

**SENATE STANDING COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS**

SUPPLEMENTARY SUBMISSION BY



17 APRIL 2014

Senate Standing Committee on Legal and Constitutional Affairs

**Inquiry into the current investigative processes and powers of the Australian
Federal Police in relation to non-criminal matters**

Supplementary Submission by Seven West Media

17 April 2014

Seven West Media (Seven) made a submission to the Inquiry into the Current Investigative Processes and Powers of the Australian Federal Police in relation to non-criminal matters dated 28 March 2014. Seven subsequently appeared at the Committee's public hearings on 7 April 2014.

A number of issues arose from the evidence given by the Australian Federal Police to the Senate Committee on 7 April 2014, a transcript of which has been provided to Seven West Media and is publicly available. The matters addressed in this supplementary submission address those issues.

Seven believes that certain aspects of the evidence given by the AFP require correction and some further information and analysis.

1. AFP evidence regarding correspondence and discussions with Seven West Media

Assistant Commissioner Ramzi Jabbour made several references during his evidence to the Committee of questions that had been made by the AFP of Seven West Media's lawyer regarding Seven West Media's production under the Production Order, which first occurred on 14 February 2014 and was supplemented on 17 February 2014.

In particular, Mr Jabbour refers to information or questions provided by the AFP "orally". For example on the top of Hansard page 5, the following exchange took place between Senator Xenophon and Mr Jabbour:

Senator Xenophon: It was not in writing?

Mr Jabbour: No. We advised the lawyer who provided the material to us. If we cut to the chase, it made reference to "the arrangement". We said, "there is no document here that pertains to the arrangement. What is the arrangement that exists?" There was no documentation to that effect we suspected that there was clearly an arrangement in place because the documentation that was provided to us referred to "the arrangement". So, through the lawyers we sought further material and said "clearly there is further material that would fall within the scope of the Production Order based on the materials you have provided thus far".

Senator Xenophon: Let me understand this. That was done orally. Is that right?

Mr Jabbour: Yes.

Seven West Media takes issue with this evidence. There was in fact no conversation between the AFP and Seven West Media's solicitor to the above effect. In fact, there was no spoken communication of any substance by the AFP to Seven West Media's solicitor, Justine Munsie, at any time prior to the execution of search warrants.

As is made clear in Seven West Media's initial submission and the evidence given to the Committee by Justine Munsie, the only information provided "orally" came from Ms Munsie herself and was an explanation of what documents had been produced on 14 February 2014. As well as some questions posed by Ms Munsie to the AFP, in response to which the AFP simply said it was not in a position to answer at that time.

The only forum in which the AFP raised questions of Seven West Media's production of documents was in the form of a letter addressed to Ms Munsie by Detective Superintendent Stephen Dametto of 17 February 2014, a copy of which has been tabled by the AFP. The response provided by Seven West Media, through its solicitor, was in two parts:

- (a) A letter dated 17 February 2014 and sent by email to the AFP at 4.24pm, a copy of which is Annexure A to this supplementary submission; and
- (b) An email sent by Ms Munsie to the AFP at 5.46pm on 17 February 2014, a copy of which (without attachments) is Annexure B to this supplementary submission.

As can be seen from the letter sent by Stephen Dametto to Ms Munsie on 17 February 2014, the AFP raises three particular questions, namely:

- (a) A question about the letter agreement between New Idea and Mercedes Corby dated 24 January 2014 and the payment of the Fee under that agreement;
- (b) A question regarding the "Mercedes Corby Exclusive Agreement", specifically the fact that there was no mention of funds that are to be paid despite a signed contract; and
- (c) A question about a Who magazine article which was published on 13 February 2014.

As can be seen by Ms Munsie's response on 17 February 2014, each of the questions raised in the AFP letter was addressed and further documents provided in relation to the New Idea Agreement in her later email. At no time, contrary to the evidence given by Mr Jabbour, were any questions raised by the AFP of Seven West Media to the effect of "there is no document here that pertains to an arrangement. What is the arrangement that exists?"

Assistant Commissioner Jabbour (at Hansard page 33) again refers to a conversation between Ms Munsie and the AFP on 17 February which Seven West Media and Justine Munsie dispute. Assistant Commissioner Jabbour asserts that Ms Munsie spoke with members of the AFP at around 12 noon and indicated that Seven had complied with the order and there were no additional materials to be provided and that she later changed that position.

As is made clear in the letter of 17 February, Ms Munsie had informed the AFP on Friday 14 February, that Seven was aware that there were further documents to be produced (e.g. payment information for the agreement between New Idea and Mercedes Corby) and that information was being looked into. At no time did Ms Munsie assert that "there were no additional materials to be provided" and later change her position in that regard.

2. Seven West Media's compliance with the Production Order

Assistant Commissioner Jabbour also gave evidence on several occasions before the Committee that during the execution of the search warrants on 18 February 2014, the AFP "were able to locate the documents" and "we were able to locate two very relevant documents at the premises which were not provided under the Production Order".

Mr Jabbour and other members of the AFP also gave evidence that the documents provided on 18 February 2014 would have been captured within the Production Order. Mr Jabbour informed the Committee that "the Production Order sought any materials for correspondence at all that, in broad terms, would suggest that Schapelle Corby or agents thereof would be in receipt of proceeds." (Hansard page 6)

The AFP has since tabled the Production Order served on Seven West Media on 11 February 2014. Seven West Media did not produce draft versions of a letter from Seven to Mercedes Corby in relation to a potential interview with Mercedes Corby and her sister, Schapelle.

It is clear that the draft documents which were later supplied to the AFP after the arrival of Seven West Media's lawyers at its Pyrmont premises 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.

Seven West Media also understood the AFP's counsel, Geoffrey Watson SC, to concede as much during the hearing of the Federal Court proceeding before Justice Jagot on 7 March 2014. Such a concession was presumably made on instructions. Contrary to evidence given by members of the AFP that no such discussion took place during the hearing, Seven West Media has referred to and provided the relevant transcript (page 80) to the Senate Committee on this issue.

On page 12 of the Senate Hansard, Assistant Commissioner Jabbour says, of the position at the end of the day on Monday, 17 February that "we still were not in receipt of the materials that we believed existed and indeed we located during the search warrants." Seven West Media understands that Mr Jabbour is there speaking of the draft documents provided to the AFP by Seven West Media during the execution of the search warrants. It is Seven West Media's position that notwithstanding any belief held by the AFP, those draft documents did not fall within the terms of the Production Order and were not required to be produced by Seven West Media.

Deputy Commissioner Phelan also asserted that the AFP "found" material which they had "specifically" asked for in the letter of 17 February. (Hansard page 14). As referred to above, the relevant material asked for by the AFP in their 17 February letter was "mention of funds that are to be paid". The draft agreements provided to the AFP at the time of the execution of the search warrants do not show that "funds are to be paid" because there was not and is not any agreement or arrangement between Seven and Schapelle Corby or any person on her behalf pursuant to which any funds will be paid to Schapelle Corby or another person in return for an interview.

Whilst Seven West Media has no interest in querying the opinions or beliefs of the AFP at the relevant stages of applying for and executing the search warrants, we take issue with the assertions which continue to be made by the AFP as to Seven West Media's actual compliance with the Production Order. Seven West Media is confident that there were no documents provided or seized by the AFP on 18 February which ought to have been produced in response to the Production Order.

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. We seek a formal confirmation from the AFP and the Committee that this is not the case.

3. Civil or criminal proceedings

There was some discussion amongst the AFP members during the hearing of the correct characterisation of the proceedings between the AFP and Seven West Media. Commissioner Phelan told the Committee (page 14) that:

“this was not a civil case... this is a proceeds of crime investigation... these are law enforcement procedures, investigative powers.”

Seven West Media wishes to note that, as seems to have been acknowledged elsewhere including in the judgment of Justice Jagot, there was no criminal case between the AFP and Seven West Media at any time. Rather, the evidence given by the AFP seems to conflate the question of how to categorise the nature of the powers exercisable by the AFP under sections 202 and 225 of the Proceeds of Crime Act (which may be seen as similar to investigative powers provided to the AFP under the Crimes Act) and the nature of the dealings between the AFP and Seven West Media during the relevant period. It is important to note that there was no “case” between the AFP and Seven West Media and indeed there never would be such a “case”.

Further, Mr Gray from the AFP asserted during his evidence that the Proceeds of Crime Act “requires” the Law Enforcement Agency, in this case the AFP, “to attempt to stop that money getting into the hands of the notorious criminal”. This is not strictly correct. Rather, the Proceeds of Crime Act empowers the AFP to apply for Orders to confiscate or restrain the payment of such money, which Orders may be made by the Court having taken into account certain matters.

There is nothing in the Proceeds of Crime Act which dictates what action must be taken by the AFP in any circumstances. In particular, the Proceeds of Crime Act does not require, or even establish any selection criteria for, the AFP to undertake any type of investigation or commence any type of proceeds of crime application.

However, Mr Gray also conceded that “when you actually look at the rest of the POCA, these literary proceeds provisions do not really fit all that well...no-one has committed a crime here.” (Hansard page 15).

In Seven West Media's submission, the nature of the investigative powers provided in the POCA are disproportionate to and incompatible with the proceeding which may ultimately be commenced for the recovery of literary proceeds such that legislative change is warranted to restore balance and sense to the process and procedure of literary proceeds matters.

Given the level of confusion that appeared to exist in the minds of the AFP as to whether this was indeed a civil or criminal matter, it is our view that the literary proceeds provisions

of the PoCA should be moved to a separate piece of legislation, to avoid any issues of this nature in future.

4. Section 126H and protection of journalists' sources

Assistant Commissioner Jabbour referred to the protections offered under section 126H of the *Evidence Act* which provides some protection for journalists' confidential sources. This evidence was given in response to questions by Senator Seselja at Hansard page 19. Assistant Commissioner Jabbour suggested that the AFP would comply with section 126H where relevant.

However, the mere existence of section 126H of the *Evidence Act* is not an answer to the concerns raised by Seven West Media and others in their submissions to the Inquiry. This is because the existence of that section does not act as a basis for refusing to provide documents in response to a section 202 Production Order or a section 225 search warrant, nor is it a basis to object to the AFP reading such material once it has been seized.

Had confidential source material been read or seized by the AFP from Seven West Media, there is nothing which could have protected the disclosure of those documents to the AFP apart from a claim for legal professional privilege.

In our view some express recognition of the ability to claim protection in relation to journalists' sources should be incorporated into the relevant literary proceeds legislation.

5. AFP process

When questioned about the process involved in the AFP applying for search warrants and section 246 Orders against Seven West Media and others, the AFP has admitted a breakdown in procedure. However, there appeared to be some attempt by the AFP officers to suggest that the Federal Court judgment of Jagot J related only to validity of the instruments used in the search warrants (i.e. the warrants and section 246 Orders) and that the judgment did not "call into question the process" (see Hansard page 20, Acting Commissioner Colvin).

In fact, the judgment delivered by Jagot J on 26 March 2014 criticised both the form of the documents used by the AFP, as well as the process engaged in having those documents issued by the Magistrates. Justice Jagot was particularly critical of the way in which the AFP presented its case, on her Honour's interpretation, to the issuing Magistrates and the misleading way in which the AFP led the Magistrates into error by not explaining to the Magistrates the nature of the proceedings before them (see [66] to [84]).

This aspect of her Honour's judgment involves as substantial and important criticism of the processes engaged in by the AFP, which goes beyond the forms of the documents used.

6. Number of AFP agents

There was some discussion about the number of AFP members deployed to conduct the execution of the search warrants on 18 February 2014. Assistant Commissioner Jabbour asserted that a total of 30 AFP members were deployed (Hansard page 25).

On our calculation, that number appears to be incorrect. On the basis of the detailed information provided by Assistant Commissioner Jabbour, the correct numbers are:

- (a) 9am at Stanley Street, Darlinghurst: a total of 7 members comprising 2 members and a further 4 members and one member from the computer forensics team;

- (b) At 9.02am at Seven West Media: at total of 13 members, comprising 4 members and a further 8 members and one member of the computer forensics team;
- (c) At 9.06am at Pacific Magazines, a total of 9 members being 3 members plus a further 5 members and one member of the computer forensics team; and
- (d) At 9.09am at Addisons, a total of 7 members, being 3 initially plus a further 3 and one member of the computer forensics team.

On the basis of these numbers, the total of AFP members deployed at around 9am was 36, not 30. A further group of members were deployed later in the afternoon to other premises, but Seven West Media understands the AFP to say that the members used on those premises came from within the 36 members deployed on other searches.

Seven West Media does not and has never made the assertion that 36 members of the AFP were involved in the search of a single office or premises during the execution of the search warrants. However, Seven West Media notes that 36 Federal Agents, from the Serious and Organised Crime Portfolio who were deployed in relation to this matter seems to be an entirely disproportionate use of limited Commonwealth resources for the purpose of gathering information which may or may not lead to a potential civil application to restrain the payment of money from Seven West Media to Schapelle Corby.

In our view, the use of 36 professionally trained AFP agents on this matter is reason alone for a need for fundamental changes in the process and procedures involved in literary proceeds orders.

ANNEXURE A

Holly Tancred

From: Justine Munsie
Sent: Monday, 17 February 2014 4:24 PM
To: 'Sandon, Adam'
Subject: RE: Production Order [DLM=Sensitive:Legal]
Attachments: LEtter to AFP 17022014.pdf

Mr Sandon

Please see our attached letter addressed to Det Superintendent Danetto.

Regards

Justine Munsie | Partner
ADDISONS

Level 12, 60 Carrington Street, Sydney NSW 2000

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From: Sandon, Adam
Sent: Monday, 17 February 2014 11:50 AM
To: Justine Munsie
Subject: Production Order [DLM=Sensitive:Legal]

Sensitive:Legal

Justine,

| Please see attached letter.

Yours Faithfully,



ADAM SANDON
TEAM LEADER
SERIOUS & ORGANISED CRIME
www.afp.gov.au

Sensitive:Legal

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AFP Web site: <http://www.afp.gov.au>



17 February 2014

Our Ref: JMM:SEV001/4053

Mr Stephen Dametto
Detective Superintendent
Australian Federal Police
110 Goulburn Street
SYDNEY NSW 2000

PRIVATE AND CONFIDENTIAL

By Email:

Dear Mr Dametto

Production Order: Seven West Media Limited

We refer to your letter dated 17 February 2014.

By way of clarification, we note that it was not at our or Seven's request that the documents sought in the production order be produced in two tranches as described in your letter. That method of production was stipulated by the AFP. Seven's suggested method of production was set out in Ms Munsie's email to Federal Agent Jeff Kokles sent at 12.42pm on Friday 14 February 2014.

We confirm that Seven has not yet produced all documents in response to the production order but has taken and is continuing to take all reasonable steps to comply with the terms of the order.

This was made clear at the time of production shortly before 4pm last Friday, 14 February, when Justine Munsie produced documents under cover of our letter to Agent Kokles in the presence of two other officers.

At the time of production, Ms Munsie informed Agent Kokles that:

1. All documents in response to the production order so far as they relate to Seven's television programs have been produced. In response to your query regarding the 7 February agreement headed "Mercedes Corby Exclusivity Agreement", there are no funds to be paid except for the matters referred to in the agreement. Accordingly, no such documents have been produced.
2. The 24 January 2014 letter agreement between New Idea and Mercedes Corby is an unsigned copy of the agreement. Seven is continuing to search for documents associated with that agreement, including documents in relation to the Fee referred to in the agreement and will produce them as soon as possible.
3. Seven has produced several other agreements between Seven's magazine division and other persons, including persons unrelated to the Corby family, which predate 1 January 2014 and which fall within the terms of the broadly drafted production order. Ms Munsie asked Agent Kokles to clarify whether the production order was intended to capture documents relating to those agreements, especially those between Seven and third parties not related to the Corby family. We have not yet received a response to this request.
4. Seven is aware of arrangements which its magazine division has entered into in the past for the purchase of photos relating to the Corby family but which Seven had not yet been able to locate in the limited time since service of the production order. These include arrangements

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Mr Stephen Dametto

17 February 2014

with third parties such as freelance photographers. Ms Munsie asked Agent Kokles to clarify whether the production order was intended to capture documents relating to those arrangements. We have not yet received a response to this request.

In response to your reference to last week's WHO magazine article, we are instructed that there were no payments made in relation to the information contained in that article and accordingly no documents have been produced. Further, apart from some arrangements which may have been made regarding the purchase of photos as described in paragraph 4 above, there are no documents in response to the production order which relate to WHO magazine.

Seven is continuing to search for and will produce any additional documents in response to the production order as soon as they are located. In the meantime, we would appreciate your responses to the requests for clarification made of Agent Kokles and set out above.

Yours faithfully

Justine Munsie
Partner

ANNEXURE B

Holly Tancred

From: Justine Munsie
Sent: Monday, 17 February 2014 5:46 PM
To: Adam Sandon
Subject: Fwd: CONFIDENTIAL: Production order
Attachments: image001.gif; ATT3053534.htm; image002.jpg; ATT3053535.htm; Mercedes Corby 11-Jul-11.pdf; ATT3053536.htm; Mercedes Corby 24-Jan-14.pdf; ATT3053537.htm; Rosleigh Rose 28-Aug-13.pdf; ATT3053538.htm; Mercedes Corby 20-Apr-12.pdf; ATT3053539.htm; Mercedes Corby 31-Mar-11.pdf; ATT3053540.htm

Mr Sandon

As discussed, I attach, by way of further production, remittance advices which relate to the New Idea contracts dated 2011 to 2014 and provided by Seven last Friday. .

Please let me know if you require production of hard copies tomorrow.

Regards

Justine Munsie | Partner
ADDISONS

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