

## Additional Comments

### Nick Xenophon, Independent Senator for South Australia

1.1 At the outset, it is important to note the crucial role proceeds of crime legislation can play in the Australian legal system. This report should not be seen as a criticism of these provisions in theory, but instead how they have been applied by the AFP in this particular situation and, in respect of literary proceeds, the need to clearly distinguish them from the general proceeds of crime provisions. The AFP's Seven West investigation, however, demonstrates the need for urgent discussion and reform in two areas: firstly, the structure and application of the current *Proceeds of Crime Act 2002* by the AFP, with particular reference to the civil matters contained in the Act (the literary proceeds provisions); and secondly, the need for specific protections for journalists and their sources in relation to law enforcement investigations.

1.2 In my view, the actions taken by the AFP against Seven West in this instance are not just unreasonable, but ill-considered and harmful. Seven West has been forced to defend itself against false and arguably snide imputations of criminal activity, which have had a significant impact on its reputation both domestically and overseas. The response from the AFP has been confused and weak at best, and its continued unsubstantiated assertions that Seven West has breached a production order have caused further damage to Seven West's reputation. It is vital to note that despite these assertions, the AFP has not charged Seven West with the criminal offence of breaching a production order, which calls the AFP's position into further doubt. It is also important to note that this continued assertion by the AFP may have a long-term impact on Seven West, in the context of the *Broadcasting Services Act 1992*. This is clearly unfair and unacceptable, given all the circumstances.

1.3 This is particularly relevant given that no final judgement has been made on whether Seven West did indeed breach the production order. The AFP has based their case on the view that the order should have captured draft documents, a view that does not appear to be supported by the wording of the order and, it should be noted, seems to be contrary to that of their own legal counsel.<sup>1</sup>

*"Could I just pause there and say this is the extra material presumably under the warrant. I don't know this. The AFP doesn't know this because they haven't been able to access it, yet:*

All you got was an unsigned draft that was your extra material. But you didn't ask –

*and this is about a reference to the production order:*

...you didn't ask for unsigned drafts. You only asked for agreements.

---

1 *Committee Hansard*, 7 April 2014, p. 50.

*That's quite right. If your Honour goes right back – I won't take you to it now – but the production order itself spoke of agreements. And a good lawyer had read it and said, "Well, that doesn't capture drafts of agreements". Well, that's the nature of the production, and that's the nature of argy bargy in this kind of litigation. It's also the case that a search warrant which is a completely separate process does separate things and it acquires information which could be helpful including a draft."*<sup>2</sup>

Given this admission by Mr Watson SC, the AFP should withdraw their assertions regarding the production order and apologise to Seven West.

1.4 I am also of the view that the AFP has not adequately explained why it chose to execute search warrants against Seven West rather than amend the production order or to seek an undertaking in order to resolve the matter. This seems inconsistent with the AFP's general approach to literary proceeds matters, as exemplified by their response to a paid interview between Channel Ten and convicted drug trafficker Renae Lawrence for an interview regarding Schapelle Corby. When questioned during the hearing, Mr Colvin stated that he was 'not aware' of the situation,<sup>3</sup> despite the interview having been widely promoted by Channel Ten. Further, an article from *The Australian* on 21 April states that the AFP was satisfied with 'taking Ten at its word' and not conducting further investigation. The article continues:

*The Australian can reveal the AFP is taking Ten at its word that Ebeli has not passed on money to Lawrence or her family, and it is not conducting any further investigations. The AFP confirmed it "is satisfied with the information that Channel 10 has provided and as such the AFP has assessed that no further action is warranted."*

*A spokesman refused to say why the AFP was so thorough in its investigations with Seven, but is not checking whether Lawrence received any money.*

*"The AFP is satisfied with the information that Channel 10 has provided and has determined that there is no breach of literary proceeds provisions as outlined within the act, and as such has assessed that no further action is warranted," the spokesman said.*

*"The AFP considers this matter to be finalised. By finalised we mean that at this stage, there is no further requirement for AFP action."*<sup>4</sup>

1.5 Both Seven West and the ABC provided evidence to the committee stating that their relationships with the AFP had generally been very cooperative and balanced. This further highlights the AFP's unexplained decision to take the

---

2 Mr G M Watson SC, *Seven West Media v Commissioner, Australian Federal Police* [2014] FCA 263, transcript p. 80.

3 Acting Commissioner Andrew Colvin, *Committee Hansard*, 7 April 2014, p. 44.

4 Michael Bodey, 'AFP clears Ten over Bali Nine claims about Corby', *The Australian*, 21 April 2014, p. 22.

---

significant and unjustified step of accelerating the investigation and obtaining search warrants to carry out a raid on Seven West.

1.6 The committee's report has discussed at length the errors made by the AFP during the warrant application process, and I support the committee's comments in this regard. It is clear that these errors reflect poorly on the AFP, and I strongly recommend the AFP be as open and transparent as possible in their review process. These events, while unfortunate, have provided the AFP with the opportunity to improve its internal procedures and training, and to develop specific protocols for dealing with civil matters under the *Proceeds of Crime Act*. If reasonable protocols are not developed, consideration should be given to legally enforceable rules being developed and implemented.

1.7 Further, given the resources used by the AFP in the raid, and the significant legal costs that have been incurred, it appears that in all the circumstances there has been an egregious misuse of public resources on the part of the AFP.

1.8 In my view, it is not appropriate to retain the literary proceeds provisions within the *Proceeds of Crime Act*, which otherwise relates to criminal offences. The Act's current structure has left the provisions open to misuse or even abuse, which is clearly unacceptable.

1.9 In particular, the structure and name of the Act gives the impression that any investigation under its provisions must relate to criminal matters. This has impacted on Seven West in this particular case, and has potentially caused significant damage to its reputation.

1.10 In my view, the best outcome would be to separate the literary proceeds provisions from the Act and enshrine them in separate legislation. Ideally, this legislation would also include specific information-gathering and investigative powers and processes for relevant authorities to ensure these circumstances are not repeated.

### **Recommendation 1**

**1.11 That the Government, as a matter of urgency, introduce legislation to establish the literary proceeds provisions as an independent Act, including requirements relating to information-gathering and investigative powers for law enforcement agencies under the Act.**

1.12 This inquiry has also revealed the urgent need for specific protections relating to journalists' sources. While I support the committee's comments regarding this, I believe the committee should go further and recommend specific legislative change. These protections should be enshrined in legislation to ensure they are enforced.

1.13 It is particularly concerning to see the extent of the information that can be accessed by the AFP under search warrants, including the seizure of entire hard drives. While the AFP has stated that it adheres to the spirit of the provisions in section 126H of the *Evidence Act 1995*, this is manifestly inadequate. It would be naive to think that information accessed as part of an investigation may not be used to 'point the way' for further investigation in another matter, even if it cannot be used as evidence.

1.14 Whistleblowers and confidential sources are vital for the public interest. Greater protection for journalists' sources will be a significant contribution to strengthening free speech and public accountability.

### **Recommendation 2**

**1.15 That the Government, as a matter of urgency, introduce legislation based on 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.***

1.16 Ultimately, the AFP's investigation of Seven West has been a chilling example of serious failures in Australia's law enforcement processes. While specific errors can be laid at the feet of the AFP, it cannot be denied that the current legislative framework has contributed to these poor outcomes. Further, this raises an important question: if the AFP acts in this manner towards an organisation with the resources and reputation of Seven West, how are they acting towards smaller organisations or individuals? These are matters that must be dealt with urgently to ensure the effective operation of both the legislative framework and law enforcement agencies.

**Senator Nick Xenophon**