

ASSET CONFISCATION UPDATE – 3 December 2013

*Stay of Proceeds of
Crime Act proceedings
pending determination
of criminal charges*



Qing Zhao & Anor v Commissioner of the Australian Federal Police [2013] VCC

On 3 December 2013, Judge Lacava published his ruling in *Zhao v AFP*, refusing to stay proceedings under the *Proceeds of Crime Act 2002 (Commonwealth) (POCA)* pending finalisation of criminal charges against the applicants.

Background facts

The applicants (who were husband and wife) were charged with proceeds of crime offences. A committal brief had been prepared but the committal hearing had not yet been held.

After the applicants had been charged, a restraining order was

made over some residential properties in which the applicants claimed an interest.

Thereafter, the Commissioner for the Australian Federal Police (**Commissioner**) made application seeking forfeiture of the restrained residential property under the POCA.

So as to protect their interests in the restrained real estate, the applicants made applications for exclusion and compensation under the POCA.

Applicants for exclusion and compensation under the POCA bear the burden of proof to satisfy the Court of the relevant statutory test. Evidence in chief at the trial is generally given by affidavit and the Commissioner is entitled to

cross-examine the relevant deponent.

However, since the applicants were facing criminal charges they did not wish to swear affidavits and be exposed to cross examination until such time as their criminal charges had been fully dealt with. Effectively, they were seeking to exercise their right to remain silent and have the prosecution prove them guilty.

In summary, it was the applicants' contention that it would be a substantial interference with the criminal justice process if they were forced to swear affidavits and expose themselves to cross examination in circumstances where they were still facing criminal charges. Hence, they made an application for a stay of the POCA proceedings pending the finalisation of the criminal charges against them.

Determination

Judge Lacava acknowledged that the County Court had power to grant a stay of civil proceedings, such as proceedings under the POCA.

Despite acknowledging the power to order a stay, his Honour refused to grant a stay to the applicants.

In refusing to grant a stay, Judge Lacava relied upon, inter alia, section 319 of the POCA, which provides that *“the fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which a court may stay proceedings under this Act that are not criminal proceedings”*.

His Honour determined that the POCA clearly envisages a situation where forfeiture and exclusion proceedings can progress whilst criminal proceedings are on foot.

Importantly, his Honour observed [at 17] that there was no specific evidence adduced on the application that demonstrated the precise prejudice that would be suffered by the applicants or how the justice system would be interfered with if the proceedings under the POCA were not stayed pending the finalisation of the criminal proceedings.

His Honour also observed [at 18] that neither applicant would be forced to give evidence and that,

in any event, if any applicant did give evidence and was asked questions that may tend to incriminate them, that applicant could object to answering the question and adopt the procedure provided for in section 128 of the *Evidence Act 2008* (Victoria) or could otherwise be properly protected by powers exercised by the trial judge under *the Evidence Act 2008* (Victoria) (although his Honour did not specifically identify the further relevant powers that could afford protection to the applicants).

Conclusion

It is clear that the court (whether Supreme Court or County Court) has the power to grant a stay of proceedings under the POCA pending the finalisation of criminal proceedings in an appropriate case. Whether to grant such a stay is a matter in the discretion of the court, to be determined on the specific facts of each particular case.

In any application for a stay, the court will pay close regard to the overlap of issues between the POCA proceeding and the criminal proceeding. It is critical that any application for a stay is supported

by evidence which addresses this particular point, namely the overlap.

In making an application for a stay, the applicant is likely to face an uphill battle. That is so because, unlike the Victorian legislation (namely the *Confiscation Act 1997* (Victoria)) which provides an express power under section 20(7) to stay confiscation proceedings until after the conclusion of any criminal proceedings,¹ the POCA starts from a different premise (by reason of section 319), namely that no stay should be granted solely by reason of the existence of concurrent criminal proceedings.

A similar stay application was recently heard in the County Court before another judge. The decision in that matter is still reserved. A newsletter will be prepared and circulated once the decision is published.

Having regard to the importance of the issue at hand, it is likely that, in the not too distant future, there will be authority from the Court of Appeal on the question of

¹ Such stays almost granted as of right under the *Confiscation Act 1997* (Victoria). Sleep

ordering stays pending the determination of criminal proceedings.

Further information

For further information concerning litigation under the *Confiscation Act 1997*, visit www.confiscation.com.au.

About the author

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