



# Commissioner of AFP v W [2016] NSWSC 683

ASSET CONFISCATION UPDATE

20 JUNE 2016

## Stay of proceedings

### Commissioner of the Australian Federal Police v W

On 1 June 2016, Adamson J handed down the decision in *Commissioner of the Australian Federal Police v W* [2016] NSWSC 683. The decision has only recently become available because the name of one of the parties was subsequently anonymized.

### The central issue

The central issue was whether proceedings under the *Proceeds of Crime Act 2002* (POCA) should be stayed pending the conclusion of the criminal proceedings against “W”.

The case is significant because section 319 of the POCA was amended with effect from 1 March 2016. The amendment was intended to *clarify*<sup>1</sup> the circumstances in which a proceeding may be stayed under the POCA. The decision

of Adamson J contains early judicial guidance on the new provisions.

Prior to the amendments, the position was governed by the recent decision of the High Court in *Australian Federal Police v Zhao* [2015] HCA 5; 255 CLR 46. Based on that decision, an accused could obtain a stay by establishing overlap between the issues in dispute in the POCA proceeding and the criminal proceeding and asserting that the continuation of the POCA proceeding prior to the conclusion of the criminal proceeding gave rise to prejudice. Little was required by way of specific evidence of prejudice. The High Court recognised that forcing an accused to go into evidence on the nature of the prejudice would defeat the very purpose of the stay. Numerous proceedings were stayed following *Zhao*.

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<sup>1</sup> Based on the Explanatory Memorandum.

## Decision

Adamson J granted the stay, albeit for a fixed period, notwithstanding the amendments to section 319 of the POCA.

Adamson J observed the following in relation to the amended stay provisions (at [45]):

*The wording of s 319(2) is somewhat curious since it prohibits the Court, in terms, from staying the civil proceedings "on any or all of the following grounds". The grounds listed are the very matters which were found to be germane (though not determinative) as to whether the interests of justice warranted a stay in Commissioner of the Australian Federal Police v Zhao.*

And (at [47]):

*... the wording of s 319 appears to leave it to the Court to determine whether a stay ought be granted in the interests of justice, while making it clear that matters such as substantial similarity between the circumstances of criminal proceedings and proceedings (which had hitherto, as in Commissioner of the Australian Federal Police v Zhao, been regarded as warranting, if not requiring, a stay) were no longer sufficient in themselves to warrant a stay.*

And (at [48]):

*Having regard to the terms and purpose of the Amending Act and the extract from the Explanatory Memorandum to the Bill that became the Amending Act, it appears that Parliament intended that more was required for a stay than the establishment of the matters in s 319(2). In other words, an applicant for a stay of an examination or proceedings under the Proceeds of Crime Act would need to show more than, for example, that criminal proceedings were on foot which related to the same circumstances as the civil proceedings.*

## Discussion

Based on the analysis of Adamson J, it appears that overlap between civil and criminal proceedings remains relevant, but the mere existence of overlap is insufficient to warrant a stay. More is required.

Since 1 March 2016, an applicant for a stay must point to the overlap and explain the prejudice arising. Additionally, the new section 319(6) requires the Court to consider each

of the following matters in deciding whether to grant a stay:

- (a) that the POCA proceedings, and any criminal proceedings, should proceed as expeditiously as possible;
- (b) the cost and inconvenience to the Commonwealth of retaining property and being unable to expeditiously realise its proceeds;
- (c) the risk of a proceeds of crime authority suffering any prejudice (whether general or specific) in relation to the conduct of the POCA proceedings if the proceedings were stayed;
- (d) whether any prejudice that a person (other than a proceeds of crime authority) would suffer if the POCA proceedings were not stayed may be addressed by the court by means other than a stay of the proceedings;
- (e) any orders (other than an order for the stay of the POCA proceedings) that the court could make to address any prejudice that a person (other than a proceeds of crime authority) would suffer if the proceedings were not stayed.

In short, although the bar for obtaining a stay has been raised, the amendments were not intended to prevent a stay being ordered in an appropriate case. Each case must be considered on its own facts.

### About the author

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He was admitted to practice in 1996 and, prior to coming to the Bar in 2004, was a partner with Deacons (now Norton Rose Fulbright).

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