of 2014

**BETWEEN: MERCEDES PEARL ESMA CORBY
First Applicant**

**VASILIOS KALANTZIS
Second Applicant**

**AND: COMMISSIONER, AUSTRALIAN FEDERAL POLICE
First Respondent**

**HIS HONOUR MAGISTRATE GRAEME CURRAN
Second Respondent**

**HIS HONOUR MAGISTRATE CHRISTOPHER O'BRIEN
Third Respondent**

JUDGE: JAGOT J

DATE OF ORDER: 26 MARCH 2014

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The following search warrants issued under s 225 of the *Proceeds of Crime Act 2002* (Cth) (the **search warrants**) be quashed as invalid and of no effect:

(a) CMO 14/041 in relation to the premises of Kalantzis Lawyers.

2. The following orders issued under s 246 of the *Proceeds of Crime Act 2002* (Cth) (the **s 246 orders**) be quashed as invalid and of no effect:

(a) CMO 14/042 to Kalantzis Lawyers.

3. In the event of any request by a non-party to access to documents filed in the proceedings, all parts of documents filed in the proceedings (including pleadings, affidavits and submissions) which identify the names of:

(a) the natural persons identified as suspects in condition two of the search warrants; or

(b) the natural persons the recipient of a s 246 order,

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other than the names Justine Munsie, Vasilios Kalantzis, Schapelle Corby and Mercedes Corby, not be disclosed other than to the parties and their legal representatives.

4. The proceedings be listed for further hearing in respect of consequential orders, and orders for costs, on a date to be nominated in consultation with the parties, such date to be vacated if the parties file consequential and costs orders by consent beforehand.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

**NSD 201 of 2014;
NSD 207 of 2014**

**BETWEEN: SEVEN WEST MEDIA LIMITED
First Applicant**

**ADDISONS
Second Applicant**

**JUSTINE MUNSIE
Third Applicant**

**PACIFIC MAGAZINES PTY LIMITED ACN 097 410 896
Fourth Applicant**

**AND: COMMISSIONER, AUSTRALIAN FEDERAL POLICE
First Respondent**

**HIS HONOUR MAGISTRATE GRAEME CURRAN
Second Respondent**

**HIS HONOUR MAGISTRATE CHRISTOPHER O'BRIEN
Third Respondent**

**NSD 201 of 2014;
NSD 207 of 2014**

**BETWEEN: MERCEDES PEARL ESMA CORBY
First Applicant**

**VASILIOS KALANTZIS
Second Applicant**

**AND: COMMISSIONER, AUSTRALIAN FEDERAL POLICE
First Respondent**

**HIS HONOUR MAGISTRATE GRAEME CURRAN
Second Respondent**

**HIS HONOUR MAGISTRATE CHRISTOPHER O'BRIEN
Third Respondent**

JUDGE: JAGOT J

DATE: 26 MARCH 2014

PLACE: SYDNEY

REASONS FOR JUDGMENT

1. THE PROCEEDINGS

1 These two proceedings involve challenges to the validity of search warrants and so-called s 246 orders issued under the *Proceeds of Crime Act 2002* (Cth) (the **PoC Act**).

2 On 17 February 2014 the second respondent, a magistrate, issued five search warrants in respect of premises occupied by Seven West Media Limited (**Seven West**), Pacific Magazines Pty Limited (**Pacific Magazines**), Addisons Lawyers, Justine Munsie, a partner at Addisons Lawyers, and Kalantzis Lawyers. At the same time the second respondent issued five s 246 orders to provide information and assistance to Seven West, “[a named individual], or any other employee Pacific Magazines (New Idea)”, “Justine Munsie or any other employee, Addisons Lawyers”, “Justine Munsie or any other resident” at Ms Munsie’s residential address, and “Kalantzis Lawyers”. On 18 February 2014 the third respondent, a magistrate, issued a search warrant in respect of premises identified as “Media City” and which are occupied by Seven West’s wholly owned subsidiaries, including Pacific Magazines.

3 The applicants are persons aggrieved by the issue of the search warrants being, in proceeding NSD 201 of 2014, Seven West, Addisons Lawyers, Ms Munsie and Pacific Magazines and, in the second proceeding NSD 207 of 2014, Mercedes Corby and her lawyer Vasilios Kalantzis, the principal of Kalantzis Lawyers. The applicants contend that the search warrants and s 246 orders are invalid on numerous grounds most of which relate, one way or another, to the propositions that the s 246 orders identified the recipients as “reasonably suspected of having committed the offence stated in the warrant” when, in fact, none of them were or at any time had been suspected of having committed an offence, and that the search warrants identified individuals who were the applicants or their employees or partners as being “suspects...that are the subject of the investigation” when, in fact, none of them were, or at any time had been, suspected of having committed an offence or suspects the subject of an investigation.

4 In order to understand the applicants’ contentions, and the response of the Commissioner, Australian Federal Police (the **AFP**) that the acknowledged errors in each of the s 246 orders do not invalidate those orders or the search warrants, it is necessary to explain the scheme of the PoC Act and the factual circumstances in which the search warrants and s 246 orders were issued.

5 None of the primary facts are in dispute.

6 The second and third respondents, the magistrates who issued the search warrants and orders, entered submitting appearances.

2. THE POC ACT

7 The PoC Act establishes a scheme to deprive persons of the proceeds of crime including “literary proceeds derived from the commercial exploitation of [the person’s] notoriety from having committed offences”: s 5(b). By s 153(2) of the PoC Act “commercial exploitation” may be by any means including publishing any material in written or electronic form, any use of media from which visual images, words or sounds can be produced, or any live entertainment, representation or interview. Pursuant to s 152, a court may make, amongst other orders, a literary proceeds order requiring a person to pay an amount to the Commonwealth if satisfied that the person has committed an indictable offence (s 152(1)) or foreign indictable offence (s 152(2)) and has derived literary proceeds in relation to the offence. Importantly, deriving literary proceeds is not itself an offence, nor is paying any person money which might enable a literary proceeds order to be made. The scheme is a civil scheme enabling recovery of literary proceeds if the conditions for the making of an order are satisfied.

8 Chapter 3 of the PoC Act enables information and evidence to be gathered for the purposes of the Act including determining whether an application for a literary proceeds order should be made. Amongst other things, s 202 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. Property-tracking documents relevantly include (s 202(5)):

- (a) a document relevant to identifying, locating or quantifying the property of any person:
 - (i) who has been convicted of, charged with, or whom its is proposed to charge with, an indictable offence; or
 - (ii) whom there are reasonable grounds to suspect of having committed a serious offence;

...

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- (e) a document relevant to identifying, locating or quantifying 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;

...

9 By s 203(2), the time for compliance with a production order is 14 days unless the magistrate who makes the order is satisfied that an earlier time should be specified, being at least 3 days after the day on which the production order is made.

10 By s 225, search warrants may be issued. Section 225 provides that:

- (1) 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 .
- (2) If an application for a *search warrant is made under section 229 (applying for warrants by telephone or other electronic means), this section applies as if subsection (1) referred to 48 hours rather than 72 hours.
- (3) The *search warrant can only be issued on application by an *authorised officer of an *enforcement agency.

11 Evidential material is defined in the Dictionary to the PoC Act (s 338) in these terms:

“**evidential material**” means evidence relating to:

- (a) property in respect of which action has been or could be taken under this Act; or
- (b) *benefits derived from the commission of an *indictable offence, a *foreign indictable offence or an *indictable offence of Commonwealth concern; or
- (c) *literary proceeds.

12 The AFP is an enforcement agency under the PoC Act and the officers of the AFP who applied for the search warrants and s 246 orders are authorised officers of the AFP.

13 Section 227(1) of the PoC Act prescribes the contents of search warrants. Amongst other things, the search warrant must state the “the nature of the property in respect of which action has been or could be taken under this Act” (s 227(1)(a)), “the nature of that action” (s 227(1)(b)), “the kinds of *tainted property or *evidential material that is to be searched for

under the warrant” (s 227(1)d)), “that the warrant authorises the seizure of other things found at the premises in the course of the search that the *executing officer or a *person assisting believes on reasonable grounds to be... evidential material in relation to property to which the warrant relates... if he or she 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” (s 227(1)(h)), and “whether the warrant authorises an *ordinary search or a *frisk search of a person who is at or near the premises when the warrant is executed if the executing officer or a person assisting reasonably suspects that the person has any tainted property or evidential material in his or her possession” (s 227(1)(i)).

14 Section 228(1) provides that a search warrant allows the executing officer and persons assisting to enter premises, search for and take fingerprints and samples, search for and seize tainted property or evidential material of the kinds specified in the warrant and, if the warrant allows, to conduct an ordinary or frisk search of a person at or near the premises if the executing officer or person assisting suspects on reasonable grounds that the person has any tainted property or evidential material in his or her possession.

15 By s 238, “[i]n executing a *search warrant, an *executing officer may obtain such assistance and use such force against persons and things as is necessary and reasonable in the circumstances”.

16 Section 245 enables the executing officer or person assisting to operate electronic equipment at the premises being searched to access data if he or she believes on reasonable grounds that the data might constitute evidential material and the equipment may be operated without damaging it, and also to copy the data.

17 Section 246 is in these terms:

- (1) An *executing officer may apply to a magistrate for an order requiring a specified person to provide any information or assistance that is reasonable or necessary to allow the officer to do one or more of the following:
 - (a) access *data held in or accessible from a computer that is on the *premises;
 - (b) copy the data to a * data storage device;
 - (c) convert the data into documentary form.
- (2) The magistrate may make an order if satisfied that:

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- (a) there are reasonable grounds for suspecting that * evidential material is accessible from the computer; and
 - (b) the specified person is:
 - (i) reasonably suspected of possessing, or having under his or her control, *tainted property or evidential material; or
 - (ii) the owner or lessee of the computer; or
 - (iii) an employee of the owner or lessee of the computer; and
 - (a) the specified person has knowledge of:
 - (i) the computer or a computer network of which the computer forms a part; or
 - (ii) measures applied to protect *data held in or accessible from the computer.
- (3) A person is guilty of an offence if the person fails to comply with the order.
- Penalty: Imprisonment for 6 months or 30 penalty units, or both.

18 Under s 266:

A person is guilty of an offence if:

- (a) the person makes a statement (whether orally, in a document or in any other way); and
- (b) the statement:
 - (i) is false or misleading; or
 - (ii) omits any matter or thing without which the statement is misleading; and
- (c) the statement is made in, or in connection with, an application for a *search warrant.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

19 Section 338 defines the term “suspect” but only in relation to a restraining order, confiscation order and an unexplained wealth order.

3. THE FACTS

20 On 11 February 2014 a magistrate issued a production order to Seven West under s 202 of the PoC Act. The order required production of documents in eight classes by 14 February 2014, each of the classes relating to arrangements between Seven West and/or its

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associated companies for the publication of the story of Schapelle Corby. The order required the documents to be produced to Jeffrey Kokles, an authorised officer within the meaning of the PoC Act and an officer of the AFP.

21 On 14 February 2014, before the expiry of the 3 day period later that day, Ms Munsie of Addisons Lawyers forwarded an email to Mr Kokles which referred to an earlier telephone call and confirmed that Ms Munsie acted for Seven West and would coordinate the response to the production order. In her email Ms Munsie requested clarification of certain issues including the fact that the order was not limited as to time and production of documents brought into existence before 1 January 2014 could not be achieved within the short time allowed, the wording of the production order which, it was said, extended to payments to staff of Seven West, and the terms of class 8 of that order. Mr Kokles replied shortly thereafter also by email. In the reply it was said that:

The AFP agrees that Seven West Media Ltd can provide requested documents in two (2) tranches as follows:

- Specified documents from the past 2 years to be provided by 4.00 pm this date as stated in the order; and
- All other documents to be provided by 25 February 2014 (14 days from the order date).

22 Mr Kokles' response also clarified the AFP's position in answer to the other questions Ms Munsie had asked.

23 Later on 14 February 2014, Ms Munsie personally delivered documents in answer to the production order to Mr Kokles. Those documents included a letter dated 24 January 2014 from New Idea to Mercedes Corby, Schapelle Corby's sister, confirming the conditions of an agreement between Mercedes Corby and Pacific Magazines, the publisher of New Idea, for an exclusive interview with Mercedes Corby. Under the heading "Fee" the letter stated:

Pacific will...pay to you or your nominee a total fee of \$25,000...within 14 days after the issue of New Idea containing the article goes off sale.

24 The documents produced also included a letter dated 7 February 2014 from Seven Network (Operations) Limited (**Seven Network**) to Mercedes Corby concerning exclusive arrangements with "Sunday Night", a proposed broadcast involving an interview between Mercedes Corby and Mike Willesee. The letter recorded Mercedes Corby's agreement to be involved in the exclusive interview and to "use [her] best endeavours to procure the

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agreement of [her] sister, Schapelle, also to be similarly involved in an exclusive interview with Mike Willesee as part of the Sunday Night feature". The letter said that Seven Network agreed to meet the obligations as outlined in an attachment. The attachment included certain arrangements said to be "following release", meaning following the release of Schapelle Corby from prison in Bali on parole. The arrangements included, for the duration of a defined exclusivity period, Seven Network paying for Mercedes Corby and her family including Schapelle to be located in a secure villa, providing to the family a local driver and providing security for the Corby family, as well as providing Mercedes Corby with a Samsung smartphone which she could retain.

25 According to a subsequent letter, when she produced the documents Ms Munsie informed Mr Kokles that: (i) all documents relating to Seven West's television programs had been produced, (ii) the 24 January 2014 letter agreement between New Idea and Mercedes Corby was an unsigned copy but Seven West was continuing to search for documents associated with that agreement including in relation to the fee and would produce those further documents as soon as possible, (iii) clarification was still required as to whether production of documents, predating 1 January 2014, between Seven West and third parties not related to the Corby family was within the terms of the production order, and (iv) Seven West was aware of arrangements entered into by its magazine division for the purchase of photographs relating to the Corby family which it had not yet been able to locate and in respect of which Seven West's request for clarification was repeated.

26 Shortly before midday on 17 February 2014, the AFP served a letter on Ms Munsie at her home address. The letter stated that the AFP had reviewed the documents produced by Seven West in response to the production order and that, in the AFP's view, it was clear that Seven West had not complied with the order. The letter said that, by way of example, the documents provided did not identify how payment of the fee of \$25,000 to Mercedes Corby "is or was to be made" and that the letter dated 7 February 2014 relating to the Mercedes Corby exclusive arrangements made "no mention of funds that are to be paid despite a signed contract". The letter concluded:

We invite Seven to review its position and provide all the documents requested in the Order in their entirety for the past two years, by no later than the close of business today.

In the event that Seven does not fully comply with the Order as required the AFP will have no option but to consider further action be taken under the Act.

27 Just before 4.00 pm on the same day, 17 February 2014, the AFP approached the second respondent, a magistrate, to request the issue of the search warrants and s 246 orders issued on that day. In support of the applications the AFP provided the second respondent with an affidavit from Mr Kokles which was sworn before the magistrate as witness to the affidavit and copies of the proposed s 246 orders and search warrants as issued on 17 February 2014.

28 Mr Kokles' 17 February 2014 affidavit identified that he was an authorised officer of the AFP, being an enforcement agency under the PoC Act, and the applicant for a search warrant under s 225 of the Act in relation to premises including the premises of Seven West, Pacific Magazines, Addisons Lawyers, Kalantzis Lawyers, Mr Kalantzis, Ms Munsie and another named individual.

29 In paragraph 5, the affidavit records that, by reason of the matters set out in the affidavit, "a magistrate may properly be satisfied that there are reasonable grounds for suspecting that there are at the premises specified above evidential material within the meaning of the [PoC Act], being evidence relating to: literary proceeds which satisfies the following three conditions."

30 The three conditions are then set out.

31 The first condition identifies "Things which are: Originals or copies of any one or more of the following, including any of them which are stored on a computer... or any other type of storage medium or storage device". Several categories of document ranging from "contracts" to "currency" are then listed.

32 The second condition is that the "things" "relate to anyone or more of the following", after which some 33 items appear including the names of individuals (including Schapelle Corby, Mercedes Corby, Ms Munsie, Mr Kalantzis and a number of other people whose names need not be repeated), entities (including Pacific Magazines, New Idea, Seven West, Seven Network and Channel Seven), and things (including "CORBY Agreement" and "Mercedes CORBY Exclusive Agreement").

33 The third condition states that the "things" are things:

in relation to which there are reasonable grounds for suspecting that they relate to:

Evidence as to Schapelle Leigh CORBY (CORBY) born 10 July 1977 who on 27 May 2005 in Denpasar, Indonesia was convicted of an offence, being a foreign

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indictable offence within the meaning of the Proceeds of Crime Act 2002, deriving Literary Proceeds as defined under section 153, Proceeds of Crime Act 2002.

34 Paragraph 6 of the affidavit, under the heading “The nature of the property in respect of which action has been or could be taken under the Proceeds of Crime Act 2002 and the nature of that action is set out below”, states

On 27 May 2005, in Denpasar, Indonesia, CORBY was convicted of an offence, being a foreign indictable offence within the meaning of the Proceeds of Crime Act 2002, deriving Literary Proceeds as defined under section 153, Proceeds of Crime Act 2002.

Proceeds of Crime action could be taken to apply for a Literary Proceeds order under section 152 of the Proceeds of Crime Act 2002 in respect of all Literary Proceeds, as defined under section 153 Proceeds of Crime Act 2002, derived by CORBY in respect to any and all agreements entered into with Seven West Media Limited and related media representative entities by CORBY or on her behalf. ...

35 Paragraph 7 of the affidavit states that records obtained by the AFP reveal that Schapelle Corby was convicted in Indonesia of an offence which Mr Kokles suspected would, if carried out in Australia, amount to an indictable offence against the laws of Australia and that Schapelle Corby was granted parole in Bali on 10 February 2014. Sources identified as “open source enquiries”, in effect newspaper articles and media statements, had reported that Channel Seven had secured an interview with Schapelle Corby for amounts of up to \$3 million. Under the heading “Actions taken by AFP”, the following paragraphs appear:

7(i) On 11 February 2014, the AFP applied for and were granted a Proceeds of Crime Act 2002 section 202 Production Order (CMO14/023) (the order) to be served on Seven West Media Ltd, by New South Wales Magistrate GROGIN. The order stipulated that documents in respect to the order were to be provided to the AFP by 4.00pm on Friday 14 February 2014. Seven West Media Ltd is the corporate entity for Seven Network;

7(j) About 5.12pm on Tuesday 11 February, the AFP attended the offices of Seven West Media Ltd and served the order on Seven West Media Ltd located at...

7(k) About 3.50pm on 14 February 2014, at..., representative of Seven West Media Ltd, Justine MUNSIE (MUNSIE) of Addisons Lawyers, handed the AFP several documents in response to the order.

36 Paragraph 7(s) of the affidavit is in these terms:

Between 14 February and 17 February 2014, the AFP have reviewed documents provided by Seven West Media Ltd in response to the order dated 11 February 2014.

Upon reviewing the documents the AFP are not satisfied that Seven Network have complied with the order for example:

- A copy of a letter from New Idea to Mercedes CORBY dated 24 January 2014 has reference to an amount of \$25,000 ("the Fee"). It is not articulated in the limited documentation provided to the AFP as to how that payment is or was to be made;
- In relation to the "Mercedes Corby Exclusive Agreement" there is no mention of funds to be paid despite a signed contract.

37 In paragraph 8 of the affidavit, Mr Kokles requested that the search warrant authorise the conduct of an ordinary search or a frisk search of a person at or near the premises if the executing officer or person assisting suspects on reasonable grounds that the person has any tainted property or evidential material in his or her possession.

38 Paragraph 9 of the affidavit records the following, under the heading "Legal Professional Privilege":

Legal premises

It is my intention that, if practicable, before the premises are searched the executing officer will give the occupier of the premises, or a person who apparently represents the occupier, a copy of the document entitled "General Guidelines Between the Australian Federal Police and the Law Council of Australia as the Execution of Search Warrants on Lawyers' Premises, Law Societies and the Like Institutions in Circumstances Where a Claim of Legal Professional Privilege is Made" (a copy of which is attached) and that, as far as possible, the search will be conducted in accordance with the procedures set out in that document in the event that legal professional privilege is claimed in respect of any document covered by the warrant.

Other premises

It is my intention that, if practicable, before the premises are searched the executing officer will give the occupier of the premises, or a person who apparently represents the occupier, a copy of the document entitled "Claims for Legal Professional Privilege: Premises other than those of a Lawyer, Law Society or Like Institution" (a copy of which is attached) and that, as far as possible, the search will be conducted in accordance with the procedures set out in that document in the event that legal professional privilege is claimed in respect of any document covered by the warrant.

39 The affidavit concludes with the statement that Mr Kokles applies for a search warrant authorising him "with such assistance by such force as is necessary and reasonable" to enter the premises mentioned in the affidavit, search for and record fingerprints and take samples of things found at the premises, search for the kind of tainted property or evidential material specified in the warrant and seize things of that kind, seize other things on the basis of a belief on reasonable grounds that seizure is necessary to prevent the concealment, loss or

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destruction or use of those things in committing an indictable offence, to conduct the ordering or frisk search of persons as specified and, “to apply provisions of an order under section 246 of the Proceeds of Crime Act 2002”.

40 At 3.55 pm on 17 February 2014 the second respondent issued the search warrants and s 246 orders as identified in the table below:

File number	Order type	Premises/Addressee
CMO 14/035	s 225 Warrant	Seven West Media Limited
CMO 14/036	s 246 Order	“Seven West Media Ltd (Seven Network)”
CMO 14/037	s 225 Warrant	“Pacific Magazines (New Idea), Media City, [###]”
CMO 14/038	s 246 Order	“[###] or any other employee, Pacific Magazines (New Idea)”
CMO 14/039	s 225 Warrant	Addisons Lawyers[]
CMO 14/040	s 246 Order	Justine Munsie or any other employee, Addisons Lawyers
CMO 14/041	s 225 Warrant	Kalantzis Lawyers
CMO 14/042	s 246 Order	Kalantzis Lawyers
CMO 14/043	s 225 Warrant	[address of Ms Munsie’s premises]
CMO 14/044	s 246 Order	“Justine Munsie or any other resident, [###]”

41 Apart from the different file numbers and premises to which the search warrants related, the search warrants were in identical terms. The search warrants were addressed to Mr Kokles. The warrants recorded the second respondent’s satisfaction in respect of each of the premises as follows:

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WHEREAS I am satisfied by information on oath provided to me by an authorised officer of an enforcement agency that there are reasonable grounds for suspecting that there is at the following premises:

[Premises]

[###]

42 The search warrants also set out each of the three conditions as referred to in the affidavit of Mr Kokles except (importantly, for the applicants' case) that the second condition appeared in these terms:

Second condition: And which relate to any one or more of the following:

List suspects, entities or other matters that are the subject of the investigation.

43 Following this statement the same 33 names of people, entities and things appeared as set out in the affidavit.

44 Apart from the different file numbers and people to whom the s 246 orders related, those orders were also in identical terms. Each order recorded that an application had been made by Mr Kokles, an authorised officer of an enforcement agency within the meaning of the PoC Act, in relation to a search warrant issued under s 225 of that Act in respect of the nominated premises for an order under s 246 of the Act. The s 246 orders also each recorded the following:

And whereas I am satisfied that:

- there are reasonable grounds for suspecting that evidential material is held in, or is accessible from, a computer or data storage devices at those premises;
- you are reasonably suspected of having committed the offence stated in the relevant warrant and a person who uses or has used the computer or device; and
- you have relevant knowledge of the computer or device or a computer network of which the computer or device forms a part and measures applied to protect data held in, or accessible from, the computer or device.

And whereas I am satisfied that it is reasonable and necessary for the constable specified above to have the information or assistance set out below to:

- access data held in, or accessible from, a computer or data storage device on the warrant premises;
- copy data held in, or accessible from, a computer or data storage device on the warrant premises; and

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- convert data held in, or accessible from, a computer or data storage device on the warrant premises into documentary form or another form intelligible to a constable.

I, [###], a magistrate within the meaning of the Proceeds of Crime Act 2002 hereby order you to provide the information or assistance set out in the following Schedule to the constable specified above.

45 Also on 17 February 2014, at 4.24 pm after the search warrants and s 246 orders had been issued but before they had been served and before the close of business that day, Ms Munsie forwarded a letter by email to the AFP in response to the AFP's earlier letter of the same day which invited Seven West to review its position and provide all the documents requested in the production order under s 202 of the PoC Act by no later than the close of business 17 February 2014.

46 The letter from Ms Munsie of 17 February 2014 confirmed that Seven West had not yet produced all documents in response to the production order "but has taken and is continuing to take all reasonable steps to comply with the terms of the order". This letter also clarified that, in response to AFP's query regarding the letter of 7 February 2014 relating to the "Mercedes Corby Exclusivity Agreement", there were "no funds to be paid except the matters referred to in the agreement" and that, accordingly, no such documents had been produced. The letter concluded with this statement:

Seven is continuing to search for and will produce any additional documents in response to the production order as soon as they are located. In the meantime, we would appreciate your responses to the requests for clarification made of Agent Kokles and set out above.

47 Later on 17 February 2014, Ms Munsie forwarded another email to the AFP which attached, by way of further production pursuant to the production order under s 202 of the PoC Act, remittance advices relating to the agreement between New Idea and Mercedes Corby. The attachments show a record of an electronic funds transfer by Seven Network to Mercedes Corby in the sum of \$25,000, as well as other records of historical transfers to members of the Corby family.

48 On 18 February 2014 another authorised officer of the AFP approached a different magistrate, the third respondent, with an affidavit seeking the issue of a search warrant in relation to the premises occupied by Media City. That officer, Victor Phun, swore his affidavit before the magistrate as witness, the affidavit being in substantially the same terms

as that sworn on the previous day by Mr Kokles. In particular the affidavit contained the same version of paragraph 7 including paragraph 7(s) referred to above forming part of Mr Kokles' affidavit. The affidavit also contained new paragraphs 7(t) and (u) to the effect that search warrants had been executed at premises of Seven Network and Seven West on 18 February 2014 and the AFP had been informed that one of the individuals named in the second condition of the search warrant was located at different premises known as Media City. No mention was made of the further correspondence from Ms Munsie late on 17 February 2014.

49 The third respondent issued a search warrant to Mr Phun in respect of the premises occupied by Media City. The conditions of this search warrant are in the same terms as the other search warrants referred to above including the second condition which sets out the name of 33 people, entities and things under the heading "List suspects, entities or other matters that are the subject of the investigation". However, this search warrant also contained deletions, which I infer to be by the third respondent, so that the authorisations to search for and record finger prints and take samples, as well as to conduct ordinary and frisk searches at or near the premises, have been struck through.

50 On 18 February 2014, the AFP served the s 246 order addressed to Addisons Lawyers on Ms Munsie at the premises of Addisons Lawyers. The AFP also executed the search warrants issued by the second respondent on 17 February 2014 in so far as they related to the premises of Seven West, Pacific Magazines, and Addisons Lawyers. The AFP did not execute the search warrant in respect of Ms Munsie's home and did not serve the s 246 orders addressed to Seven West, Pacific Magazines or the residents of Ms Munsie's home. Also on 18 February 2014, the AFP executed the search warrant issued that day by the third respondent in respect of the Media City premises.

51 On 21 February 2014, in response to a letter from the solicitors for Addisons Lawyers and Ms Munsie, the AFP confirmed in writing that the statement in the s 246 order stating that the magistrate was satisfied that "you are reasonably suspected of having committed the offence stated in the relevant warrant" was "incorrect", "should not have been made", was a "regrettable error" and an "innocent word-processing error". Further, as the AFP had "made clear" to Ms Munsie on 18 February 2014, "she was not suspected of any offence" and that "this was and has always remained the position". In a press conference held on 22 February 2014 the AFP confirmed that:

When our members put the search documents together and the accompanying order under s 246, they used a previous pro-forma from another matter, that in there referred to a criminal offence. Then they changed some of the details, what they failed to do, was omit that particular paragraph. That's all it was. It did say in there it referred to a criminal offence in the warrant. Of course when you go to the warrant there is no criminal offence. Having said that though it is a mistake and it's a mistake the AFP regrets, and we sincerely apologise for any inconvenience, particularly to the individuals who may have thought as a result of their name being at the top as the occupier of the premises that we had any way inferred that they committed any criminal activity.

52 Consistent with these matters, it is common ground in this proceeding that none of the
33 people, entities and things identified in the second condition of the search warrants, other than Schapelle Corby in respect of the offence committed in Indonesia in 2005 for which she had been convicted and was on parole, was or had ever been a "suspect". Further, none of the recipients of the s 246 orders was or had ever been "reasonably suspected of having committed the offence stated in the relevant warrant".

4. DISCUSSION

53 The parties proceeded on the basis that the decisions of the second and third respondents to issue the search warrants and s 246 orders were amenable to judicial review under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) and s 39B of the *Judiciary Act 1903* (Cth) (Judiciary Act). I agree.

4.1 The "suspects" points

54 As noted, the applicants' primary contentions of invalidity are founded upon the propositions that the s 246 orders wrongly asserted the recipients were reasonably suspected of having committed an offence and the search warrants wrongly identified numerous individuals as "suspects". According to the applicants, as a result of these matters, the s 246 orders and search warrants are bad on their face as they show the second and third respondents addressed the wrong question, and the decisions to issue the s 246 orders and search warrants should be vitiated for error of law as those decisions: - (i) were based on facts which did not exist, (ii) disclose a failure of any consideration of the statutory conditions for the issue of the s 246 orders and search warrants, (iii) disclose the taking into account of an irrelevant consideration, and (iv) were so unreasonable that no reasonable person could have made the decisions.

55 The AFP answered the applicants' primary contentions in a number of ways.

56 The AFP submitted that while the s 246 orders contained a clear clerical error (the statement that “[y]ou are reasonably suspected of having committed the offence stated in the relevant warrant”), the same could not be said of the search warrants. The second condition in the search warrants involves three alternatives – suspects, entities or other matters that are the subject of the investigation. Some of the items appearing in the list are plainly not capable of being “suspects” (for example, the item the “Mercedes CORBY Exclusive Agreement”). It is not tenable, according to the AFP, to construe “entities” and “other matters” as excluding natural persons as to do so would “suggest that individuals who were not suspects were intended to be excluded from the Second Condition (in circumstances where non-suspect entities were included”. As the AFP put it:

An ordinary reading of the three categories together, along with the statutory context, makes clear than an individual who is not a suspect may nonetheless be listed in the Second Condition.

57 The AFP said also:

...the warrant makes plain that the only relevant offence is the offence for which Schapelle Corby was convicted. It is abundantly clear that, other than Schapelle Corby, no person, entity or thing on the list could even conceivably be regarded as a “suspect” in the commission of an offence.

58 It may be accepted that the search warrants identify Schapelle Corby as having committed an offence. However, the second condition of the warrants also identifies “suspects, entities or other matters that are the subject of the investigation”. I do not accept the submission that a natural person may fall within the descriptions “entities or other matters”. The natural and ordinary reading of the second condition is that all of the individuals named in the list are “suspects... that are the subject of the investigation”. The ordinary meaning of a “suspect”, in the context of a search warrant, is a person suspected of having committed an offence.

59 The AFP’s submission that no person in the list “could even conceivably be regarded as a “suspect” in the commission of an offence” ignores the terms of the second condition. The submission also assumes both knowledge of the PoC Act (specifically that, despite its title, the Act provides a civil scheme for the recovery of literary proceeds and does not create any offence in connection with the payment of funds which might be recovered as literary proceeds) and that such knowledge would trump the plain words of the second condition. Neither assumption is justified. The AFP called no evidence explaining what occurred before

the second and third respondents. No inference may be drawn in the AFP's favour that the second and third respondents knew about the scheme of the POC Act insofar as it applies to literary proceeds or, if they held that knowledge, that it meant they did not give the search warrant its natural and ordinary meaning that each of the individuals appearing in the list under the second condition were "suspects ... that are the subject of the investigation".

60 It is convenient to state here in the form of conclusions (and explain subsequently) that I am satisfied that there are a limited range of possible ways in which these search warrants and s 246 orders were issued. Either:

- (1) the second and third respondents did not consider the terms of the orders and warrants; or
- (2) the second and third respondents knew about the scheme of the PoC Act in respect of the recovery of literary proceeds and that the scheme did not create any offence or other wrong by those paying for an interview or facilitating that payment, in which event the second and third respondents could not have issued the s 246 orders stating that "[y]ou are reasonably suspected of having committed the offence stated in the relevant warrant" or the search warrants identifying numerous individuals as "suspects" on any rational basis, had they considered the terms of the orders and warrants; or
- (3) the second and third respondents did not know about the scheme of the PoC Act in respect of the recovery of literary proceeds and, had they considered the terms of the orders and warrants, wrongly assumed that the scheme did create an offence or other wrong by those paying for an interview or facilitating that payment, in which event the s 246 orders and search warrants were issued on a fundamentally false premise induced (wrongly, but innocently) by the AFP by reason of the erroneous statements and other material placed before the second and third respondents.

61 As explained below, whichever possibility is correct (and, as will become apparent, the last possibility seems the most likely), the decisions to issue the s 246 orders and search warrants are materially affected by legal error and should be quashed. I return later to these matters.

62 In addition to the submission that the search warrants did not contain any clerical error (which I have rejected above), the AFP submitted that it could not be inferred that the

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acknowledged error in the s 246 orders affected the search warrants. As the AFP put it, there was no evidence that the second respondent considered the s 246 orders before considering the search warrants on 17 February 2014 and the third respondent did not issue any s 246 orders. The submission makes no allowance for the ordinary process of the drawing of inferences. In particular, insofar as the second respondent is concerned, it is known that the applications for all the search warrants and s 246 orders were supported by a single affidavit. It is known that the affidavit was sworn before the second respondent with the second respondent acting as witness. It is known that the search warrants and s 246 orders bear file references running sequentially from CM 14/035 to CM 14/044. It is an agreed fact that the search warrants and s 246 orders were all issued at about 3.55 pm on 17 February 2014. In these circumstances, the notion that the second respondent did not have in mind the s 246 orders when he issued the search warrants and, conversely, did not have in mind the search warrants when he issued the s 246 orders is unrealistic. It does not matter that there is no evidence that the second respondent looked at the s 246 orders before issuing the search warrants. The proper inference to be drawn in the circumstances is that in deciding to issue each search warrant and each s 246 order the second respondent had in mind the whole of the material placed before him including all of the s 246 orders and all of the search warrants.

63 Two other general submissions the AFP made may be accepted but neither leads to the ultimate conclusion for which the AFP contends, that the errors in the s 246 orders and search warrants were immaterial. It is true that “[w]hether or not a particular document records what in fact were the decision-maker’s reasons for the decision is a question of fact” (*Rashid v Minister for Immigration and Citizenship* [2007] FCAFC 25 at [17]). It is also true that the applicants bear the onus of establishing error on the part of the second and third respondents (*Hu v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 63 at [19]). The AFP’s submissions, however, gloss over the fundamental facts that, in issuing the s 246 orders under his signature, the second respondent effectively certified that he was satisfied that the recipients were reasonably suspected of having committed an offence stated in the relevant warrant and, further, in issuing the search warrants, the second and third respondents each effectively certified that they were satisfied that the individuals nominated in the second condition were “suspects...that are that are the subject of the investigation”.

64 Accordingly, the AFP’s conclusion that “a state of satisfaction as to a reasonable suspicion that the addressees had committed an offence was no part of the Second

Respondent's reasoning process" can be accepted only if it is also inferred that the second respondent did not consider the statements in the s 246 orders and search warrants at all. The five reasons given by the AFP in support of its conclusion, as explained below, are unpersuasive.

65 First, the AFP said that the statutory criteria to which the second respondent was required to have regard do not include the existence of a reasonable suspicion of the commission of an offence. This is true but, as noted, the s 246 orders expressly refer to the second respondent being satisfied as to the existence of such a suspicion and the search warrants refer to the named individuals as suspects the subject of an investigation. Further, the investigation is described in the affidavit of Mr Kokles (and Mr Phun) as relating to property and action which has been or could be taken as follows:

On 27 May 2005, in Denpasar, Indonesia, CORBY was convicted of an offence, being a foreign indictable offence within the meaning of the Proceeds of Crime Act 2002, deriving Literary Proceeds as defined under section 153, Proceeds of Crime Act 2002.

Proceeds of Crime action could be taken to apply for a Literary Proceeds order under section 152 of the Proceeds of Crime Act 2002 in respect of all Literary Proceeds, as defined under section 153 Proceeds of Crime Act 2002, derived by CORBY in respect to any and all agreements entered into with Seven West Media Limited and related media representative entities by CORBY or on her behalf.

66 These paragraphs are dense to say the least. The first paragraph, moreover, arguably suggests that a part of the offence Schapelle Corby committed in Denpasar in 2005 included deriving literary proceeds within the meaning of the PoC Act. Accordingly, although it formed no part of the conditions precedent to the issue of a s 246 order and/or search warrant under the PoC Act, the material before the second and third respondents either (in the s 246 orders before the second respondent) expressly identified the recipients as being reasonably suspected of having committed "the offence stated in the relevant warrant" or (in the search warrants before the second and third respondents) expressly identified many individuals, including the recipients, as suspects in the investigation and (in the affidavits before the second and third respondents) identified the investigation in ambiguous terms which did not make clear 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.

67 In these circumstances, the fact that the statutory criteria to which the second and third respondents were required to have regard do not include the existence of a reasonable

suspicion of the commission of an offence is not indicative of the immateriality of the material before them which expressly stated that the recipients of the s 246 orders and warrants were reasonably suspected of having committed an offence or were suspects in an investigation. To the contrary, that fact is indicative of the statutory powers vested in the second and third respondents having miscarried by reason of the errors in the s 246 orders and search warrants and, possibly, also by the lack of explanation about the operation of the PoC Act in the supporting affidavits of Mr Kokles and Mr Phun.

68 Second, the AFP said that the references in the s 246 orders to the recipients being “reasonably suspected of having committed the offence stated in the relevant warrant” disclosed that the statements were in obvious error because the only offence identified in the warrant is that of Schapelle Corby for which she was convicted, and the warrants do not identify any offence committed or suspected of having been committed by any other person. Accordingly, the AFP submitted:

The Applicants thus ask the Court to attribute to the Second Respondent a nonsensical or meaningless statement. The Court would not readily infer that the Second Respondent was satisfied of an unspecified matter. In the absence of any relevant offence being specified in the warrant, the Court would thus infer that the language in the Section 246 Order upon which the Applicants rely was a mere clerical error.

69 When this submission is unpicked, it is apparent that it conflates several considerations. The fact that the statements in the s 246 orders were the result of “clerical error” may be accepted. It is not part of the applicants’ case that the AFP wrongly believed the recipients of the s 246 orders to be suspects in the commission of any offence or that the AFP intentionally misled the second respondent by including knowingly false statements in the s 246 orders. However, the characterisation of the clerical error as “mere” is more difficult to accept if by “mere” it is meant to suggest the error was trivial or insignificant. The statements are not immaterial typographical errors or errors of detail. The statements are of the most serious kind and the second respondent, by his signature, affirmed he was satisfied they were true. The second respondent did so in the context of a warrant which identifies in the second condition numerous individuals as “suspects...that are the subject of the investigation” and in the third condition describes the suspicions as relating to evidence that Schapelle Corby “was convicted of an offence, being a foreign indictable offence within the meaning of the Proceeds of Crime Act 2002, deriving Literary Proceeds as defined under section 153, Proceeds of Crime Act 2002”. As noted, it is by no means clear from the

warrant that deriving literary proceeds is not itself some form of offence. Accordingly, it cannot be said that the second respondent made a meaningless or nonsensical statement in the s 246 orders by stating his satisfaction that the recipients were reasonably suspected of having committed an offence stated in the warrant. Nor can it be said, for the same reason, that the second respondent was stating he was satisfied as to an unspecified matter. The statement was wrong, but that is a different matter.

70 It is this context which leads to the three possible explanations identified above for what occurred and, if it is necessary to express any conclusion in this regard (which I do not consider it is), makes the third of those possibilities most likely.

71 A number of factors support this inference.

72 For one thing, there is no reason to assume that the second and third respondents were familiar with the scheme of the PoC Act in respect of literary proceeds. There was no cogent explanation of the scheme in the material made available by the AFP to the second or third respondents and, as explained above, the erroneous and ambiguous statements in that material, if taken at face value, arguably suggested that there was an offence in respect of deriving literary proceeds.

73 For another thing, the second and third respondents issued the s 246 orders and search warrants on an urgent basis, as disclosed by the fact that the supporting affidavits were sworn in front of the second and third respondents. It is unlikely that either would have had the time to analyse the provisions of the PoC Act given the length and complexity of that legislation. In the ordinary course, both would have been relying on the AFP to explain the statutory scheme, preferably in a cogent manner in writing in the affidavit. The affidavit, as discussed, does not provide a cogent explanation of the statutory scheme for literary proceeds.

74 Moreover, insofar as oral explanations might have been given, neither of the officers who swore the affidavits, Mr Kokles and Mr Phun, have been called to give evidence in respect of what the second and third respondents were told about the PoC Act and the circumstances calling for the issue of the s 246 orders and search warrants.

75 Further, and most importantly, the second respondent issued the s 246 orders and search warrants and the third respondent issued the search warrant in terms which contain the erroneous statements – as to the existence of the reasonable suspicion and the individuals being suspects – as identified. The issue of a search warrant and a s 246 order are solemn

acts issued under the hand of the individual magistrate. They authorise actions which would otherwise constitute trespass and, insofar as searches of the person are concerned, an assault. They represent serious intrusions into private and property rights of which the common law “has long been jealous” (*George v Rockett* (1990) 170 CLR 104 at 110). Accordingly, the orders and warrants would not have been issued lightly by the second and third respondents.

76 These circumstances make it exceedingly unlikely that the second and third respondents failed to consider the terms of what they were issuing (the first possible explanation). It is equally exceedingly unlikely that the second and third respondents considered the terms of what they were issuing and, because they knew the scheme of the PoC Act, knew also that the terms included errors involving accusing numerous people of being suspected of having committed an offence or being suspects in an investigation when there is no offence under the PoC Act, and yet dismissed those matters as “mere clerical errors” and decided to issue the orders and warrants in any event (the second possible explanation). If that was the decision-making process, then it was so unreasonable that no reasonable magistrate could have made the decisions. Yet, accepting this last proposition – attributing to the second and third respondents manifest unreasonableness – is what the AFP’s submissions necessarily involve, once properly analysed. How else can it be said that the erroneous statements – such a prominent part of the s 246 orders and plainly disclosed in the search warrants – played no part in the second respondent’s reasoning process, as the AFP would have it?

77 Against these extremely unlikely possibilities is the third possibility identified – that the erroneous and ambiguous statements in the AFP’s material were considered by the second and third respondents as part of a proper consideration of the material as a whole and, in the circumstances of urgency and a lack of any cogent explanation in the material of how the PoC Act operated in respect of literary proceeds, led the second and third respondents to assume the AFP’s statements were correct and that there thus was some offence relating to literary proceeds in the PoC Act, thereby justifying the issue of the s 246 orders and warrants.

78 While I have said it is not necessary to make a finding as to which of the three possibilities is correct because each involves legal error sufficient to quash the s 246 orders and search warrants, I have considered these matters because of the way in which the hearing proceeded. In short, the AFP was critical of the applicants for identifying the alternative ways in which they asserted there must have been legal error by the second and third

respondents. What the AFP did not acknowledge was that, when analysed, its own submissions – that the second and third respondents must be taken to have considered what was before them and treated the statements in issue as “mere clerical errors” – would have the second and third respondents acting in a manner in which no reasonable magistrate could have acted (that is, by issuing solemn documents identifying people as suspected of having committed an offence and as suspects, who could not be suspects or suspected of any offence given the terms of the legislation on the basis that those statements were a “mere clerical error”). Nor did the AFP acknowledge the fact that, had the second and third respondents done exactly what they could be expected to have done in the circumstances – that is, rely on the AFP to provide cogent and accurate information about the investigation in terms of the scheme in the PoC Act – it is not at all difficult to see how and why the second and third respondents were led into error by the AFP.

79 Third, the AFP said that no evidence was placed before the second or third respondents relevant to the commission of any offence by any person other than Schapelle Corby. As discussed above, the material placed before the second and third respondents did identify that Schapelle Corby had committed an offence. However, the problem is the combination of the erroneous statements and what the material did not say. The material did not explain that the PoC Act created no offence in respect of the derivation of literary proceeds, whether by Schapelle Corby in deriving such proceeds or by another person in facilitating that derivation. The material did not explain that a literary proceeds order is not founded upon any such offence, the scheme created by the PoC Act being a civil, rather than criminal, regime. The material did not do these things in the face of statements that the recipients of the s 146 orders were reasonably suspected of having committed an offence and the individuals listed in the third condition of the search warrants were suspects the subject of the investigation. In these circumstances, the fact that the material did not identify the commission of any offence by any person other than Schapelle Corby does not support the AFP’s submission that the erroneous statements played no part in the reasoning process of the second (or, for that matter, the third) respondent.

80 Fourth, the AFP said that the erroneous statement appears in each and every one of the s 246 orders and it is “highly improbable” that the second respondent was declaring himself satisfied that each recipient was reasonably suspected of committing an offence. I disagree. The submission assumes that the second respondent, despite the urgent circumstances, the errors and ambiguities in the AFP’s material, and the lack of any cogent

explanation in the affidavit as to how the PoC Act operated, knew that the PoC Act did not create any offence relating to the derivation of literary proceeds yet issued orders and warrants asserting that numerous people connected with the Corby family perhaps deriving literary proceeds were suspected of having committed an offence. It is that assumption which is highly improbable. What is not highly improbable is that the second respondent was misled by the AFP, albeit by innocent errors, and wrongly assumed that there was an offence relating to the derivation of literary proceeds and that those involved in facilitating that derivation, accordingly, were reasonably suspected of having committed an offence and were suspects in the investigation.

81 Fifth, the AFP said that the manner in which the s 246 orders were addressed (such as to “a named company or individual or any other employee of a specified entity”) made it implausible that the second respondent was declaring himself satisfied that the recipients were reasonably suspected of having committed an offence. As the AFP put it:

It cannot seriously be suggested that the Second Respondent was purporting to be satisfied that every employee of the specified entities were reasonably suspected of having committed an offence. That, however, is the necessary consequence of the Applicant’s submission.

82 This submission has to be assessed in the overall context. The references to “or any other employee” in two of the s 246 orders and to “any other resident” in another follows the identification, in capital letters, of the primary recipient of the order. In these circumstances it is not difficult to infer that the “you” in the statements of satisfaction is the person or entity appearing in capital letters at the commencement of the orders. Once that it is accepted, it is also not difficult to accept, for the reasons already given, that the second respondent was declaring that he was satisfied that each first named recipient of the orders was reasonably suspected of having committed an offence.

83 Another point should be made. The AFP, in its written and oral submissions, emphasised that the s 246 orders and search warrants should not be scrutinised “minutely and finely with an eye keenly attuned to the perception of error”, citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; [1996] HCA 6 at 272. However, and as the applicants submitted, this observation concerns the reasons for an administrative decision-maker’s decision. The s 246 orders and search warrants are not the reasons for the decision. They are the instruments authorising acts that otherwise would be unlawful. Reasons may not be obtained for a decision to issue a search warrant (s 13 and Sch 2 para

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(e)(iii) of the ADJR Act). Moreover, the law in relation to search warrants is established in *George v Rockett*. In particular, “strict compliance with the statutory conditions governing the issue of search warrants” was said by the High Court to “give effect to the purpose of the legislation” (at 111), in that case the *Criminal Code Act 1899* (Qld), but the same conclusion applies in the present case. Further, there is imposed on the justice issuing the search warrant a duty to be satisfied that the conditions of the issue of the warrant are fulfilled and “the warrant should express the justice’s satisfaction that there are reasonable grounds for the suspicion and relief” (also at 111). Accordingly, there is no scope for the operation of the principles which inform the construction of reasons for administrative decisions in the review of a search warrant. Even if there were, the error in each of the s 246 orders is egregious and that in the search warrants only slightly less so. Neither error, to a person properly informed about the operation of the PoC Act, is to be found only by an eye keenly attuned to the perception of error.

84 For these reasons, the AFP’s submission that the applicants’ case is based on a false premise, being the premise that the erroneous statements in question were central to the decisions of the second and third respondent when according to the AFP those statements should be inferred to have played no part in the second and third respondent’s reasoning processes, cannot be accepted. The erroneous statements must be inferred to have been a central, indeed fundamental, matter which the second and third respondents considered when deciding to exercise their discretion to issue the s 246 orders and search warrants. The exercise of the discretion thus miscarried. If it is necessary to label how it miscarried it is sufficient to say that I accept that it is possible it could have been in any one of the three ways I identified above, although I consider it most likely that the second and third respondents were simply led into error by the material the AFP placed before them and assumed a critical fact – that the PoC Act created an offence relating to the derivation of literary proceeds – when there is no such offence. In any event, as I have said, whatever possibility represents the true position, be it a failure of consideration or manifest unreasonableness or an incorrect belief as to the existence of an offence, there is material error requiring intervention. The s 246 orders and search warrants, accordingly, must be quashed.

85 To the extent it is necessary to say more about these issues by reason of particular submissions, I do so in an abbreviated form.

86 While the grounds in ss 5(1)(h) and 5(3)(b) of the ADJR Act (no evidence and decision based on fact which did not exist) are confined in their scope (*Minister for Immigration and Multicultural Affairs v Rajamannikam* (2002) 210 CLR 222; [2002] HCA 32 at [58]), the grounds in s 5(1)(e) (improper exercise of the power) and s 5(1)(j) (decision was otherwise contrary to law) of the ADJR Act, also pleaded by the applicants, are not so confined. Nor is the jurisdiction under s 39B of the Judiciary Act. Even if consideration is limited to the grounds in ss 5(1)(h) and 5(3)(b) of the ADJR Act, on the third possibility as to what occurred, the test in *Rajamannikam* at [58], that the decision would not have been made but for the finding, would be satisfied. To explain, if the second and third respondents had been misled into believing the PoC Act created an offence relating to deriving literary proceeds then, given the terms of the s 246 orders and search warrants including the erroneous statements, it should be inferred that unless satisfied the individuals were reasonably suspected of having committed the offence or were suspects in the investigation, the second and third respondent would not have made the decisions under challenge. Otherwise, the first and second possibilities engage ss 5(1)(e) and (j) of the ADJR Act.

87 I do not accept the applicants' submission that a magistrate is precluded from taking into consideration anything not expressly stated in s 246(2) of the PoC Act in deciding whether or not to issue an order under s 246(1). That would be to ignore the discretion which exists even if the magistrate is satisfied as to the required matters in s 246(2). In terms of the exercise of discretion, the law remains that relevant and irrelevant considerations, if not expressly identified, are to be determined from the "subject-matter, scope and purpose of the Act" (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; [1986] HCA 40 at 40). I cannot see anything which would limit the discretion in s 246(2) to the matters specified in s 246(a) – (c). For this reason, the label of taking into account an irrelevant consideration is inapt. The problem is not that s 246(2) prohibited the second and third respondents from considering that the various recipients and listed individuals were suspected of having committed an offence. The problem is that, despite the assertions to the contrary in the s 246 orders and search warrants, there is no offence known to law which the various recipients and listed individuals could have committed.

88 I do not accept the AFPs submission that the s 246 orders and search warrants should not be considered together. As explained, I infer that is how the second respondent dealt with them and thus the errors in the one affected, and infected, the other. Further, the same error operated in respect of the search warrant issued by the third respondent on 18 February 2014.

Although the third respondent cannot be inferred to have had the s 246 orders before him, the search warrant contained the second condition in the same terms (listing numerous individuals as suspects the subject of the investigation) which, in and of itself, gives rise to the same three possibilities of error identified above.

89 For these reasons, I consider the s 246 orders and search warrants to be affected by material legal error. The AFP did not make any submission that relief should be withheld in the exercise of discretion. Nor is any basis for withholding relief apparent. The legal errors are material, go to the heart of the decisions to issue the s 246 orders and search warrants, and the decisions infected by those errors should be quashed.

90 The other arguments which the applicants put may also be considered in an abbreviated form.

4.2 Failure to be satisfied of statutory condition for s 246 orders

91 Section 246(2)(b) of the PoC Act required the second respondent to be satisfied that:

(b) the specified person is:

- (i) reasonably suspected of possessing, or having under his or her control, *tainted property or evidential material; or
- (ii) the owner or lessee of the computer; or
- (iii) an employee of the owner or lessee of the computer;

92 According to the applicants, the s 246 orders failed to record the second respondent being so satisfied. Instead, the s 246 orders said only that the second respondent was satisfied that the person “uses or has used the computer”.

93 It is true that the s 246 orders do not, on their face, disclose that the second respondent was satisfied as to the matters in s 246(2)(b). The terms of s 246(2)(b) may be compared with what the s 246 orders relevantly said in this regard as follows:

And whereas I am satisfied that:

- there are reasonable grounds for suspecting that evidential material is held in, or is accessible from, a computer or data storage devices at those premises;
- you are reasonably suspected of having committed the offence stated in the relevant warrant and a person who uses or has used the computer or device; and
- you have relevant knowledge of the computer or device or a computer

network of which the computer or device forms a part and measures applied to protect data held in, or accessible from, the computer or device.

94 The first and third dot points appears to refer to subs-s 246(2)(a) and (c) respectively. The second dot point bears no resemblance to s 246(2)(b). Despite the obvious differences, the applicants' arguments are not attractive on this point.

95 The applicants submitted that the presumption of regularity did not apply to magistrates and thus the order had to show authority on its face, a requirement that would not apply to a warrant issued by a superior court which has the benefit of the presumption of regularity (*Ousley v The Queen* (1997) 192 CLR 69 at 88-89 and 108-109). Whether or not the presumption of regularity should extend to inferior courts is not a matter for present discussion. Suffice it to say that, if the presumption did so extend, this ground should fail. It is also not apparent that a s 246 order is or should be the subject of the same requirements as a warrant issued by an inferior court. An order under s 246 is intended to be ancillary to a warrant, facilitating its execution. The considerations which support the principle that a warrant must show jurisdiction on its face, if issued by an inferior court, are not readily applicable. Further, the *expressio unius* principle relied on by the applicants referring to *Ousley* at 111 (namely, that because the second respondent expressly referred to at least one statutory condition it should be inferred he was not satisfied as to the others) is of doubtful application in this context. Finally, the issue is, or at least should be, whether the second respondent should be inferred not to have been so satisfied in all of the circumstances. That question, if asked, must be answered against the applicants.

96 Given the conclusions I have reached that the s 246 orders and search warrants are invalid on other grounds I prefer not to express any decision which would be seen as giving support to the applicants' arguments on this point.

4.3 **Misrepresentation**

97 The applicants in NSD 201 of 2014 contended that the search warrants should be quashed because the AFP unintentionally misled the second respondent by stating that the AFP was not satisfied that Seven had complied with the s 202 order for production when a consensual regime was in place for continuing compliance and by failing to disclose material information to the state of Seven's compliance.

98 The applicants in NSD 207 of 2014 contended that the AFP should be inferred to have misled (including, in some respects, deliberately misled) the second respondent as to a series of matters including that: - (i) Mr Kalantzis was reasonably suspected of having committed an offence, (ii) Mr Kalantzis was a suspect in the investigation, (iii) Mercedes Corby was a suspect in the investigation, (iv) numerous other named individuals were suspects in the investigation, (v) Schapelle Corby had entered into an agreement with Seven, (vi) Seven had finished producing documents under the s 202 order, (vii) the Mercedes Corby exclusive agreement made no reference to payments, (viii) Seven Network had agreed to pay Mercedes and/or Schapelle Corby \$1-3 million, (viii) Mr Kokles intended to comply with the guidelines as to privilege referred to in paragraph 9 of his affidavit, and (ix) Mr Koles intended to seize documents only in accordance with the terms of the search warrants.

99 The first matter which must be stated is that there was no proper foundation for the submission in NSD 207 of 2014 that the AFP deliberately misled the second respondent. The evidence simply does not support that submission and I reject it.

100 That said, it must be accepted that the material which the AFP placed before the second and third respondents was misleading insofar as it identified people as reasonably suspected of having committed an offence or as suspects. That caused the discretion to miscarry for the reasons discussed above. Apart from those matters, the essence of the applicants' complaint is that the second and third respondents were misled because they were not informed about the arrangements which had been made to extend the time for compliance with the s 202 order or that Seven was continuing to comply with the s 202 order in a co-operative manner, Seven having requested clarification of certain issues, provided further information when producing the documents, and having indicated that searches were ongoing and further documents would be produced.

101 There is no doubt that the affidavits of Mr Kokles and Mr Phun, regrettably, create an impression about the status of Seven's production contrary to the true position. Any reasonable person reading Mr Kokles' affidavit would infer that Seven had produced documents up to 14 February 2014 and this production was inadequate. That was not the true position, as the facts recorded above disclose. Any reasonable person reading Mr Phun's affidavit would reach the same conclusion, despite the fact that the very examples of alleged inadequacies in Seven's production referred to in paragraph 7(s) of each affidavit had in fact been answered in Ms Munsie's letters sent to the AFP at 4.24 pm and 5.46 pm on 17

February 2014, before Mr Phun swore his affidavit on 18 February 2014 in support of the further search warrant.

102 The AFP's submission that there is no evidence that Mr Kokles or Mr Phun knew about the status of all communications with Seven's solicitors at the time they swore their affidavits is misconceived. As the applicants submitted, Mr Kokles and Mr Phun were giving evidence in their capacity as officers of the AFP. They were giving evidence about the AFP being not satisfied as to the production by Seven. In these circumstances, this submission by the AFP has no merit.

103 I also do not accept that there were no material misrepresentations to the second and third respondent. The identification of persons as reasonably suspected of having committed an offence and as suspects in an investigation was materially misleading. So too, by material omission, was the AFP's description of the circumstances relating to compliance with the s 202 order for production. Apart from these matters, however, I do not accept that the material placed before the second and third respondents was misleading in the way the applicants in NSD 207 of 2014 contended. At worst, things said to have been intended in the material did not occur on execution of the warrants, but this does not mean that the stated intentions were not held at the time. Accordingly, these contentions must be rejected.

104 The real argument, accordingly, is the one put by the applicants in NSD 201 of 2014, an argument which the other applicants also adopted and is equally applicable in their case.

105 The position is this. If innocent but nevertheless material misrepresentations which may be inferred to have induced the issue of a search warrant and s 246 order have the effect of vitiating the warrant and order, then these warrants and orders should be quashed. This is because I am satisfied that there were innocent but material misrepresentations which induced the issue of the search warrants and orders, being those relied upon by the applicants in NSD 201 of 2014. If, however, no misrepresentation, no matter how egregious and despite it inducing the issue of the search warrant and s 246 order, can vitiate the search warrant or s 246 order if innocently made, then these warrants and orders should not be quashed on this ground. This is because I am satisfied that all of the misrepresentations were innocent. The AFP officers had no intention of misleading the second and third respondents.

106 The AFP submitted that the decision in *Lego Australia Pty Ltd v Paraggio* (1994) 52 FCR 542; [1994] FCA 1286 ('*Lego*') answers the issue against the applicants. In *Lego*, the

Full Court of the Federal Court rejected the notion of any free-standing duty of disclosure in the making of an application for a search warrant (at 555). It also said at 555 that, despite this:

It is true that, in an exceptional case, an administrative decision may be vitiated by fraud or misrepresentation even at common law (see, eg Sir William Wade, *Administrative Law* (6th ed, 1988), p 257). The AD(JR) Act itself makes such a provision: see s 5(1)(g).

107 Section 5(1)(g) of the ADJR Act requires fraud.

108 At least one subsequent decision has construed *Lego* as requiring deliberate misrepresentation (in effect, fraud) to enable a search warrant to be quashed on this ground (*Majzoub v Kepreotis* [2009] NSWSC 1498 at [68]). Another might be taken to be suggesting the same thing (*Jilani v Wilhelm* (2005) 148 FCR 255; [2005] FCAFC 269 at [98]-[101]). Another decision, in *obiter dicta*, concludes that fraud is required (*Firearm Distributors Pty Ltd v Carson* [2001] 2 Qd R 26; [2000] QSC 159 at [42], [44]).

109 The applicants submitted that *Lego* was distinguishable, primarily on the basis that the PoC Act contains s 266, which makes it an offence to make a statement in application in a search warrant if the statement is false or misleading or omits any matter or thing without which the statement is misleading. There was no equivalent provision in the statute under consideration in *Lego*. However, as the AFP submitted, s 266 cuts both ways. On one view, it might support the existence of a duty of disclosure. On another, it might be thought that the provision indicates the lack of any such duty and an intention not to invalidate warrants issued by reason of unintentional misrepresentation. On balance, I do not consider that s 266 is a sound basis upon which *Lego* might be distinguished.

110 The applicants submitted that *Lego* embraced innocent misrepresentations and the case (or cases) to the contrary involved a misreading of *Lego* or were simply wrong. I am not persuaded that *Majzoub v Kepreotis* involves a misreading of *Lego*. In particular, when regard is had to the reference to s 5(1)(g) of the ADJR Act in the passage from *Lego* at 555 it is difficult to conclude that the Full Court was saying that anything less than fraud would suffice as an independent ground for quashing a search warrant if the issue was one of a failure to disclose material matters. Accordingly, I consider that I am bound by *Lego* in this regard. On this basis, despite the fact that I am satisfied: - (i) the AFP misled the second and third respondent, by stating that the AFP was not satisfied that Seven had complied with the

s 202 order for production when a consensual regime was in place for continuing compliance and by failing to disclose material information to the state of Seven's compliance, and (ii) the misrepresentations by omission and incomplete statements were material to the decisions to issue the s 246 orders and search warrants, I do not consider that the s 246 orders and search warrants can be quashed on this basis because I also accept that the misrepresentations were unintentional. Whether the lack of any remedy in this regard is satisfactory is not a matter for present consideration.

111 It is appropriate here also to deal with the applicants' contention that the second and third respondents each failed to take into account the extension of time granted in respect of the s 202 order and the fact that, at the time the search warrants and s 246 orders were issued, Seven West was taking steps to comply with the s 202 order, which was said to amount to a failure to take into account relevant considerations. The apparent basis for this submission is the existence of a number of less intrusive measures available to give effect to the purposes of the PoC Act. Nothing further was advanced in support of this contention. As with the question of irrelevant considerations, the submission misconceives the nature of what is required by the PoC Act. There is nothing in the provisions which suggests that the use of and extent of compliance with other measures are mandatory considerations under the PoC Act. In any event, there is no evidence that the second and third respondents failed to consider any of the material before them in respect of the s 202 orders issued to Seven West. The applicants' complaint is really directed to the conduct of the Messrs Kokles and Phun in applying for the search warrants and s 246 orders which, for the reasons given above, does not provide any basis for quashing the search warrants and orders.

4.4 No sworn evidence as to suspicion of evidential material

112 The applicants contend that the search warrants are invalid because the affidavits in support of the application for them to be issued did not contain a statement that the deponent believed that there were reasonable grounds for suspecting that there was evidential material at the premises. The argument is based on the observation in *George v Rockett* at 111 that "it is implicit in [the section] that the applicant for the search warrant should entertain the suspicion and belief to which that section refers...". When read in context as a whole, I do not accept that the High Court was saying that a search warrant would be invalid if the applicant did not give evidence on oath as to the holding of the relevant suspicion. Nor do I

consider *Williams v Keelty* (2001) 111 FCR 175; [2001] FCA 1301 at [167] to support that reading of *George v Rockett*.

113 Nothing in the PoC Act suggests that invalidity should be the result of a failure of the deponent of the affidavit supporting the application to swear that the deponent holds the relevant suspicion. Moreover, and as the AFP submitted, the PoC Act in fact suggests that there is no such requirement in respect of s 225 because other provisions contain express requirements to the effect alleged (s 17(3)(a), 18(3)(a), 19(1)(e) and 20(3)(a)).

114 Accordingly, I reject this ground of invalidity.

4.5 Other grounds in NSD 207 of 2014

115 The applicants in NSD 207 of 2014 contended that the search warrant and s 246 order the subject of that proceeding was invalid because there was insufficient evidence to satisfy a reasonable person that there was evidential material of the kind listed in the search warrant accessible from the computer of, or at the premises of, Mr Kalantzis. I do not accept this ground. There was some material before the second respondent to support the belief that Mr Kalantzis held evidential material relating to the derivation of literary proceeds by Schapelle Corby or other members of the Corby family which might enable an application for a literary proceeds order. As such, it cannot be said that, in the way the applicants in NSD 207 of 2014 claim in any event, the decision of the second respondent to issue the search warrant and s 246 order was so unreasonable that no reasonable person could have made it.

116 The applicants in NSD 207 of 2014 also contended that the issue of the search warrant and s 246 order was unnecessary and that Mr Kalantzis should have been given the same opportunity as Seven to provide documents under a s 202 production order. According to the applicants, given that a search warrant is a mechanism of last resort, no reasonable person in the second respondent's position would have decided to issue the search warrant or s 246 order. I disagree. Properly analysed, this is a complaint about a decision to use one statutory power when another was available in circumstances where nothing in the statute dictates that the use of one or other power is necessary or should be preferred. Moreover, it is directed to the decision of the AFP to apply for the search warrant and s 246 order rather than the second respondent's decision to issue it.

117 The other complaints of the applicants in NSD 207 of 2014 relate to the execution of the search warrant and claims for legal professional privilege. I made an order that

paragraphs 1 to 5 of the amended originating application in NSD 207 of 2014 be heard separately from and in advance of all other issues in that proceeding. Accordingly, those other issues need not be addressed at this time.

5. CONCLUSIONS

118 The applicants in both proceedings have established that the s 246 orders and search warrants are materially affected by legal error, the consequence of which is that orders should be made quashing the s 246 orders and search warrants. I will make orders accordingly and hear further from the parties as to other consequential orders which should be made, in particular, about the material seized pursuant to the search warrants which is held by the AFP, the balance of the proceeding NSD 207 of 2014 and costs.

119 One other comment should be made. Under r 2.32 of the *Federal Court Rules 2011* (Cth), a person who is a party is entitled to inspect many documents as of right, but subject to any contrary confidentiality order. Under r 2.32(4) a person may also apply for leave to inspect other documents. I consider it appropriate to make an order that insofar as the documents filed in the Court disclose the names of the individuals identified as persons reasonably suspected of having committed an offence or as suspects, other than those individuals whose identities are already in the public domain or were placed in the public domain by counsel during the hearing (being Justine Munsie, Vasilios Kalantzis, Schapelle Corby, and Mercedes Corby), those parts of the documents should be made the subject of a confidentiality order as contemplated by r 2.32(3)(a). The reason for this is that it is common ground between the parties that none of those individuals were, or ever could have been, suspects or suspected of committing any offence as asserted in the search warrants and s 246 orders. I have made orders quashing the search warrants and s 246 orders, the effect of which is that they are taken not to have existed. Further, it is not necessary for those names to be disclosed for the public to understand the applicants' claims, the AFP's defence of those claims, and these reasons for judgment. In these circumstances, the potential for harm to those individuals by reason of the disclosure of parts of documents revealing their names substantially outweighs any public interest in such disclosure. The order I propose to make is not a non-publication or suppression order as referred to in s 37AA of the *Federal Court of Australia Act 1977* (Cth) which creates a high bar to the making of any such order (and one that could not be satisfied in this case). The effect of my order is only to prevent the disclosure by the Court, at the request of a non-party, of those parts of the documents filed in

- 40 -

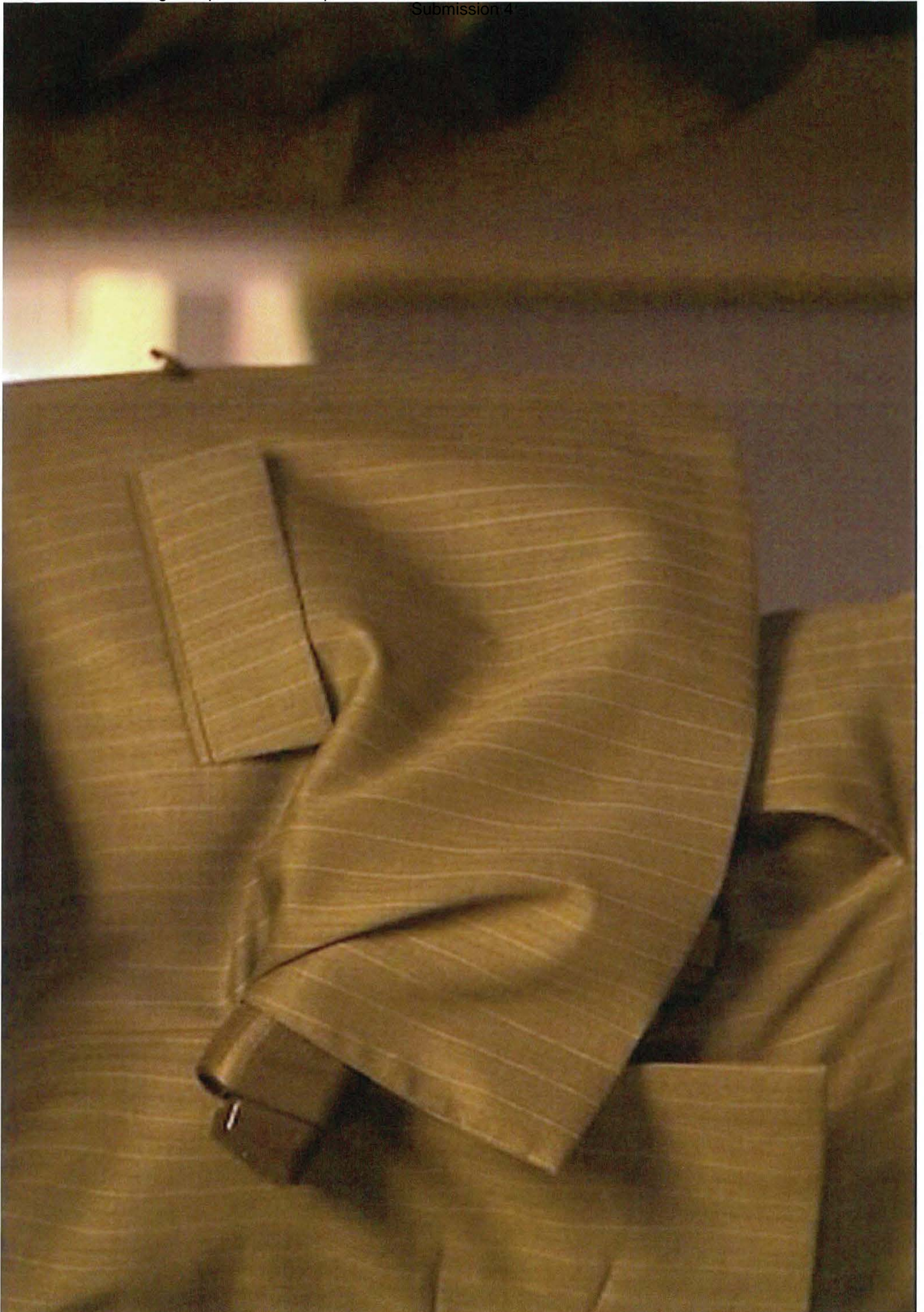
the Court which reveal the names in question, a far more limited form of order than a non-publication or suppression order.

I certify that the preceding one
hundred and nineteen (119)
numbered paragraphs are a true copy
of the Reasons for Judgment herein
of the Honourable Justice Jagot.

Associate: 

Dated: 25 March 2014





DVD Seven News story, 18 February 2014.

10 x hard copy to be couriered.

Anton Piller or “Search Orders” in civil litigation

Anton Piller orders, or ‘search orders’ under the Uniform Civil Procedure Rules 2005 (NSW), have the object of preserving evidence necessary to an applicant’s claim which is at imminent risk of destruction, tampering or removal from the jurisdiction.

A court may grant a search order if the following requirements set out in UCPR r 25.20 (or, identically, in 7.43 of the Federal Court Rules 2011) are satisfied:

- (a) the applicant has a strong prima facie case on an accrued form of action;
and
- (b) the potential or actual loss if the order is not made will be very serious; and
- (c) there is sufficient evidence that the respondent
 - (i) possesses important evidentiary material; and
 - (ii) there is a real possibility that the respondent might destroy such material.

In applying this test courts have elaborated on what is required by each element.

Rather than applying the elements mechanically, Brereton J expressed the view that they were “factors to be taken into account in the exercise of a discretion, rather than essential proofs” in an exercise involving the balancing of the strength of the applicant’s case, the seriousness of the actual or potential damage, the gravity of the risk of destruction, and, significantly, the potential injury to the (often absent) respondent.¹

‘Strong prima facie case’ is a departure in wording from comparable concepts arising in different contexts such as ‘triable issue’ and suggests that the applicant must affirmatively satisfy the court that on the state of the presently available information there is a genuine likelihood of success on the substantive claims.

The critical element requiring a ‘real possibility’ of the risk to the evidence has been interpreted to mean a probability that is more than fanciful or insubstantial, ‘a degree of likelihood that gives rise to a genuine concern’, without the need for mathematical calculations of a more than 50% chance.²

An Anton Piller order is usually granted ex parte, and is regarded as a drastic form of discovery, often granted even before service of originating process. To reflect the invasiveness of such an order, courts have remarked on the ‘heavy burden’ to be discharged by ex parte applicants in meeting these evidential requirements.³

¹ Brags Electric Pty Ltd t/a Inscope Building Technologies v Gregory [2010] NSWSC 1205, [18].

² Rickard v Swenrick Building & Construction Pty Ltd [2006] VSC 382.

³ Microsoft Corp v Goodview Electronics Pty Ltd [1999] FCA 754 (Bransen J); Australian Football League v Hard on Sports Pty Ltd [2012] VSC 475, [18] (Vickery J).