



Commissioner of AFP v Wang & Ors [2016] VSC 243

ASSET CONFISCATION UPDATE

8 JUNE 2016

Examinations under Proceeds of Crime Act

Commissioner of the Australian Federal Police v Wang

On 9 June 2016, Zammit J handed down her decision in *Commissioner of the Australian Federal Police v Wang & Ors* [2016] VSC 243.

The central issue

The Commissioner of the Australian Federal Police (**Commissioner**) made application for an examination order under section 180 of the *Proceeds of Crime Act 2002* (**POCA**). The Commissioner sought to examine Mr Zhang in relation to the purchase of a Lamborghini vehicle by Mr Wang.

The question for the Court was whether such order should be made. In resolving that question, the Court considered the principles that guide the discretion in ordering an examination under the POCA.

Determination

The Court refused to order the examination of Mr Zhang. In short, the Court was not satisfied that there was a sufficient evidentiary basis to order the examination.

In coming to that conclusion, her Honour observed the precarious position that a person ordered to be examined finds themselves in (at [30]):

The consequences of such an order for a person ('examinee') may be severe. It is an offence for, amongst other things, an examinee to refuse or fail to answer a question of the examiner or to leave the examination before being excused by the examiner.¹ A number of privileges to which a person may otherwise have recourse are abrogated for the purposes of an examination; for example, the privilege against self-incrimination,² legal

¹ *Proceeds of Crime Act 2002* (Cth) ss 196(b), (d).

² *Ibid* s 197(2)(a).

professional privilege,³ and professional confidential relationship privilege.⁴

Her Honour observed that *while a Court should not hesitate to give an examination order in an appropriate case, the discretion to grant such an order should be exercised with caution* (at [32]).

The Court found support for such caution from the observations of Crispin J in *DPP v Chan* [2004] ACTSC 101, where his Honour observed:

It should be noted that the provisions governing an examination of that kind enable the person to be asked questions to which he or she may not be entitled to decline to answer on the ground of self-incrimination, and that such an investigation may therefore place that person in a position of considerable prejudice. It seems to me that it is incumbent upon the Director seeking an order of this kind to establish that there are adequate grounds for the order to be granted, and that those grounds should be established by sworn evidence. In the present case I am not satisfied that the evidence does disclose such grounds, and I accordingly dismiss that application.⁵

Crispin J's observations were approved, in obiter, by the New South Wales Court of Appeal in *Lee v DPP* (2009) 75 NSWLR 581, [50]-[52].

Zammit J observed (at [90]):

Crispin J in Chan indicated that an examination order application must 'substantially address the question of why an examination of this particular person is necessary'.⁶ This is because an examination order may place a person in a position of 'considerable prejudice' as he or she may not be entitled to decline an answer on the ground of self-incrimination.⁷ As such, his Honour stated there must be 'adequate grounds' for the order to be granted and that those grounds should be established by sworn evidence'.⁸

In refusing the examination order, her Honour observed (at [93]):

As such, there is nothing to indicate that an examination order for [Mr Zhang] would be 'necessary', particularly when considering that Mr Wang has sworn on oath that it was Mr Song who sent the sum of \$747,000 from the Song Junket Account to Zagame.

The Commissioner was ordered to pay the costs of the unsuccessful application.

Observations

Since the decision of the Forrest J in *Commissioner of the Australian Federal Police v Zhang (Ruling 1)* [2015] VSC 390, there has been a proliferation of examination applications. Such applications were made to ensure that the Commissioner could meet his evidentiary onus on forfeiture applications under section 47 and 49 of the POCA.

The *Zhang* ruling is subject to an application for leave to appeal, which will be heard, together with the appeal, in the Victorian Court of Appeal on 21 June 2016.

The decision of Zammit J highlights the need to carefully consider the affidavits upon which the Commissioner relies in seeking examination orders. Unless the evidence establishes the necessity for the examination, there will be good grounds to oppose the application.

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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³ Ibid s 197(2)(b).
⁴ Ibid s 197(2)(ba).
⁵ Ibid [27].

⁶ *Chan* [2004] ACTSC 101 [26]
⁷ Ibid.
⁸ Ibid [27].

Christian is available to advise on confiscation and proceeds of crime issues in all Australian jurisdictions and appear in proceeds of crime litigation throughout Australia.

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