

## CHAPTER 2

### Background and overview of the Commonwealth proceeds of crime regime

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

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

#### Overview of the confiscation scheme in the POC Act

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

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

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

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

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

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

- *Conviction based restraint and confiscation:* Restraining orders may be made when a person has been, or will be, charged with a Commonwealth offence, and final orders made upon conviction may include pecuniary penalty orders and forfeiture of non-restrained property. Automatic forfeiture applies in respect of restrained property upon conviction for a serious offence.
- *Non-conviction person-directed restraint and confiscation:* Restraining orders may be made when a person is suspected of committing certain serious offences. Final orders may be made where the court is satisfied that the person committed a relevant offence (even though there may have been no conviction for that offence).
- *Non-conviction asset-directed restraint and confiscation:* Restraining orders may be made over property suspected of being the proceeds of certain offences. Final orders may be made where either the court is satisfied that the property is proceeds of a relevant offence, or no claim is made in respect to the property.
- *Literary proceeds:* Literary proceeds orders may be made where the court is satisfied that: the person committed a relevant offence (even though there may have been no conviction for that offence); and the person has derived benefits through the commercial exploitation of his or her notoriety resulting from the commission of the offence.
- *Unexplained wealth orders:* Unexplained wealth provisions enable the restraint and forfeiture of unlawful wealth. Under these provisions a person can be compelled to attend court and prove that his or her wealth was not derived from certain offences.<sup>4</sup>

#### ***Literary proceeds orders***

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

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

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

*Definition of 'literary proceeds'*

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

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

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

*Considerations in making literary proceeds orders*

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

*Uniqueness of literary proceeds orders within the POC Act*

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

There is a fundamental difference in the factual matrix which underpins a literary proceeds investigation, compared with investigations undertaken for other applications under [the POC Act]. It is not illegal for a person who has committed a crime to sell their story, nor is it illegal for a publishing or media company to buy that story. As such, investigations in support of

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

literary proceeds actions will inevitably be required to focus on the actions or suspected actions of entities such as publishers or media organisations which are perfectly legal and a normal part of their business activities.

Other investigations under [the POC Act] will, however, always focus on the suspected commission of certain offences or property that is suspected of being the proceeds or instruments of certain offences. The difference between literary proceeds orders and other proceeds of crime orders is reflected in the broad discretion given to the court in deciding whether or not to make an order.<sup>6</sup>

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

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

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

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

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

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

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

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6 *Submission 6*, p. 2.

7 *Submission 4*, p. 12.

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

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

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

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

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

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

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

### **Evolution of Commonwealth proceeds of crime legislation**

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

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8 *Submission 6*, p. 7.

9 *Submission 6.1*, pp 3-4.

10 *Submission 6.1*, p. 3.

11 *Submission 6*, p. 8.

12 *Submission 6.1*, p. 3.

this regime: search and seizure; court orders for the production of documents (production orders); and court orders to direct a financial institution to give information about transactions conducted through an account held by a particular person with the institution (monitoring orders).<sup>13</sup>

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

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

2.22 Several sets of amendments to the POC Act have been made in the last few years. In particular, the provisions introducing unexplained wealth orders were included in the Act in 2010.<sup>15</sup>

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

### **Operational framework for proceeds of crime matters**

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

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

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

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

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

16 *Submission 6*, p. 3.

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

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litigation and provides legal advice concerning all matters relating to proceeds of crime.<sup>18</sup>

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

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

### **Recent literary proceeds investigation involving Seven West Media**

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

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

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

#### ***Summary of events***

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

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

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18 *Submission 6*, p. 15.

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

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

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

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

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

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

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

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

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

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

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

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

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

