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Sophie Dunstone  
Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
Parliament House  
Canberra ACT  
Sent electronically to: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

17 April 2014

Dear Ms Dunstone

**Response to question taken on notice with regard to Inquiry into the current investigative processes and powers of the Australian Federal Police in relation to non-criminal matters**

The Committee has asked me whether in my view the production order to Seven West Media Limited (Channel 7) dated 7 February 2014 sought delivery to the AFP of a draft agreement.

In answering the question I do not intend to provide legal advice or to in any way be critical of the Australian Federal Police (AFP). My comments below proceed on the assumption there was no contract entered into between Channel 7 and Ms Corby, or anyone on her behalf.

RoLIA's submission to the Committee is directed to seeking a minor amendment to the *Proceeds of Crimes Act 2002* namely, to obtain a search warrant for property tracing documents the AFP should first obtain a production order unless a production order would be ineffective or has not been complied with. The proposed amendment as contained in Appendix B of our submission dated 27 March 2014 is:

“225A Documents identifying etc. evidential material etc.

*A magistrate must not issue a \*search warrant under such section 225(1) in respect of \*evidential material unless:*

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

The main reason for seeking this amendment was that when the *Proceeds of Crime Bill 2002* was considered by the Parliament at no time does it seem to have been brought to the attention of the Parliament in either the Explanatory Memorandum or elsewhere that the power of the AFP to obtain a search warrant was being changed so it no longer had to first seek the documents utilising a production order. The amendment reinstates the position as it was prior to 2002.

The schedule to the production order has 8 bullet points but only one appears to be relevant.

The third bullet point states:

*“Electronic and written records in relation to any contractual arrangements entered into in order to secure CORBY’S participation and/or assistance in providing information and/or narrative and/or interviews for CORBY’S story.”*

My Comments:

1. The production order seeks written records in relation to any contractual arrangements entered into. A written record by itself clearly includes drafts, copies and originals.
2. In my view a contractual arrangement entered into means a legally binding agreement.
3. Undoubtedly if a contract had been entered into between Channel 7 and Ms Corby, a draft of that contract is a written record in relation to the contract and would have to be produced.

4. However as there was no contract it is difficult to see there could be an electronic or written record in relation to something that did not exist.

The debate over this issue shows that whether a production order has been complied with by a respondent should be left to a neutral umpire. The amendment we have put forward would require that a magistrate who receives an application for a search warrant to first determine whether or not a production order has been complied with.

If the amendment had been in force at the time the search warrant was requested by the AFP, the following should have occurred:

- (a) the magistrate should have sought clarification over the wording of the production order and whether it had been complied with. This would have resolved any interpretation issues.
- (b) if the magistrate was satisfied that the wording of the production order was sufficiently clear and it has not been complied with, the magistrate would have issued the search warrant. The AFP would not then be, and nor should they be, put in the difficult position of having to make that assessment and determination. Magistrates and judges routinely determine the meaning of words in statutes, subpoenas, notices to produce and many other documents. They have the experience and training to do so.
- (c) If the magistrate is not satisfied the schedule to the production order is clearly worded or not satisfied the recipient has failed to comply with the production order, the AFP can obtain another production order seeking further documents.

As well as protecting the reputations of recipients of production orders and search warrants, the amendment will help to protect the reputation of the AFP from something like this happening again.

Yours sincerely

Malcolm Stewart  
**Vice President**