



## Commissioner of AFP v W (No 3) [2016] NSWSC 1200

ASSET CONFISCATION UPDATE – EDITION 10 / 2016

1 SEPTEMBER 2016

# Stay of proceedings

## Commissioner of the Australian Federal Police v W (No 3)

On 29 August 2016, Adamson J published reasons for refusing to extend a stay of proceedings under the *Proceeds of Crime Act 2002 (Act)*, pending criminal trials.

### The facts

The defendants in the proceeding under the POCA obtained orders staying the civil proceedings on 1 June 2016 (*Commissioner of the Australian Federal Police v W* [2016] NSWSC 683; which is the subject of an Asset Confiscation Update published on 21 June 2016).

One of the factors that influenced Adamson J in granting the stay at that time was the fact that the criminal trial was to be heard in August 2016 (hence a stay of some 3 months). The principal basis for seeking the stay was that the accused sought to maintain their right of silence.

After the stay was granted, the Commissioner became aware that the accused had already provided to the prosecution in the criminal proceeding the affidavits which they had filed in the civil proceeding. That is matter that had not been disclosed to Adamson J when his Honour ordered the stay.

Further, the accused then made application for the vacation of the criminal trial on the basis that they had insufficient funds for the criminal trial, having spent their funds in the proceedings under the Act. It had also not been disclosed to Adamson J at the time the stay was ordered that the funding for the criminal trial had not been put in place and that there was a risk that the criminal trial might need to be vacated.

The criminal trial was vacated on the application by the accused. It was expected that the criminal trial would not be relisted for many months.

The accused applied to extend the stay until the conclusion of the criminal trial. The application was refused.

### **Basis for refusal**

The principal basis for refusing the stay was the delay which would be occasioned to the proceedings under the Act. At [11] and [12], Adamson J observed the following:

*However, even aside from the defendants' non-disclosure of the material disclosed to the DPP on the application for a stay, the vacation of the criminal trial affects the balance of the factors such that I consider that the civil proceedings ought be heard although the criminal trial remains pending.*

*Having regard to the fact that the criminal trial is not likely to be concluded this year or, indeed, in the first half of next year, if at all, I am not disposed to extend the stay. There are mechanisms that can be used and directions made to protect the defendants' right to silence such as were made by the Court of Appeal in *Restricted Judgment*<sup>1</sup> [2016] NSWCA 103 (see order (7)).*

His Honour took that view notwithstanding the fact that he accepted that there was overlap between the factual matters relevant to the criminal trial and the civil proceedings.

### **Discussion**

Although the duration of any stay is clearly a relevant matter in the exercise of the discretion, in this particular case the fact that the accused had voluntarily made disclosure to the prosecution of matters was also clearly a matter that weighed heavily against the extension of any stay. That is so because the principal reason for seeking the stay was to retain

the right of silence. To some extent, that right had been waived by the voluntary disclosure.

### **NOTE:**

*On 29 August 2016, the Queensland Court of Appeal published its reasons (314 pages) in *Commissioner of the Australian Federal Police v Hart & Ors; Flying Fighters Pty Ltd v Commonwealth of Australia & Another; Commonwealth of Australia v Yak 3 Investments Pty Ltd & Ors* [2016] QCA 215.*

*That decision deals with a large number of issues arising under the Act. I will in due course publish an Asset Confiscation Update in relation to that decision. Having regard to its length, that may take some further time.*

*Key issues considered in Hart include:*

- *the definitions of "proceeds" and "instrument";*
- *whether property can be said to have been used in or in connection with the commission of an offence;*
- *whether property can be said to have been derived, directly or indirectly, from the commission of an offence;*
- *principles of statutory construction applicable to the Act.*

### **About the author**

Christian Juebner is a barrister at the Victorian Bar and practices extensively in confiscation and proceeds of crime litigation in various Australian jurisdictions.

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).

<sup>1</sup> McGlone. Although that decision was for some time restricted, it appears not be restricted any longer. It has been referred to in several unrestricted decisions.

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