

CHAPTER 5

Committee views and recommendations

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

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

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

AFP processes and procedures during proceeds of crime investigations

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

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

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

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

Scope of the production order and search warrant

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

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

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

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

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

Recommendation 1

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

Making all relevant information available to magistrates granting orders and warrants

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

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

Recommendation 2

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

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

Recommendation 3

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

Literary proceeds matters under the POC Act

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

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

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

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

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

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

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

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

Recommendation 4

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

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

Possible changes to the investigative powers available under the POC Act

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

Requirements for obtaining a search warrant under the POC Act

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

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

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

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

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

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

Recommendation 5

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

Allowing for enforceable undertakings in relation to literary proceeds matters

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

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

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

3 *Submission 6.1*, p. 6.

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

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

Recommendation 6

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

Protecting press freedoms during AFP investigations

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

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

Guidelines to be observed when dealing with media organisations

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

Recommendation 7

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

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

Guidelines to be observed during the execution of search warrants

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

Recommendation 8

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

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

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

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

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

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

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

Recommendation 9

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

Senator Penny Wright
Chair

