R v Hunt [2014] NTSC 19

PARTIES:	THE QUEEN
	v
	HUNT, Paul Vincent
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21326215
DELIVERED:	2 June 2014
HEARING DATES:	8 & 9 May 2014
JUDGMENT OF:	HILEY J

CATCHWORDS:

CRIMINAL LAW – Evidence – Judicial discretion to admit or exclude - Evidence obtained in consequence of an impropriety – Defective police investigation – Whether failure to involve Indonesian Police is unlawful or improper – *Mutual Assistance in Criminal Matters Act 1987* (Cth)
- *Evidence (National Uniform Legislation) Act 2011* (NT) s138

CRIMINAL LAW – Evidence – Judicial discretion to admit or exclude - Evidence obtained in consequence of an impropriety – Defective police investigation – Accused not cautioned or informed of rights prior to questioning - *Evidence (National Uniform Legislation) Act 2011* (NT) ss138 & 139

CRIMINAL LAW – Evidence – Judicial discretion to admit or exclude - Evidence obtained in consequence of an impropriety – Defective police investigation – Misleading conduct of police in obtaining consent to search - *Evidence (National Uniform Legislation) Act 2011* (NT) s 138

CRIMINAL LAW – Evidence – Judicial discretion to admit or exclude - Evidence obtained in consequence of an impropriety – Defective police investigation – Whether subsequent conduct of police affects admissibility of evidence - *Evidence (National Uniform Legislation) Act 2011* (NT) s 138

Director of Public Prosecutions v Carr (2002) 127 A Crim R 151; *George v Rockett & Anor* [1990] HCA 26; (1990) 170 CLR 104; *Parker v Comptroller-General of Customs* [2009] HCA 7, (2009) 83 ALJR 494; *Perry v Northern Territory* [2014] NTSC 17; *R v Camilleri* (2007) 68 NSWLR 720; *R v Dalley* (2002) 132 A Crim R 169; [2002] NSWCCA 284; *R v FE* [2013] NSWSC 1692; *R v Liddington* (1977) 18 WAR 394; *R v Rondo* [2001] NSWCCA 540; *Ridgeway v The Queen* (1995) 184 CLR 19; *Robinson v Woolworths Ltd* (2005) 64 NSWLR 612; [2005] NSWCCA 426; *Tasmania v Crane* (2004) 148 A Crim R 346; *Winkler v Director of Public Prosecutions* (1990) 25 FCR 79 – applied

R v Naa (2009) 76 NSWLR 271 – considered

Bollag v Attorney-General (1997) 79 FCR 198; *Cohns Industries Pty Ltd v Deputy Commissioner of Taxation (Cth)* (1979) 37 FLR 508; *R v Charlie* (1995) 121 FLR 306; *R v Cornwell* (2003) 57 NSWLR 82; *R v Hancock* [2011] NTCCA 14; *R v Jones* (1999) 108 A Crim R 50; *R v MM* [2004] NSWCCA 364; *R v Su* (1995) 129 FLR 120; *R v Tkacz* (2001) 25 WAR 77; *R v Versac* [2103] QSC 46; *Victims Compensation Fund v Brown and Ors* (2002) 54 NSWLR 668 – referred to

Crimes Act 1914 (Cth)
Evidence (National Uniform Legislation) Act (NT) ss 138 & 139
International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)
Mutual Assistance in Criminal Matters Act 1987 (Cth)
Mutual Assistance in Criminal Matters Treaty, Australia – Indonesia, signed 27 October 1995 (entered into force 17 July 1999)
Police Administration Act 1978 (NT) s 143

REPRESENTATION:

Counsel:

Applicant:	J Pappas
Respondent:	GR Rice QC

Solicitors:

Applicant:	Ben Aulich & Associates
Respondent:	Commonwealth Department of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v Hunt [2014] NTSC 19
No. 21326215

BETWEEN:

THE QUEEN
Respondent

AND:

PAUL VINCENT HUNT
Applicant

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 2 June 2014)

Introduction

[1] The applicant has been charged with 12 offences of producing, and one offence of possessing, child pornography material outside Australia, contrary to s 273.5(1)(a) of the *Criminal Code (Cth)* and one offence of possessing child abuse material in the Northern Territory, contrary to s 125B of the *Criminal Code 1983 (NT)*. The offences are alleged to have been committed at various times between about 28 March and 31 July 2012.

[2] The material relating to the 13 offences alleged to have been committed outside Australia was found on an external hard drive which was identified during a search carried out by officers of the Australian Federal Police (**AFP**) on the morning of 31 July 2012 at the residence in Jakarta, Indonesia, of the applicant and some of his family.[1] The material relating to the offence alleged to have been committed in the Northern Territory was found on a thumb drive which other members of the AFP received from the applicant after they approached him near his hire car that was parked on the Esplanade opposite the Mantra Hotel, Darwin, also on the morning of 31 July 2012.[2]

[3] In addition to the images found on the external hard drive located in the Jakarta residence, and those found on the thumb drive received in Darwin, the Crown also proposes to tender and rely on other evidence including admissions made by the applicant's wife (JH)[3] during the search at the residence, admissions made by the applicant (PH) during the enquiries on 31 July 2012, and evidence found on and investigations of the computer which the applicant had with him in Darwin at the time.

[4] The applicant seeks orders pursuant to s 138(1) of the *Evidence (National Uniform Legislation) Act 2011* (NT) (**the Act**) that none of that material be admitted into evidence at the trial.

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1 I shall refer to this as **the Jakarta material**.
2 I shall refer to this as **the Darwin material**.
3 I propose to use initials to refer to relevant family members, including in quotations.

[5] Prior to the commencement of the voir dire on 8 May the parties filed written outlines of submissions.[4] A number of documents were tendered,[5] and the following witnesses were called: Federal Agent Sandra Booth, Federal Agent Timothy Davis, Federal Agent Christopher Sheehan, Federal Agent Peter Mellor, Federal Agent Malcolm Young, and JH. The parties subsequently provided further written submissions.[6]

Exclusion of improperly or illegally obtained evidence

[6] The applicant contends that the material should be excluded because of "significant impropriety on the part of the investigating police" without which there would be no evidence of criminal conduct.[7]

[7] The principles established by the common law have now been enshrined in s 138 of the Act.

Sections 138 and 139

[8] The relevant parts of ss 138 and 139 of the Act are as follows:

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4 "Outline of Voir Dire Submissions on behalf of the Crown" dated 22 April 2014 ("**Respondent's submissions**") and "Applicant's Outline of Submissions on Voir Dire Application" dated 5 May 2014 ("**Applicant's submissions**").

5 Tendered by the Crown were: P1 Brief of Evidence; P2 Transcript of Committal before Cavanagh SM dated 11/2/14; P3 Emails of 27/7/12; P4 Letter of 26/7/12 to Bryan Parker; P5 Letter of 22/5/12 of Todd Hunter; P6 Letter w/ redactions of 21/2/14 of Christopher Sheehan and P7 Affidavit for warrant to search premises. Tendered by the defence were: D2 Letter of 28/6/13 of Christopher Sheehan; D3 Handwritten notes of Christopher Sheehan of 27/5/12; D4 Casenote of 31/7/12 and D5 Email from Christopher Sheehan dated 25/7/12.

6 "Applicant's Further Submissions" dated 16 May 2014 and "Respondent's Further Submissions" dated 21 May 2014.

7 Applicant's submissions [5].

"138 Exclusion of improperly or illegally obtained evidence

(1) Evidence that was obtained:

(a) improperly or in contravention of an Australian law; or

(b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) …

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

(a) the probative value of the evidence; and

(b) the importance of the evidence in the proceeding; and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(d) the gravity of the impropriety or contravention; and

(e) whether the impropriety or contravention was deliberate or reckless; and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

139 Cautioning of persons

(1) For the purposes of section 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:

(a) the person was under arrest for an offence at the time; and

(b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person; and

(c) before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(2) …

(3) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.

(4) Subsections (1), (2) and (3) do not apply so far as any Australian law requires the person to answer questions put by, or do things required by, the investigating official.

(5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if:

(a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning; o(b) the official would not allow the person to leave if the person wished to do so; or

(b) the official would not allow the person to leave if the person wished to do so; or

(c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

(6) A person is not treated as being under arrest only because of subsection (5) if:

(a) the official is performing functions in relation to persons or goods entering or leaving Australia and the official does not believe the person has committed an offence against a law of the Commonwealth; or

(b) the official is exercising a power under an Australian law to detain and search the person or to require the person to provide information or to answer questions."

[9] The "fundamental concern" of s 138 has been said to be:

> "…to ensure that, if the law has been breached, or some other impropriety has been involved in obtaining the evidence, this is balanced against the public interest in successfully prosecuting alleged offenders. The competing interests are obedience to the law in the gathering of evidence and the enforcement of the law in respect of offenders."[8]

[10] The reasoning process required by s 138 has been described by Simpson J in *R v Dalley* [9] as follows:

> "[16] The argument put on behalf of the appellant at first instance, and in this Court, was that the admissions and incriminating statements made by him during the course of the interview constituted evidence that had been obtained improperly or in contravention of an Australian law or in consequence of such impropriety (or improprieties) or contravention(s). The first question which arises is, therefore, whether any such improprieties or contraventions were established. The second question is whether, if so, any of the evidence on which the Crown relied was obtained by or in consequence of such impropriety or contravention. The third (if the first and second are answered affirmatively) is whether, having regard to the matters identified in subs(3) as matters to be taken into account and any other relevant matters, the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way the particular evidence was obtained. Unless that question is also answered affirmatively, the evidence is not to be admitted."

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8 *R v Camilleri* (2007) 68 NSWLR 720 at 727, [31] per McLellan CJ at CL.

9 (2002) 132 A Crim R 169; [2002] NSWCCA 284 at [16].

[11] The need for a causal connection between the first two questions was further referred to by her Honour at [86].[10]

[12] As to the onus of proof, per French CJ in *Parker v Comptroller-General of Customs*: [11]

> "The party seeking to exclude evidence has the burden of showing that the conditions for its exclusion are satisfied, namely that it was obtained improperly or in contravention of an Australian law. The burden then falls upon the party seeking the admission of the evidence to persuade the Court that it should be admitted. There is thus a two stage process."

[13] Section 138(3) sets out a number of matters which the court must take into account in exercising the discretion conferred by s 138(1). Many of these are similar to those which courts would take into account at common law.[12]

Impropriety

[14] As the applicant points out, s 138(1) does not just relate to illegally obtained evidence but to evidence obtained improperly or in consequence of an impropriety.

[15] Subsections 139(1) & (2) have the effect of deeming evidence of a statement made or an act done by a person during questioning to have

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10 See also *R v Cornwell* (2003) 57 NSWLR 82 at 89, [25]-[27].

11 *Parker v Comptroller-General of Customs* [2009] HCA 7; (2009) 83 ALJR 494 at 500-501, [28] (***Parker v Comptroller-General of Customs***).

12 See for example the factors listed by Applegarth J in *R v Versac* [2103] QSC 46 at [6] (***Versac***).

been obtained improperly in certain circumstances, such as where the person should have been given a caution.

[16] Except where provisions such as those apply, the Court will have to decide for itself whether or not particular evidence was obtained improperly or in consequence of an impropriety.

[17] There is no definition of "improperly" or "impropriety" in the Act. It has been said that the word should not be "narrowly construed".[13]

[18] In considering the exercise of the discretion under s 138, in *Robinson v Woolworths Ltd*[14] Basten JA cited the following passage from the joint judgment of Mason CJ, Deane and Dawson JJ in *Ridgeway v The Queen*:[15]

> "…It is neither practicable nor desirable to seek to define with precision the borderline between what is acceptable and what is improper in relation to such conduct. The most that can be said is that the stage of impropriety will be reached in the case of conduct which is not illegal only in cases involving a degree of harassment or manipulation which is clearly inconsistent with minimum standards of acceptable police conduct in all the circumstances, including, amongst other things, the nature and extent of any known or suspected existing or threatened criminal activity, the basis and justification of any suspicion, the difficulty of effective investigation or prevention and any imminent danger to the community."

[19] His Honour considered that:

> "…because the Act does not define the concept of impropriety, it is difficult to perceive any necessary intention on the part of

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13 *Director of Public Prosecutions v Carr* (2002) 127 A Crim R 151 per Smart J.
14 (2005) 64 NSWLR 612; [2005] NSWCCA 426, at [18].
15 (1995) 184 CLR 19, at 37.

> the legislature to vary the principles collected in Ridgeway, derived from earlier Australian authority. Accordingly, those principles should be applied.
>
> It follows that the identification of impropriety requires attention to the following propositions. First, it is necessary to identify what, in a particular context, may be viewed as "the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement". Secondly, the conduct in question must not merely blur or contravene those standards in some minor respect; it must be "quite inconsistent with" or "clearly inconsistent with" those standards. Thirdly, the concepts of "harassment" and "manipulation" suggest some level of encouragement, persuasion or importunity in relation to the commission of an offence: thus, in describing the first category of cases the joint judgment in Ridgeway (at 39) referred to offences being procured or induced." [16]

[20] The third proposition is not applicable to a case of the present kind. Indeed both *Ridgeway* and *Robinson* were cases involving entrapment by police causing or facilitating a crime to be committed. However, as the applicant points out, some concepts of relevance to the present matter can be extracted from those authorities, namely:

(a) What are the minimum standards of conduct (propriety) to be expected of law enforcement personnel?

(b) Have those standards been clearly breached?

(c) How egregious was the breach or breaches?

(d) How difficult would it have been to gather the evidence in question without breaching those standards?

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[16] (2005) 64 NSWLR 612; [2005] NSWCCA 426, [22]-[23].

[21] In *R v Rondo,*[17] Spigelman CJ said that improprieties or illegalities for the purposes of s 138 of the Act are to be viewed cumulatively and not disjunctively. At paragraphs [1] to [8] His Honour identified a number of ways in which the learned trial judge failed to view the various illegalities in light of other defects in the investigative procedure as he purported to engage in the balancing exercise under s 138 of the New South Wales Act. In that case all of the defects flowed from police stopping a motor vehicle without reasonable cause or suspicion. There followed an illegal search, however the trial judge concentrated on the illegal search without properly taking into account the antecedent improper stopping of the vehicle.

[22] Per Smart AJ in that case:

> "[60] In the exercise of his discretion the judge did not take into account that the Supra was unlawfully stopped and that all else flowed from that. That stopping of the vehicle amounted to an unlawful interference with the appellant's freedom of movement and harassment. The failure to take such an important matter into account vitiates the judge's exercise of his discretion. Section 138 refers to evidence obtained "in consequence of" an impropriety or of a contravention of an Australian law. The words "in consequence of" are important in the present case."

[23] I agree with the applicant's contention that for evidence to be obtained improperly or in consequence of an impropriety it follows *ipso facto* that the impropriety must occur before the evidence is obtained. I also accept that some improper or illegal conduct after the evidence has

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17 [2001] NSWCCA 540 (24 December 2001).

been obtained can be taken into account as part of the subsequent balancing exercise.[18]

Background and Facts

[24] The AFP operates a Child Protection Operations (**CPO**) unit from its Canberra headquarters. Federal Agent Peter Mellor was assigned to that unit. A technological tool used by CPO identified that between 9 April 2011 and 6 October 2011 907 child exploitation material (**CEM**) images were downloaded to a computer. IP addresses associated with the download were subscribed to by the applicant's wife JH, at a particular address in Nicholls, ACT. At the time, that residence was occupied by the applicant, his wife and their two teenage children.

[25] In January 2012, the applicant, a military officer, commenced a posting in Jakarta, where he and his family were provided with accommodation.

[26] An internal AFP memorandum dated 21 May 2012 (the **21 May memorandum**) entitled "CPO Investigation concerning identified CEM suspected to have been accessed by a member of ADF" was sent from Superintendent Todd Hunter NCCPO HTCO[19] to the NMHTCO[20] and

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18 Cf *Tasmania v Crane* (2004) 148 A Crim R 346 per Blow J at [21].

19 National Coordinator Child Protection Operations High Tech Crime Operations.

20 National Manager High Tech Crime Operations.

MCCO.[21] FA Mellor assisted with the drafting of that document and was satisfied as to its accuracy.

[27] The memorandum included most of the facts noted above. After referring to the fact that PH had previously been posted to Indonesia it said: "From the information and inquiries to date PH would appear to be the principle (sic) suspect."

[28] It then stated:

> "Intelligence at this time is strictly limited to the downloading of images however it should be noted that Indonesia is a destination of preference for offenders travelling to commit sex offences against children. Suspects identified as accessing CEM have been known to extend their access and possession of CEM to contact (CST) offending."

[29] The memorandum set out four possible options for further investigation. AFP decided to attempt a search of the family residence in Jakarta on 31 July 2012. There being no warrant, any search could only be consensual. Police were aware that the applicant's wife would be home on the morning of 31 July, and that PH had travelled to Darwin on business on 24 July and was staying at the Mantra Hotel on the Esplanade, Darwin.

[30] By letter dated 26 July 2012 Commander McEwan of AFP wrote to Captain Parker, the Provost Marshal of the ADF (the **ADF briefing paper**) providing details about the investigation. The letter indicated

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[21] Manager Cyber Crime Operations.

that the AFP had exhausted all avenues of inquiry, but had sufficient evidence to believe that a person at the residence occupied by the applicant and his family has "accessed, downloaded and potentially uploaded a substantial amount of CEM" between April and October 2011. It indicated that the AFP proposed to deploy members to Darwin to execute a search warrant on the applicant's accommodation there and to interview him prior to leaving Darwin, and that AFP members in Indonesia would "interview family members residing in Jakarta and attempt to obtain the suspect device for forensic analysis." The letter then said: "It must be stated that a suspect has the presumption of innocence and this course of action is designed to establish the identity of the offender."

[31] FA Mellor and other police travelled to Darwin intending, if possible, to search the applicant on 31 July and question him about the downloading activity. There were several emails between FA Mellor and AFP colleagues based in Jakarta over the days prior to 31 July.. An application made to a Magistrate in Darwin on 30 July for warrants to search the applicant and his room was refused (or technically, deferred) for insufficient grounds.

[32] Police conducted a search of the applicant's office in Jakarta on 29 July, and found nothing relevant there. On 30 July, FA Booth and FA Davis met and planned how they would go about the search at the Jakarta residence the next day.

[33] I accept that at all times prior to the searches, the evidence and information available to police with respect to the downloading activity was limited to that recited in the memorandum and noted above.

[34] At about 6.00 am on the morning of 31 July, AFP officers FA Sandra Booth, FA Tim Davis and others went to the residence in Jakarta. Meanwhile FA Mellor and others positioned themselves near the Mantra Hotel in Darwin.

[35] A voice recorder operated by FA Davis recorded the conversation passing between police and JH during the Jakarta search. The conversations have been transcribed.

[36] Soon after JH had allowed the AFP officers into the house and FA Booth had provided some information about the purpose of the search, JH asked to speak with her husband by phone. This occurred between 6.11 am and 6.15 am. Some words were recorded by the recording device and others were overheard by police. JH was overheard saying the words "coordinated sting" to the applicant.[22] The respondent contends that this was a reference to the indication given to her by FA Booth (at about 6.00 am) that "we're only here at this time because it's coordinated with things that are going on in Australia as well." JH

[22] Exhibit P1 – Brief of Evidence - Statement of FA Sandra Louise Booth, dated 29 November 2012.

then signed a document consenting to the search and told police "P was more than adamant go for it."[23]

[37] In a desk drawer the police found an external hard drive with 407 CEM images on it and 1 video file. Although not recorded by FA Davis' recorder, there is evidence that JH told police that the applicant owned the external drive. FA Davis telephoned FA Mellor and told him about finding the CEM and JH's indication that the applicant owned the hard drive.

[38] In Darwin, at about 10.35 am, the applicant left the Mantra Hotel and was walking across the road to his car which was parked on the Esplanade when he was approached by FA Mellor and others. There was a brief exchange during which the applicant indicated he had electronic equipment in his laptop bag and that police were free to examine it.[24] It was found to contain child pornography. Subsequent forensic examination of a thumb drive revealed 20 image files that had been copied onto the thumb drive, at about 6.20am Jakarta time on 31 July, that is about five minutes after the conclusion of the applicant's conversation with his wife earlier that day.

[39] Examination of a Toshiba laptop found in the laptop bag revealed that the operating system had been reinstalled at 10.08 am Darwin time (or

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23 Exhibit P1 – Brief of Evidence - Record of Conversation of consensual search at Jakarta Residence, at 31.

24 Exhibit P1 – Brief of Evidence - Statement of FA Peter Mellor of 8 February 2013, at 5 [16].

7.38am Jakarta time), the effect of which was to delete previously existing data.[25] 12 of the 20 CEM image files that were located on the thumb drive had been created on the laptop. The laptop was set to Jakarta time zone.

[40] The respondent contends that after the applicant spoke to his wife at 6.15 am (Jakarta time) about the presence of police at the house to search for child pornography in a "coordinated sting", he almost immediately copied selected images from his laptop to the thumb drive and later reset his laptop's operating system to delete all remaining data.

Improprieties

[41] The applicant has alleged a number of improprieties, relating to:

(a) the *Mutual Assistance in Criminal Matters Act 1987* (Cth);

(b) not informing the Indonesian police about the investigation and search;

(c) the search at the Jakarta residence;

(d) the search and questioning in Darwin; and

(e) subsequent conduct particularly while giving evidence at the committal and in this court.

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[25] Exhibit P1 – Brief of Evidence - Computer Forensic Report Summary of Robert Nelson dated 10 September 2012.

Mutual Assistance in Criminal Matters Act and failing to inform or involve the Indonesian police

Applicant's contentions

[42] It is common ground that no assistance was sought from Indonesia under the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (**MACMA**) or the *Mutual Assistance in Criminal Matters Treaty* (the **Treaty**)[26], and that Indonesian police were not informed of the proposed search.

[43] The applicant contended that the AFP regarded the applicant as the principal suspect in relation to child pornography offences committed in Australia, and although the applicant and his family were then resident in Indonesia, AFP made a conscious and reasoned decision not to seek the assistance of Indonesia pursuant to MACMA and the Treaty to investigate his supposed criminality.

[44] The applicant contended that s 6 of MACMA required the AFP to obtain assistance pursuant to the Treaty if assistance was available. If this were so, I would have thought that AFP's failure to do so would have been "in contravention of an Australian law". Even if such

[26] MACMA applies to the Republic of Indonesia subject to the Treaty: *Winkler v Director of Public Prosecutions* (1990) 25 FCR 79 at 90 per Wilcox and O'Loughlin JJ). *The Law of Mutual Assistance in Criminal Matters* (Law No 1 of 2006) (Indonesia) sets out in detail the way in which a request would be dealt with by Indonesian Authorities. In particular, Article 41 describes the issue of a search and seizure warrant and Article 42 sets out the basis on which such a warrant might issue in Indonesia.

failure did not constitute such a contravention, the applicant relies upon the failure as a significant impropriety.

[45] The applicant also contended that the definition of "criminal matters" in s 3 MACMA does not embrace the concept of a "serious offence against an Australian law", and thus offences for which the applicant has been charged in the present matter. The applicant contends that s 6 therefore has the effect that if assistance may be provided or obtained under the MACMA then that is the way it should be obtained. For reasons which I give in [56] below I do not agree with this contention.

[46] As counsel pointed out s 14 of MACMA provides that Australia "may request" Indonesia to obtain, relevantly, a search warrant to search for and seize evidence to be sent to Australia[27] in the course of an investigation "relating to a criminal matter involving a serious offence against an Australian law if there are reasonable grounds to believe that a thing relevant to the … investigation may be located in [Indonesia]."[28]

[47] A decision to seek such assistance could only be made by the Attorney-General.[29] The applicant complained that in the present matter the Attorney-General was not given any opportunity to even consider the matter.

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27 *Mutual Assistance in Criminal Matters Act 1987* (Cth) s 14(2).
28 Ibid s 14(1).
29 Ibid s 10.

[48] The applicant submitted that any assistance provided by Indonesia would have been subject to the law of Indonesia (Articles 6 and 17 of the Treaty) and pursuant to *The Law of Mutual Assistance in Criminal Matters Act* (Law No 1 of 2006) (Indonesia) (Articles 41 to 44) and *The Law of Criminal Procedure Act* (Law No 8 of 1987) (Indonesia) (Articles 7, 33, 35, 125, 128, 163 and 168). The applicant contended that he would have been assured greater protection than he was given under the "informal procedure" which was adopted in this case.

[49] The applicant also pointed out that Australia[30] and Indonesia[31] are both signatories to the *International Covenant on Civil and Political Rights* (the **Covenant**).[32] He contended that he was entitled, consequently, to the protection of the rights recognised under the Covenant including protection from arbitrary or unlawful interference with his privacy, his home and his correspondence. As his home was, at all relevant times, in Indonesia he contended that he was entitled to that protection in Indonesia.

[50] He contended that, on what was known, it seems unlikely that the AFP could have obtained, via mutual assistance, a search warrant in Indonesia to search his home. Article 42 of *The Law of Mutual Assistance in Criminal Matters Act* (Law No 1 of 2006) (Indonesia)

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30 Signed by Australia on 18 December 1972; ratified with reservations and declarations on 13 August 1980 with all such reservations withdrawn except as to articles 10, 14 and 20 on 6 November 1984.

31 Indonesia ratified the covenant on 23 February 2006.

32 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

requires “reasonable belief” as opposed to “reasonable suspicion” in Australia.[33]

[51] He contended that the AFP wished to keep control over the investigation as well as any prosecution and the outcome of any such prosecution and that those considerations arguably robbed him of the protection to which he would have been entitled in Indonesia.

[52] Counsel pointed out that the AFP did not even have sufficient information to obtain a search warrant in Darwin on Monday, 30 July 2012 to search the applicant or his hotel room or his car.

[53] He contended that the decision taken to conduct a police investigation within Indonesian territory without any pre-warning of the International National Police (**INP**) or the Indonesian Government in the face of the Treaty and legislation designed to give effect to the Treaty, was a significant impropriety initiated not at the upper levels of Government but by police officers acting unilaterally and without reference to the Attorney-General.

Consideration

[54] Indonesian police were not informed of the proposed search or requested to assist with the search. In fact it appears that by 27 July

[33] See *George v Rockett & Anor* [1990] HCA 26; (1990) 170 CLR 104.

2012 a decision had been made that: "INP not to be advised until after action is taken."[34]

[55] Sections 5, 6, and 14 of MACMA provide:

> "5 Objects of the Act
>
> The objects of this Act are:
>
> (a) to regulate the provision by Australia of international assistance in criminal matters when a request is made by a foreign country in respect of which powers may be exercised under this Act (whether or not in conjunction with other Australian laws); and
>
> (c) to facilitate the obtaining by Australia of international assistance in criminal matters.
>
> 6 Act not to limit other provision etc. of assistance
>
> This Act does not prevent the provision or obtaining of international assistance in criminal matters other than assistance of a kind that may be provided or obtained under this Act.
>
> 14 Requests by Australia for search and seizure
>
> (1) This section applies to a proceeding or investigation relating to a criminal matter involving a serious offence against an Australian law if there are reasonable grounds to believe that a thing relevant to the proceeding or investigation may be located in a foreign country.
>
> (2) If this section applies to a proceeding or investigation, Australia may request the appropriate authority of the foreign country:
>
> (a) to obtain a warrant or other instrument that, in accordance with the law of the foreign country, authorises:

[34] Exhibit D3 - Handwritten notes of Christopher Sheehan of 27/5/12.

(i) a search for a thing relevant to the proceeding or investigation; and

(ii) if such a thing, or any other thing that is or may be relevant to the proceeding or investigation is found as a result of the search—the seizure of that thing; and

(b) to arrange for the thing that has been seized to be sent to Australia.

(3) If the appropriate authority of the foreign country has obtained any thing relevant to the proceeding or investigation by means of a process authorised by the law of that country other than the issue (as requested by Australia) of a warrant or other instrument authorising the seizure of the thing, the thing:

(a) is not inadmissible in evidence in the proceeding; or

(b) is not precluded from being used for the purposes of the investigation;

on the ground alone that it was obtained otherwise than in accordance with the request."

[56] I disagree with and reject the applicant's contention that the AFP was required to obtain assistance pursuant to the Treaty if assistance was available.[35] I also reject the contention noted in [45] above. I consider that the definition of "criminal matters" does extend to most if not all offences prescribed in Australian criminal legislation including the legislation under which the applicant has been prosecuted. In my view the words following the word "includes" in the definition are there to enlarge the normal meaning of "criminal matters", not to limit it.[36]

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35 Cf [44] above.

36 See for example DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011) [6.61] and [6.64]; *Cohns Industries Pty Ltd v Deputy Commissioner of Taxation (Cth)* (1979) 37 FLR 508 at 510; *R v Tkacz* (2001) 25 WAR 77 at 88- 92 [43] – [57]; *Victims Compensation Fund v Brown and Ors* (2002) 54

[57] Rather I consider that s 6 MACMA makes it plain that that Act does not provide an exhaustive mechanism for seeking international assistance. That Act is not a code.[37]

[58] This conclusion is consistent with the Explanatory Memorandum to the Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996, which substituted section 6 in its current form:

> "This item repeals existing section 6 and inserts a replacement section. The replacement section provides that the Act does not prevent the provision or obtaining of assistance other than of a kind that may be provided or obtained under this Act. This clause is intended to clarify that assistance that may be requested or provided through other channels may continue to be requested or provided in that manner as long as it is not assistance of a kind that may only be requested or provided under the Act. The Act provides that only the Attorney-General may request or provide assistance that requires the exercise of coercive powers (for example the issue of a summons requiring a person to attend court to give evidence). Where the assistance requested or provided does not require the exercise of coercive powers and other channels exist for the provision or obtaining of the assistance then those channels may be used, for example, channels such as Interpol, World Customs Organisation, Australian Federal Police Liaison Officer network."

[59] I also agree with the respondent's contention that s 14 provides a mechanism for seeking assistance from a foreign country to conduct a coercive search in that country. The effect of the words "may request" in s 14(2) is that those who are investigating a criminal matter involving a serious offence "may", not "must", invoke the procedures under MACMA. Moreover, s 14 cannot be used where the basis for

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NSWLR 668 at 674-5 [28] – [36] and *Perry v Northern Territory* [2014] NTSC 17 at [31] – [44].

[37] *Bollag v Attorney-General* (1997) 79 FCR 198 at 213.

making a request for such assistance does not exist. Nothing in the MACMA requires an investigating body to make a request whenever any kind of investigation is to be pursued in a foreign country.

[60] Commander Sheehan explained:

> "There is a significant amount of work between the AFP and INP and indeed between AFP and other foreign law enforcement agencies that takes place at a police to police level without the need to use mutual assistance requests and the treaty process."

[61] The memorandum of 21 May 2012 (referred to in [26] above) identified 4 options and sets out "pros" and "cons" in respect of each option, one of which was to make a "mutual assistance request" presumably under MACMA. Another option was to involve the Indonesian police. There were a number of "cons" identified in respect of each of those options, including possible diplomatic consequences, lower penalties (for possession of CEM) in Indonesia and limited ability for AFP to influence the outcome. The author of the memorandum recommended the fourth option which was that the matter be investigated jointly with the ADF.

[62] I do not consider that there was anything unlawful or improper about AFP proceeding in the way that it did. In addition to what I regard as "operational" reasons for proceeding as it did (namely those referred to in the memorandum) it is apparent (and is accepted by the applicant)[38] that there was insufficient evidence to satisfy the relevant test required

[38] See [50] above.

by s 14 MACMA. Police did not know what if anything might be found until they had access to whatever computer devices might have used the IP address.

[63] Accordingly I accept the contentions put on behalf of the respondent that in the circumstances which existed here, where:

(a) it was not unlawful not to use MACMA procedures to conduct the kind of inquiry undertaken, and that Act was not an exhaustive mechanism for seeking assistance;

(b) it is routine for a "significant amount of work" to take place cooperatively between AFP and overseas police agencies;

(c) no assistance from Indonesia was needed, or wanted; and

(d) grounds did not exist to invoke s 14, even if that had been the preferred option;

there was no impropriety in not making a request to Indonesia under MACMA or otherwise.

[64] The AFP investigators had no other practical option but to further this part of their investigation by way of consensual search. This did not require assistance from Indonesian police, either formally or informally.

[65] The applicant was also critical of the respondent for not informing INP of the search for another year or so when Commander Sheehan provided a letter of 28 June 2013[39] and spoke to Inspector General Salamuddin, Chief of International Relations Division, INP.[40]

[66] As the respondent pointed out the inquiry by way of consensual search was of Australian citizens, in relation to a possible domestic offence, not an offence committed in Indonesia or against Indonesian law. In those circumstances, as Commander Sheehan said: "there was no need to advise or involve the INP." Much later, some statements were obtained from Indonesians. Participation in that exercise was sought and obtained from INP.[41]

[67] Commander Sheehan's diary notes (Exhibit D5) record his preference to have informed INP before the event,[42] not because that was a requirement in any sense, but for "courtesy" and to maintain the relationship.

[68] When INP were informed by Commander Sheehan on 28 June 2013, there was no expression of concern about the course that had been followed.

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39 Exhibit D2

40 In Applicant's Further Submissions the applicant was critical of the contents of that letter and asserts that it was misleading and that Commander Sheehan's evidence about that letter sheds doubt about the accuracy of his evidence. I shall return to that later when exercising my discretion under s 138(1).

41 Exhibit P6.

42 See also testimony to that effect.

[69] I do not consider that there was anything improper about failing to inform the INP of the investigation, and in particular of the proposed search at the Jakarta residence. The failure to inform or involve the INP, either by notifying them in advance or by requesting their assistance under MACMA, the Treaty or otherwise, did not constitute an impropriety of the kind contemplated in s 138.

The search at the Jakarta residence

Applicant's contentions

[70] The applicant contended that having gained access to the applicant's residence in Jakarta at 6.00 am on 31 July 2012 members of the AFP deliberately misled the applicant's wife as to their enquiries whilst at all times being aware of the importance of her informed consent to any search of the premises which might ensue. They engaged her in conversation and obtained thereby at least one admission against his interest without informing her that her husband was the subject of their investigations.

[71] He contended that his wife was inveigled to consent to a search of the home in Jakarta and she could not tell him any more about the reason for the search than she was told by those in attendance. He says that whether he may have "known" that he was the target of the investigation is irrelevant. He contended that in acting as they did the AFP deprived the applicant of the protection of Indonesian law and not

only violated the sanctity of JH's residence but caused her to unwittingly inculpate her husband in serious criminal activity when she would have been entitled, as a matter of law, to stand mute.

[72] In the Applicant's Further Submissions the applicant contended that the AFP officers, in particular FA Booth and FA Mellor, "lied and misled JH to gain access to the family home and confronted PH in a manner designed to convey to him that he had but little option to comply with their demands to see the electronic devices in his possession." It was submitted that:

> "There can be no pretence, despite the coordinated bleating of all of the police witnesses, that this was not a deliberate, planned, carefully executed operation involving a conscious and malicious misleading of JH in order to invade the sanctity of her home."

[73] The Applicant's Further Submissions include the following propositions:

(a) It is clear that the applicant was the principal suspect from the outset.

(b) It is clear that the AFP operation was timed to coincide with his presence in Australia and a desire that he not return to Indonesia for fear of causing political embarrassment or other fallout.

(c) It is clear that the search in Jakarta was integral to the operation, particularly when it proved impossible to obtain warrants to search PH's hotel room, his car or his person.

(d) It is clear that no other person or people were under serious suspicion and it is clear that JH was lied to and misled and the applicant's rights were trammelled because it suited the convenience of investigating authorities.

[74] I agree with the propositions in subparagraphs (b) and (c) above.

[75] For reasons that I set out below, I also agree that the applicant was the main "suspect".[43] But I consider that he was only one of a number of people who, at that point in time, could have been and was suspected of an offence, namely downloading the CEM the previous year at the IP address in Canberra. (Unless otherwise apparent, I am not using the word "suspect" in the sense defined in the *Crimes Act 1914* (Cth) (the ***Crimes Act***)). Rather I am using the word in the more neutral sense of a person who might be under suspicion, for example merely because they may have had an opportunity to commit the relevant offence.)

[76] As to whether JH was lied to and misled and whether the applicant's rights were "trammelled because it suited the convenience of investigating authorities", much depends upon the evidence as to what

[43] The definition of "suspect" in the *Crimes Act* (s 23WA) is, relevantly, in relation to an indictable offence, "a person whom the constable suspects on reasonable grounds has committed the indictable offence".

was actually said to JH, compared with the knowledge and intentions of the AFP officers at the time.

What was said ?

[77] Most of the conversation at the Jakarta residence is included in the transcript of the recording taken by FA Davis at the time. FA Booth and FA Davis (and others) were questioned about much of this both at the committal and at the hearing before this Court.

[78] FA Booth and FA Davis went to the residence with Flight Lt O'Reilly and John Cox (an ADF Padre) at about 5.55 am. The transcript records O'Reilly telephoning JH from the front of the residence. He apologised for ringing so early and told her that he had a couple of AFP members with him who were "just making enquiries in reference to your property back in Nicholls in Canberra" and asking whether they could have a chat with her about that.

[79] After they got inside the house and introduced themselves FA Booth assured JH that no one had been hurt and went on to state "the reason why we are here". This conversation included the following:

BOOTH: *So what's happened is between April and October last year you guys would have had an internet address at that premises*

Mrs H: *Yes*

BOOTH: *okay so the IP address*

Mrs H: *oh okay*

BOOTH: *Yeah so the IP address that was that was allocated to your residence in Nicholls has been used to download some some photographs that we have some concerns about*

Mrs H: *Oh okay*

BOOTH: *now those photographs and those images are of child pornography what I want to explain to you is this is not an investigation about you or your son or your husband or your daughter*

Mrs H: *Yeah*

BOOTH: *this is an investigation into the IP address*

Mrs H: *Okay*

BOOTH: *because IP addresses can be stolen*

Mrs H: *yeah*

BOOTH: *the addresses can be used by guests in your house IP addresses can be used you know, its.*

Mrs H: *It can be, they can be*

BOOTH: *It can be accessed by other people*

Mrs H: *yes, yes, yes, yes, yes*

BOOTH: *So as a result of the AFP doing an investigation*

Mrs H: *yes*

BOOTH: *into the use of child pornography*

Mrs H: *yes*

BOOTH: *we need to exclude your family*

Mrs H: *right*

BOOTH: *from that investigation*

Mrs H: *sure*

BOOTH: *so to do that we need to be able to look at your computers and have our forensic examiner put his little tool into them and make sure there's no images on there*

Mrs H: *right now*

BOOTH: *sure*

BOOTH: *Now, we're not here under any warrant*

Mrs H: *Okay*

BOOTH: *we're here purely to speak to you and to seek your consent to do that, which you can remove at any time so you, you, if you don't want me to do this you can tell me to leave right now*

Mrs H: *yeap*

BOOTH: *or*

Mrs H: *can I just ring my husband first*

BOOTH: *you can do whatever you like*

COX: *that's fine*

BOOTH: *yeap*

COX: *everythings all*

Mrs H:

BOOTH: *This is completely consensual*

COX: *completely in your court Joanne*

Mrs H: *yeah*

BOOTH: *and there's a lot of information to digest at six o'clock in the morning. I'm very conscious of that*

Mrs H: *ah um*

DAVIS: *we're only here at this time because it it's co-ordinated with things that are going on in Australia as well so*

Mrs H: *oh okay, so we're …(indistinct)…*

DAVIS: *so we're not trying to, we're not trying to catch you by surprise.*

Mrs H: *I think …(indistinct)…*

BOOTH: *No, no, no. It's …(indistinct)… and I know that you've got to go to work today as well*

Mrs H: *so what, what do you need from me*

BOOTH: *okay so what we would need ah um if you consent*

Mrs H: *yes*

BOOTH: *we would get you to sign a consent form*

Mrs H: *right*

BOOTH: *which would allow us then to have a look at your computers that you have in the house and iPhones that sort of thing just to see just to exclude them from this IP address*

Mrs H: *sure yes*

BOOTH: *okay, and any information that might have been downloaded from that IP address*

Mrs H: *okay*

BOOTH: *you what what is really important for you to understand though is, this is purely consensual*

Mrs H: *yes*

BOOTH: *you don't not have to do anything. You can ring Paul, you can ring anyone you want*

Mrs H: *yes let me ring Paul first its alright he's he's in Darwin*

BOOTH: *and at any time if you don't want us to be here you can ask us to leave*

Mrs H: *give me a second I'm more than happy to do it (indistinct) Paul*

[80] JH gave evidence at the hearing in this Court. In response to a question as to what she was told about the reason for the visit that morning she said :

> "… There was a query with our IP address in Canberra from the time that we were residing there from the April to the October in 2011."

[81] She was then asked whether she was told whether she, for instance, was any under any suspicion of any criminal activity, and answered:

> "No. One of the first things that was told to me was that myself, my husband and my son and daughter were not under – were not – how do I say it – we're not – we're not under any investigation."

[82] Then followed the exchange:

> "If you had been told that your husband was a suspect in a criminal investigation, would that have made any difference to your attitude to their attendance at your home? --- Probably. I probably would have asked to see a search warrant.
>
> And the fact that you were told that none of your family, including your husband, were under investigation, did that have any impact on you in terms of your cooperation and assistance to the police? --- Hugely, yes.
>
> In what way? --- I wouldn't have let them in otherwise."

[83] During cross-examination, she was shown the transcript of the conversation and agreed that she had seen it before. She did not suggest that it was inaccurate in any respect. She agreed that she had only recently been requested to recollect the conversation and did so without reviewing the transcript and without the benefit of any other notes.

[84] She agreed that FA Booth's actual words were "this is not an investigation about you or your son or your husband or your daughter". She also agreed that FA Booth went on to say that this was an investigation into the IP address, IP addresses can be stolen or used by

guests in her house, and that “we need to exclude your family” from that investigation.

[85] When it was put to her that this statement that “we need to exclude your family” meant that her family had not been excluded as possible users of the IP address at the relevant time, her initial response was that: “Yes, but she’d already excluded them up there saying it wasn’t about you, your son, your husband or your daughter.” When further pressed on this she agreed that the exclusion of the family “could have been” one thing that the police wanted to investigate, and said that she “probably didn’t hear that very clearly at that stage, it was 6 o’clock in the morning.” She also recalled FA Booth telling her about the possibility of IP addresses being stolen. She said that foremost in her mind was FA Booth’s earlier assurance that “this is not an investigation about you, your son, your husband or your daughter.” She said: “That was the foremost in my mind – it was the first thing that stuck. I felt she was trying to exclude our computer usage.”

[86] I accept, and find, that the transcript does accurately record what was said, and that JH genuinely believed, at least when she first consented to the search, that none of her family were under any real suspicion of criminal activity and that the purpose of the investigation was to attempt to ascertain whether there was any relevant material on any computer devices in the home, and if so who it was that had used the Canberra IP address to download it.

[87] I also accept that it was made clear to her that she could withdraw her consent at any time. However, I consider that she was still under the above belief at least until after the CEM was found on the external hard drive and she told the officers that the hard drive belonged to her husband.

What were the beliefs and intentions of FA Booth and FA Davis?

[88] The applicant criticises the testimony and conduct of AFP officers, particularly FA Booth and FA Mellor, in several respects. The main criticism was directed at the true belief of FA Booth at the time when she attended the Jakarta residence. In short it was contended that she, FA Davis and FA Mellor had already decided that the applicant was the only suspect, and that she and FA Davis decided that neither JH nor the applicant should be told this until both searches had taken place.

[89] FA Booth and FA Mellor both gave evidence that the ADF briefing paper (of 26 July 2012)[44] set out the sum of the information available. FA Booth read it before the search. In evidence she said that there was no specific information about any one person, and that the purpose of investigation was "to look at the IP address." Objectively, based on that document, that was a view she was reasonably entitled to.

[90] She had not read the memorandum of 21 May. She was aware that warrants were to be sought in Darwin in relation to the applicant.

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[44] Exhibit P4 - Letter of 26/7/12 to Bryan Parker.

[91] She had also spoken to her superior, Commander Sheehan, about the proposed search. Her evidence was:

> "I'm asking you now whether Commander Sheehan said anything to you about his understanding of the purpose of the search? --- We spoke about the purpose of the search to find evidence in relation to the IP address.
>
> Right, now are you saying on your oath that that's what Commander Sheehan told you was his understanding of the purpose of the search, is that right? --- I believe so."

[92] This accords with Commander Sheehan's evidence during cross-examination:

> "…The focus of the investigation was to collect evidence to determine who had accessed and uploaded material from an IP address. So I think it's a bit presumptuous I guess to say that the police thought PH was a bad apple.
>
> Well you regarded him as the prime suspect didn't you? --- No I regard him as one of the people who had access to that IP address - - -
>
> You've seen him described …? --- same as the wife and his son, the same as his wife, his son and potentially anyone else that could have accessed that IP address.
>
> ….
>
> Now, leaving that for one moment, you knew, I want to suggest by July 2012, that there was such a suspicion and it centered entirely upon PH? --- I can't agree with that. He was – look. The extent of the suspicion based on the way that the exploitation material was identified in the first place, certainly could not go beyond saying that a person utilising the IP address at the residence that it was utilised at was responsible. Now, taking the conservative approach, and certainly based on my experience, you don't make assumptions. Was PH one of

those people? Absolutely. Could it have been other people? Equally possible.

[93] I agree with the applicant, that FA Booth and FA Davis (and others including Commander Sheehan) did regard the applicant and his family as potential suspects, and the applicant as the main suspect. However none of them were, or could have been, regarded as suspects in the sense of the definition in the *Crimes Act.* The only basis for regarding any of JH and the children as being suspects was the fact that they lived at the address in Canberra where the IP address was registered / located.

[94] That the AFP did in fact regard the appellant as the main suspect is apparent from a number of circumstances: the memorandum of 21 May 2012; various other notes and documents clearly referable to the applicant, such as references to an investigation into "his" IP address, "PH in Australia now – in Darwin" and "our man", the heading of the ADF briefing paper of 26 July 2012 "Serving ADF member being a suspect in a child exportation matter" and a reference in that document to "his" computer; the fact that the search was undertaken of the applicant's office in Jakarta with AFP retaining the key to his office; and the decision to have both searches carried out at about the same time.

[95] I find therefore that at the relevant time AFP did regard the applicant as the main suspect.

[96] However, as I have said, he was not a suspect in the sense defined in the *Crimes Act*. There was no hard evidence to link the applicant with any crime. The only real evidence was to the effect that someone, more likely to be the applicant than anyone else, had downloaded the CEM (in 2011). Thus, there was a possibility that it might still be on whatever computer device was used for the download. If this were the case, there was a possibility that the applicant might have committed criminal offences of accessing and possessing CEM.

[97] The reasons why AFP regarded the applicant as the principal suspect were explored.

[98] The following evidence of FA Mellor gives the impression that the only reason for referring to the applicant as the "principle (sic) suspect" in the memorandum of 21 May 2012 was the fact that he was the only adult male in the house.

> "No? --- At the time the report was written, JH and all of the children and any friends or family that visit the residence in Canberra where the IP address was subscribed to that the material was downloaded on – all of those are suspects.
>
> Right, yes? --- PH was the principal one because they are all equally suspects for the offence. PH was nominated as the principal one.
>
> Yeah? --- Through collective experience in the crime type. A very high percentage of the offenders in this crime type are the adult male in the big group, or collection of people that had access to that IP address.

> Okay? --- It's not definitive, not always the case, but it is more often than not the case.
>
> Alright? --- That's how he was nominated as the principal suspect in the report."

[99] In my opinion the reference in the memorandum to the applicant having previously been posted to Indonesia coupled with the subsequent paragraph containing general statements about Indonesia being a destination of preference for offenders and extending their activities to contact offending, was an additional reason for the statement that the applicant would appear to be the principal suspect. This is also apparent from other references in the memorandum, when the four options are being considered, such as the risks of "potential progression of online offending to contact offending placing children at risk" and that the "suspect may reoffend".

Conclusions

[100] I conclude that at the time of the Jakarta search, FA Booth and FA Davis were aware that the applicant was the main suspect, not only because he was the only adult male in the house, but also because of other broad assumptions based upon the fact that some people who download CEM do reoffend and extend their offending to contact offending coupled with the fact that the applicant had been posted to Indonesia previously.

[101] I also conclude that the AFP officers were in fact at the Jakarta residence for the purpose which they stated, namely to investigate the IP address in order to ascertain who downloaded the CEM. I consider that that was their primary and ultimate purpose, but that they suspected that the applicant was a likely culprit. But, as I have said, this suspicion was only based upon general assumptions of the kind referred to above which put the applicant at the forefront of the range of possible suspects.

[102] Prior to that search AFP members would not have been able to ascertain who was most likely to be responsible unless and until they could locate and search whatever computer device was used to download and or store the CEM, find the CEM still on that computer device, or that it had been deleted and or transferred to some other computer device(s); and draw inferences as to who it was who downloaded the CEM.

[103] Accordingly, I do not consider that the assertion that "this is an investigation into the IP address" was false. However I do consider that it was, in the circumstances, misleading.

[104] I do consider that the statement that this is not an investigation about "you or your son or your husband or your daughter" was false, and was likely to mislead JH into thinking that to be the case. Further, I consider that JH was in fact so misled.

[105] I consider that JH would have been under that misapprehension when she spoke to the applicant on the telephone and obtained his agreement to the search been conducted. In my view she consented to the search under that misapprehension. She would also have been under the misapprehension when she told the police that the external hard drive belonged to her husband.

[106] I also consider that FA Booth and FA Davis were aware of the need to convince JH to consent to the search, and of the risk that she might not consent if she was led to believe that she or the applicant were under suspicion. They knew that AFP had been unable to obtain the search warrants in Darwin, and that unless a consensual search resulted in evidence regarding the downloading, it would be very difficult to gain access to whatever computer devices existed at the Jakarta residence.

[107] In the course of planning the visit to the Jakarta residence, FA Booth and FA Davis discussed what information would be conveyed to JH when they went there. FA Davis agreed that they were concerned about alarming JH, particularly with serious allegations about her husband, and that FA Booth should say words to the effect that the investigation was not about her or her family. FA Davis did not consider this would be misleading, saying that they weren't there to investigate the applicant, but rather to investigate why that IP address was used.

[108] As I have said, it was misleading to convey this impression to JH. Moreover, I consider that that conduct was deliberately misleading. I reject the assertions, in particular those of FA Booth and FA Mellor, to the effect that the only purpose of the proposed search was to investigate the IP address.

[109] However I decline to find that FA Booth's conduct, although deliberately misleading, amounted to her having "lied". Although she must have had suspicions about the applicant, based upon the assumptions that I have previously referred to, I think that she was primarily focusing upon ascertaining who had in fact accessed the IP address, and regarded that as the primary and ultimate focus of the investigation, rather than any particular person at that stage.

[110] The relevant question in this matter is whether the conduct of FA Booth amounted to impropriety. This is a difficult question because it requires the Court to consider the conduct without any or adequate information as to the kind of conduct that is normally considered appropriate in the course of operational matters such as this, in particular in the course of investigating a serious offence, relevantly the possession of CEM. For example, I would not think it appropriate, let alone necessary, for an investigating officer to disclose all relevant information about an investigation to a person who is to be questioned or asked for permission for a consensual search. I would think that there must be some flexibility allowed to investigating officers, subject

of course to constraints imposed by legislation such as s 139 and police standing orders.

[111] On balance, based upon the evidence before me and my own sense of what is proper in all circumstances, I do consider that to deliberately convey misleading information to a person knowing that she may not consent to a search if she were told important and relevant facts, in particular that her husband was a suspect albeit on the basis of generalised assumptions, was improper.

[112] I conclude that the material found on the hard drive at the Jakarta residence, and JH's statement that the hard drive belonged to the applicant, was evidence obtained improperly or in consequence of the impropriety to which I have just referred.

The search and questioning in Darwin

Applicant's contentions

[113] The applicant contended that armed with knowledge of the items found during the Jakarta search and JH's statement that the hard drive belonged to the applicant, police in Darwin approached the applicant (still without any warrant to search him or his hotel or his car) and engaged him in conversation which, on any view of what had happened earlier that day, was clearly likely to result in him making inculpatory statements if he chose to speak. The applicant was not criminally cautioned at that time and therefore any evidence of his actions or

words is taken to have been improperly obtained, contrary to s 139 of the Act.

[114] Without the fruits of the "consensual search" in Jakarta the AFP in Darwin would not have had sufficient information to facilitate that approach and would not have had sufficient information to obtain an Australian search warrant. Further, the AFP would not have had enough information to arrest the accused.

[115] The Applicant's Further Submissions refer to s 23F(1) of the *Crimes Act* which says that:

> "… if a person is under arrest or a protected suspect, an investigating official must, before starting to question the person, caution the person that he or she does not have to say or do anything, but that anything the person does say or do may be used in evidence."

[116] It was contended that, following the telephone communications from FA Davis to FA Mellor in Darwin, and prior to him and other AFP police approaching the applicant as he was walking towards his car, he was a "protected suspect" (as defined in s 23B(2)) and should therefore have been cautioned.

Consideration

[117] Section 23B(2) states that a person is a "protected suspect" if (omitting (d) and (e) which are not relevant here):

> "(a) the person is in the company of an investigating official for the purpose of being questioned about a Commonwealth offence; and
>
> (b) the person has not been arrested for the offence; and
>
> (c) one or more of the following applies in relation to this person:
>
> (i) the official believes that there is sufficient evidence to establish that the person has committed the offence;
>
> (ii) the official would not allow the person to leave if the person wished to do so;
>
> (iii) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so."

[118] Section 23B(6) states that:

> "In this Part, a reference to questioning a person:
>
> (a) is a reference to questioning the person, or carrying out an investigation (in which the person participates), to investigate the involvement (if any) of the person in any Commonwealth offence (including an offence for which the person is not under arrest) …."

[119] The respondent contended that the only utterance of the applicant's to police when spoken to at his vehicle, to be relied on at trial by the

Crown, is his consent to a search of the laptop bag. It is not necessary for the Crown to rely on any admission as to his ownership of the bag and contents being his since he was seen carrying the bag from the Mantra Hotel and placing it in his hire car. The forensic examination of data on the laptop and thumb drive also supports the applicant's ownership.

[120] The respondent refers to FA Mellor's statement setting out the circumstances in which the applicant consented to the search and his cross-examination. The respondent says that taking that evidence together, it is apparent that FA Mellor had done no more than introduce himself and identify the matter about which he wished to speak to the applicant, when the applicant either offered up his laptop bag for inspection, or perhaps was asked if police could look at it. Either way, FA Mellor then confirmed the applicant's consent before acting on it.

[121] The respondent submitted that to that point no questioning had commenced, and referred to the discussion about the meaning of the word "questioning" in s 139 of the *Evidence Act* by Howie J in *R v Naa*.[45]

[122] The respondent submitted that s 139 is squarely premised upon "a statement made or an act done by a person during questioning…". The section is not enlivened until questioning is under way. Even then, it

[45] *R v Naa* (2009) 76 NSWLR 271 at 295. See too *R v Charlie* (1995) 121 FLR 306 at 312 regarding the use of the word "questioning" in a similar provision in s 142 of the *Police Administration Act 1978* (NT).

would remain to be determined whether the applicant was then "under arrest" as that term is defined in s 139(5). The applicant had not been arrested, and was free to leave in his vehicle had he wished. The information conveyed to FA Mellor by FA Davis prior to approaching the applicant, that images had been found on a device in a folder entitled "Sesko", "went no further to Mellor than 'lend(ing) itself to indicating it may be PH' (i.e. that the images were his)." The evidence does not show that FA Mellor believed he then had sufficient evidence to establish that the applicant had committed an offence. Accordingly, absence of a caution to the point where consent was forthcoming does not infringe s 139.

[123] However, those submissions do not address the application of s 23F of the *Crimes Act*.

[124] I agree with the applicant's contentions that the applicant was a protected suspect from the moment when he was approached and spoken to by FA Mellor.

[125] FA Mellor was carrying out an investigation in which the applicant participated and thus the applicant was in FA Mellor's company for the purpose of being questioned about a Commonwealth offence.[46] Section 23B(6)(a) had this effect even before there was any "questioning" in the more usual sense, or in the narrower sense referred to by Howie J

[46] Cf s 23B(6) and 23B(2)(a) *Crimes Act 1914* (Cth).

in *R v Naa*.[47] This included FA Mellor's request for consent for police to look into his bags and finding the laptop computer and USB thumb drives.

[126] I also consider that one or more of the circumstances set out in s 23B(2)(c) applied.

[127] In his evidence, FA Mellor agreed that the day before the two searches he told FA Booth that he thought the applicant might be a suspect. He agreed that he knew that FA Booth was co-ordinating what was to happen in Jakarta, and that she knew that he and the other AFP officers in Darwin proposed to approach the applicant once she had conducted the Jakarta search. When asked whether he considered that the applicant was the offender, he said: "No. Not a suspect offender". I found this evidence somewhat confusing and unconvincing. Moreover, he had been waiting in a coffee shop over the road from the Mantra Hotel, with three other police officers ready to approach the applicant as he walked towards his car. Despite what he said about this, I consider that he did believe that the applicant was a suspect at that time.

[128] By then FA Mellor was aware that the hard drive had been seized, that JH had said that it belonged to the applicant, that it contained child exploitation material of the sort that he (FA Mellor) already knew about and that that material had been found in a Sesko file.

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47 *R v Naa* (2009) 76 NSWLR 271 at 295.

[129] Based upon that information, I consider that there was sufficient evidence to establish that the applicant had committed an indictable offence, in particular the offence of possessing CEM, and that an investigating officer in the position of FA Mellor would have believed that to be the case. I also consider that the applicant was in fact a "suspect" in the sense of the definition in s 23WA *Crimes Act* in that an investigating officer in the position of FA Mellor would have suspected on reasonable grounds that the applicant had committed such an offence. Accordingly he was to be treated as such.[48]

[130] Despite his equivocation, I consider that FA Mellor did believe that there was sufficient evidence to establish that the applicant had committed the offence of possessing CEM.

[131] Indeed FA Mellor did caution the applicant at about 10.52 am, that is less than 17 minutes after police approached him. By that time, the USB and computer in his possession had not been examined, and there was no other incriminatory information additional to that which FA Mellor had when he first approached the applicant. Indeed FA Mellor said that nothing had changed after the initial introductions.

[132] I am not convinced by FA Mellor's evidence that the reason why he then gave the applicant the caution was that the applicant may incriminate himself or produce evidence against other people. He also

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[48] Cf *R v FE* [2013] NSWSC 1692 at [90], [97] and [99]; *R v Su* (1995) 129 FLR 120 at p 170.4.

said, when asked whether the applicant was a suspect at the time when he did caution him: "As I said before, he was a suspect but not necessarily as for the downloading the IP address. No more than another person in that household." I do not accept that answer as correct.

[133] I also consider it more likely than not that if he had the power FA Mellor would not have allowed the applicant to leave Darwin if he wished to do so.[49] He was there with several other AFP officers and had information strongly implicating the applicant. Police had already attempted to obtain a warrant authorising them to search the applicant and could well have successfully renewed the application for a warrant once they were armed with the additional information following the Jakarta search. The police knew that the applicant had been booked to fly back to Indonesia that afternoon. The fact that a senior officer of the Defence Force Investigative Service attended on the applicant after the AFP had finished questioning him and ensured that he went to Canberra the next day instead of returning to Jakarta, also supports this conclusion.

[134] I conclude therefore that the applicant should have been cautioned at the outset, and in particular before he was asked to consent to a search and asked any other questions.

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[49] Cf s 23B(2)(c)(ii) *Crimes Act 1914* (Cth).

[135] Even if s 139(1) or 139(2) of the *Evidence Act* did not apply, for example because of a narrower meaning of the word "questioning" in those provisions,[50] and thereby deem the evidence to have been obtained improperly for the purposes of s 138(1), I consider that evidence obtained in breach of s 23F of the *Crimes Act* would be evidence obtained improperly or in contravention of Australian law.

[136] The applicant's submissions also complain about the apparent non-compliance with s 23V of the *Crimes Act*. In short s 23V provides that "if a person who is being questioned as a suspect … makes a confession or admission to an investigating officer, the confession or admission is inadmissible as evidence against the person in proceedings for any Commonwealth offence" unless one of the statutory exceptions apply. The most common exception is where the questioning and answering was tape-recorded. In the present matter, many of these admissions made by the applicant were not tape-recorded, apparently due to an oversight. Accordingly, the Crown would have to convince the Court that the admission of that evidence "would not be contrary to the interests of justice".[51]

[137] As the Crown does not place reliance upon those admissions, non-compliance with s 23V is of no practical consequence. However the applicant points to that failure to tape-record important parts of the

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50 See earlier reference to *R v Naa* (2009) 76 NSWLR 271 at 295.

51 *Crimes Act1914* (Cth) s 23V(5). See too s 143 of the *Police Administration Act 1978* (NT).

conversation as another example of improper conduct on the part of the AFP officers.

Conclusions about improprieties

[138] I have concluded that improprieties have been established in relation to both the Jakarta and the Darwin search. I also consider that the Jakarta material and the Darwin material and the information provided by the applicant during that part of the investigation were obtained in consequence of such improprieties.

Discretionary considerations

[139] The next question to be considered is whether "having regard to the matters identified in s 138(3) as matters to be taken into account and any other relevant matters, the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way the particular evidence was obtained."[52]

[140] I agree with the applicant's contentions that there is very considerable public interest in compelling law enforcement officials to act honestly and with a high level of probity. I also agree that "they should not be encouraged to flaunt the law in relation to informed consent or in relation to criminal cautions and they should not be encouraged to

[52] *R v Dalley* (2002) 132 A Crim R 169 at [16].

think it is acceptable to give 'clever' evidence about their behaviour in order to avoid judicial scrutiny of that behaviour."

[141] I am aware that improprieties or illegalities for the purposes of s 138 are to be viewed cumulatively and not disjunctively.

[142] In addition to the matters specifically identified in s 138(3) the applicant contended that there were other improprieties on the part of the AFP that should also be taken into consideration. These include:

(a) the failures to tape-record important parts of the Darwin conversation;

(b) the overall behaviour of members of the AFP not only in the period leading up to and during the conduct of the searches, but in the course of giving their evidence, both during the committal proceedings and in this Court; and

(c) the failure to involve the Indonesian police, and not informing them of the events until nearly a year after they occurred, and in a "benign and misleading way".

[143] I accept that the failure to tape-record the conversation and admissions made by the applicant in Darwin was inadvertent, and that the officers should have attempted to cure that omission. I do not regard that as improper conduct. Rather it is simply a matter which raises the need for the Crown to invoke s 23V(5) of the *Crimes Act* and or s 143 of the

Police Administration Act 1978 (NT) if it needs to rely on that evidence.

[144] In relation to behaviour leading up to and during the conduct of the searches, the applicant is critical of FA Booth, FA Davis and FA Mellor, for planning to deceive JH and the applicant into thinking that the investigation did not involve them but was directed at ascertaining who it was that accessed the IP address and downloaded the CEM material.

[145] As I have already indicated, I do consider that the primary and ultimate focus of the investigation was the latter. In relation to the Jakarta search, it was FA Booth and FA Davis who planned that part of the operation. Although they were answerable to Commander Sheehan I do not consider that he knew what they would be saying to JH and that they intended to tell her that this was not an investigation about her, her husband or her family.

[146] I do agree that during their evidence at the committal and in this Court, some of the witnesses placed undue emphasis on the fact that the ultimate objective was to identify who downloaded the material and tried to downplay the fact that FA Booth did actually tell JH that this was not an investigation about her and her family and did so intending to convey that impression to her, having discussed this with FA Davis prior to the search taking place.

[147] I agree that some of the witnesses, namely FA Booth, FA Mellor and FA Davis, did engage in unreasonable semantics in their endeavours to convey that impression to both courts, and did so aware that their conduct was being criticised by the applicant and exposed. They often resorted to a mantra regarding the investigation of the IP address and expressed reluctance to concede that they were wrong to create the impression that the applicant and his family were not under investigation. However I do consider that they all generally believed that the ultimate aim of the investigations was as they asserted, namely to identify who actually downloaded the CEM material, and that this coloured their approach to answering questions when confronted with the fact as to what was actually said to JH. I do not consider that any of the witnesses deliberately lied to either court.

[148] I did find FA Mellor's evidence unsatisfactory in some respects. In particular his answers as to whether or not the applicant was a suspect were unconvincing, although as I have said, that word does have different meanings, namely its "ordinary" meaning and the meanings defined in the relevant statutes. I also had some difficulty following the reasons he gave for cautioning the applicant when he did if he did not already consider him to be a suspect when he initially approached the applicant a short time earlier.

[149] Conduct of this kind, namely conduct that has occurred well after the events the subject of the particular searches, is relevant to one of the

two parts of the balancing process, namely the public interest in ensuring not only that evidence is obtained properly and lawfully, but also in ensuring that the facts and circumstances during and leading up to the relevant searches, can be revealed and examined by others including a court at some later time.

[150] I do not consider that there was anything improper, at least for the purposes of s 138, in not informing the Indonesian police of their activities prior to, during or for some time after the Jakarta search, or in the way that they did eventually inform them of the matter. I do not consider it appropriate for this Court to delve into matters of policy and diplomacy as between Australia and Indonesia. As far as the Jakarta material is concerned, its use in this Court is influenced by the laws of evidence and procedures applicable in the Northern Territory, and not by whatever attitude might be felt or expressed by members of the executive of another country.

s138(3)(a) Probative value of the evidence

[151] The respondent contends that the images and video file located on the devices are the foundation of the case against the applicant. The applicant concedes that the Crown could not succeed in the prosecution of him without that evidence and therefore that it is vital to the Crown

case. The evidence is highly probative. This would tend to weigh in favour of all the evidence being admitted.[53]

s138(3)(b) Importance of the evidence in the proceeding

[152] There is no alternate evidence available. As stated above, the evidence resulting from the searches is critical to the Crown case. There is a strong public interest in admitting it.

s138(3)(c) Nature of the relevant offence and the nature of the subject-matter of the proceeding

[153] The public interest in admitting evidence varies with the gravity of the offence. The more serious the offence, the more likely it is that the public interest requires the admission of the evidence.[54]

[154] The offences in the present matter are serious ones. The maximum penalties are 15 years imprisonment for each of counts 1-13 and 10 years for count 14.

[155] The applicant points out that these offences do not fall at the top end of the range for such offences. For example there is no allegation that the applicant recruited or corrupted any young people in order to manufacture the material or that any young person was corrupted by his conduct. However the applicant acknowledges that the photo-shopped material, which is the subject of the 12 counts alleging the production

53 Cf *R v Camilleri* (2007) 68 NSWLR 720 at 727, [35].

54 *R v Dalley* (2002) 132 A Crim R 169, [3], [7] per Spigelman CJ; [102] per Blanch AJ; *R v MM* [2004] NSWCCA 364 at [54].

of child pornography, does fall within the definition of child pornography in the *Criminal Code* (Cth).

[156] The applicant's alleged conduct extended beyond the mere downloading and possession of CEM. It included the photo shopping of a number of images, including super imposing photographs of people known to him onto other pornographic material. A further concern is the fact that when he became aware of the Jakarta search he not only attempted to remove the images from his laptop, but also copied some onto the USB, presumably for later access.

[157] The offences are directed to the protection of children from exploitation. The seriousness of these kinds of offences is reflected in the strong penalties set by parliament and has been stressed by the courts. As was acknowledged by Ipp J in *R v Liddington:*[55]

> "The mere fact that persons are prepared to possess child pornography, albeit for their private purposes, necessarily creates a market for the corruption and exploitation of children. Children are abused, violated and degraded in order to create a market of this kind."

[158] This weighs heavily in favour of all the evidence being admitted. The measure of public interest in the conviction of an offender is greater in relation to serious crimes.

<u>s138(3)(d) The gravity of the impropriety or contravention</u>

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55 (1977) 18 WAR 394 at 403. See too *R v Jones* (1999) 108 A Crim R 50 at 52; and *R v Hancock* [2011] NTCCA 14.

[159] I consider that the impropriety in relation to the Darwin search was more severe than that regarding the Jakarta search. By the time the Darwin search was carried out the investigating officers were armed with knowledge of highly relevant material implicating the applicant and must have known that they should take extreme care before approaching him to ensure that he was not deprived of his fundamental rights, in particular his right to silence. These rights were not accorded to him until he was cautioned, but that did not occur until after he had already consented to the search of the devices and made admissions.

[160] The impropriety regarding the Jakarta search was also serious in that it did involve obtaining access to the devices at the residence of the applicant and his family, and thus an invasion of their right to privacy in their own home. However I consider that the impropriety in relation to the Jakarta search was only marginally so, particularly when compared with the kind of improprieties referred to in *Ridgeway v The Queen*. It did not involve any "harassment or manipulation which is clearly inconsistent with minimum standards of acceptable police conduct in all the circumstances", and in my view did not significantly contravene the minimum standards which a society such as ours would expect.

[161] Apart from misleading JH to the belief that none of her family were under investigation, FA Booth and the other AFP officers treated JH fairly and properly. This included her being given the opportunity to

speak to her husband on the telephone prior to giving her consent and being told that she could withdraw her consent at any time.

s138(3)(e) whether the impropriety was deliberate or reckless

[162] Although I have concluded that the officers did intend to mislead JH into thinking that none of her family were under investigation, I do not consider that they intended to engage in improper conduct or were reckless in doing so. I think that although they deliberately set about to mislead JH, they simply failed to turn their mind as to whether such conduct would be improper. The situation would be much different if there were written directions that they disobeyed.

[163] However I consider that the impropriety in relation to the Darwin search was reckless. FA Mellor and those officers with him should have known that the applicant should have been cautioned from the outset.

[164] I do not consider that the improper conduct was systemic.

s138(3)(f) Impropriety or contravention contrary to rights under ICCPR

[165] Article 17 of the ICCPR provides that: “No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”.

[166] Whilst the Jakarta search involved interference with the applicant's privacy, family and home, it was not arbitrary or unlawful. Police attended the Jakarta premises for a proper lawful purpose.

[167] On the other hand the engaging of the applicant in Darwin and searching his computer devices before giving him a caution was an impermissible interference with his privacy.

s 138(3)(g) Whether any other proceeding has or will be taken in relation to the impropriety

[168] There is no evidence of any other proceeding in relation to any of the alleged improprieties.

s138(3)(h) Difficulty of obtaining the evidence without impropriety or contravention of Australian law

[169] If JH had not been misled, it may well be that she would have refused to consent to the Jakarta search. There was insufficient evidence to enable a warrant to be obtained. Accordingly the evidence that was found then could not have been obtained until the applicant returned to Australia with his hard drive and any other computer devices which contained CEM. Even then, there may have been difficulties obtaining a search warrant similar to those difficulties which were experienced when the AFP attempted to obtain the search warrant in Darwin the day before the Darwin search. However, I understand that the applications for the search warrants in Darwin were deferred and not refused. This

suggests that given more information and better prepared, a search warrant could be obtained under Australian law authorising the search of any computer devices owned by members of the applicant's family that could have been used to download the CEM material that had been downloaded in 2011. Such a search would reveal the additional CEM material, including the photo shopped pornography, unless it had been permanently deleted in the meantime.

Conclusion

[170] I consider that the desirability of admitting the evidence obtained during the Jakarta search outweighs the undesirability of admitting it. I consider that the public interest in ensuring that this evidence can be used in support of a prosecution for those serious offences outweighs the public interest in discouraging improper conduct of the kind that was engaged in the early stages of that search.

[171] I have reached a different conclusion in respect of the evidence and information obtained during the Darwin search. I think that the public interest in requiring investigating officers to comply with important and fundamental obligations, relevantly to provide the suspect with a caution, outweighs the public interest in allowing the use of the materials and information obtained following and as a consequence of that impropriety.

[172] Accordingly, I would admit the evidence obtained during the search at the applicant's residence in Jakarta and not admit the evidence obtained during the search in Darwin.