

CHAPTER 3

Use of investigative powers by the AFP under the POC Act

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

Information gathering powers in the POC Act

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

Production orders

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

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

1 POC Act, subsection 5(e).

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

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

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

Search and seizure powers

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

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

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

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

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

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

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

Appropriateness of the investigative powers available under the POC Act

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

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

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

Thresholds for obtaining production orders and search warrants

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

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

4 *Submission 6*, p. 8.

5 *Submission 6*, p. 9.

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

7 *Submission 4*, p. 14.

8 *Submission 4*, pp 14 and 77.

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

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

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

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

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

10 *Submission 6*, p. 10.

11 *Submission 6*, p. 10.

12 *Submission 6.1*, p. 4.

13 *Submission 6.1*, p. 4.

14 *Submission 6.1*, p. 4.

Alternate means of information gathering

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

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

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

Requirements for obtaining a search warrant under the POC Act

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

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

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

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

15 *Submission 4*, p. 14.

16 *Submission 1*, p. 4.

17 *Submission 1*, pp 6 and 11.

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

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

The AFP tailors its investigative strategy to the individual circumstances of each case. Compliance with a production order does not preclude the use of search warrants under [the POC Act], nor does the Act require production orders to be used as a pre-requisite to the use of search warrants. This provides the AFP with appropriate flexibility to ensure that evidence is preserved and assets are not dissipated.¹⁹

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

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

Exercise of investigative powers by the AFP

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

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

19 *Submission 6*, p. 11.

20 *Submission 6.1*, p. 6.

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

Guidance available to officers involved in investigations

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

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

Processes associated with obtaining search warrants

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

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

Accessing electronic information during the execution of search warrants

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

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

22 *Submission 6*, pp 11-12.

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

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

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

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

Specific issues relating to the recent investigation involving Seven West Media

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

Decision to proceed with a search warrant

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

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

Timing of obtaining the search warrant

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

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

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

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

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

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

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

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

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

Content of the search warrant, affidavit and section 246 order

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

Errors contained in the warrants and associated orders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Explaining the legislative framework for literary proceeds matters

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

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

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

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

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

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

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

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

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

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

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

3.43 The AFP stated further in a supplementary submission:

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

Scope of the production order and search warrant

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

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

39 *Submission 4*, p. 13.

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

41 *Submission 6.1*, p. 9.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.50 Seven West continued:

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

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

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

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

49 *Supplementary Submission 4.1*, p. 4.

50 *Supplementary Submission 4.1*, p. 5.

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

Other options for obtaining information that could have been pursued

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

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

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

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

Conduct of officers during the execution of the search warrant

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

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

52 *Submission 4*, p. 10.

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

54 *Submission 6.1*, p. 7.

55 *Submission 6.1*, p. 7.

56 *Submission 4*, p. 2.

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

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

Cost of the investigation

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

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

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

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

Actions initiated by the AFP as a result of this investigation

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

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

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

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

59 *Submission 4*, p. 7.

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

61 *Submission 6.1*, p. 13.

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

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

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

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

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

63 *Submission 6.1*, p. 9.

64 *Submission 6.1*, p. 9.

