



Commissioner of AFP v Zhao [2015] HCA 5

COMMISSIONER OF AFP V ZHAO

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Stay of proceedings under Proceeds of Crime Act 2002

by Christian Juebner

On 12 February 2015, the High Court (French CJ, Hayne, Kiefel, Bell and Keane JJ) unanimously dismissed an appeal by the Commissioner of the Australian Federal Police (**Commissioner**) seeking to overturn the decision of the Victorian Court of Appeal staying certain proceedings under the *Proceeds of Crime Act 2002* (**Act**) pending the finalisation of criminal proceedings against the accused.

In short, the accused had been charged with aiding and abetting another person to deal with property alleged to be proceeds of crime, contrary to section 400.4 of the Criminal Code.

The County Court of Victoria made a restraining order under section 19 of the Act restraining certain property on the basis that it was suspected of being proceeds of crime. The Commissioner

subsequently sought forfeiture of the restrained property under section 49 of the Act. It was alleged on behalf of the Commissioner (as is commonly the case) that the property in respect of which forfeiture was sought was derived from the offences with which the accused had been charged.

In addition to the application for forfeiture made by the Commissioner, the accused also made applications for exclusion seeking to have the restrained property freed from the restraining order.

After the accused made the applications for exclusion, the accused sought a stay of the proceedings under the Act pending the

finalisation of the criminal proceedings. The Commissioner opposed the stay application.

At first instance, the stay was refused in the County Court of Victoria. That decision was reversed by the Victorian Court of Appeal. The High Court upheld the decision of the Court of Appeal.

The basis for the stay was the fact that the circumstances relating to the forfeiture proceedings and criminal proceedings were substantially identical. The High Court held that very slender evidence was sufficient to identify the prejudice to the accused in having to proceed with proceedings under the Act whilst facing criminal charges. However, such stays are unlikely to be available for compulsory examinations under the Act, since evidence given in examinations cannot be used against the accused in the criminal proceedings.

In short, the decision will now make it much easier to obtain a stay order in respect of forfeiture and exclusion applications under the Act, pending the finalisation of criminal charges.

By contrast, the Victorian legislation, the Confiscation Act 1997, expressly contemplates staying proceedings pending the finalisation of criminal proceedings (see section 20(7)). It has long been the practice of the DPP in State prosecutions to consent to a stay order pending the finalisation of criminal charges. Hence, the issue agitated in *Zhao* had not previously arisen under the Confiscation Act 1997.

About the author

Christian Juebner is a barrister at the Victorian Bar and practices extensively in proceeds of crime litigation in various Australian jurisdictions. He was admitted to practice in 1996 and, prior to coming to the Bar 10 years ago, was a partner with Deacons (now Norton Rose Fulbright).

He can be contacted as follows:

- by email on juebner@vicbar.com.au
- by phone on (03) 9640 3216.

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