



VICTORIAN BAR

THE VICTORIAN BAR AND  
CRIMINAL BAR ASSOCIATION

**SUBMISSION ON THE CRIMES  
LEGISLATION AMENDMENT  
(PROCEEDS OF CRIME AND OTHER  
MEASURES) BILL 2015**

20 JANUARY 2016

## INTRODUCTION

1. The Criminal Bar Association ("CBA") was established in 1978 and currently has 581 members who represent nearly one quarter of barristers practising in Victoria and almost one-third of Victoria's judiciary.
2. CBA members appear in federal and state criminal cases in Victoria and all other Australian States and Territories of the Commonwealth.
3. Some CBA members principally prosecute those accused of criminal offending, some principally defend them and others have a mixed practice.
4. CBA meets regularly with the principals of the Courts and with Government ministers and staff to discuss Federal and State legislation, reform and other issues in the criminal justice system. We issue press releases and make public comment in state and national media. We also conduct Continuing Legal Education programs and workshops in the Criminal Law under the auspices of the Victorian Bar.
5. The CBA website is found at [www.crimbarvic.org.au](http://www.crimbarvic.org.au) and is regularly updated.
6. CBA notes the Senate reference of this Bill to the Committee and is pleased to make the following submission.

## PRINCIPAL SUBMISSIONS

7. The CBA opposes the proposed amendment to s 315A to compel a Court to hear any application for exclusion from an existing restraining order before hearing an application for a forfeiture order.
8. The CBA opposes the proposed amendment to s 319 to limit the Court's inherent power to stay proceedings under the *Proceeds of Crime Act 2002 (Cth)* ("POC Act" or "Act").

## PROPOSED AMENDMENT TO SECTION 315A

9. The proposed amendment to s 315A provides that any forfeiture application may only be heard and determined after any application for exclusion from a restraining order.
10. This proposed amendment is made in response to T Forrest J's ruling in *Commissioner of the Australian Federal Police v Zhang and Anor (Ruling No 1) ("Zhang")* [2015] VSC 390.<sup>1</sup> In *Zhang*, T Forrest J ruled that the Commissioner's application for forfeiture should be heard and determined before any applications by the respondents for exclusion.
11. CBA submits, with respect, His Honour's reasoning, based on fairness to all parties and the requirement to avoid multiple proceedings, was correct and, accordingly, legislative interference is not warranted.
12. In *Zhang*, neither respondent had been charged with nor convicted of any offence. Two properties and a motorcar they owned were the subject of restraining orders.
13. The relevant structure of the Act, as it applied in *Zhang*, in summary form, is as follows:
  - a. Restraining orders may be made by a Court under various heads of power in Division 1 of Part 2.1 of the Act. One such head of power is s 19. Pursuant to s 19, the Court must make a restraining order over property if there are reasonable grounds to suspect that the property is either the proceeds of crime or an instrument of crime.

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<sup>1</sup> See Explanatory Memorandum para 7.

- b. Pursuant to s 29, the person affected may then apply to the Court for exclusion of their interest in the restrained property. On such an application, the person must satisfy the Court that his or her interest is neither the proceeds of an indictable offence or an instrument of crime.
  - c. Pursuant to s 49(1), a Court must order that property restrained under s 19 is forfeited to the Commonwealth if the Court is satisfied that the property is either the proceeds of crime or an instrument of crime.
  - d. Section 49(3) provides that the applicant for the forfeiture order is relieved of the need of satisfying the Court that the property is either the proceeds of crime or an instrument of crime if an application for an order, excluding property from a restraining order, has not been made or has been made but has been withdrawn.
  - e. Section 73 provides that a person can apply for exclusion of a specified interest in property from a forfeiture order. In such a case, the person must satisfy the court that the interest in property is neither the proceeds of crime nor an instrument of crime.
14. In *Zhang*, Forrest J had before in him three applications, namely an application by the Commissioner for forfeiture of the property and applications by the Respondents for exclusion from the restraining order and from the forfeiture order (if made).
  15. The question for His Honour to decide was the order in which the Court should determine the applications. His Honour ruled that he should first hear and determine the application for forfeiture and then, if necessary, hear and determine the exclusion applications.
  16. It is submitted that His Honour's ruling reflects the proper balance to be struck between the community's interest in the forfeiture of property that is either proceeds of crime or an instrument of crime and the rights of the individual, who faces substantial interference to her or his proprietary rights, to procedural fairness.
  17. Each case turns on its own particular facts. The CBA submits the proposed amendment would unjustifiably fetter the Court's discretion to ensure fairness.
  18. It is submitted the proposed amendment to s 315A is unwarranted in the circumstances.
  19. It is further submitted the amendment proposed serves only to make a complex legislative regime even more complicated.
  20. An individual whose property has been restrained, because of the default forfeiture provisions, must make application for exclusion from the restraining order in order to contest forfeiture. If they do not, then s 49(3) applies.
  21. Under 49(3), the property is forfeited subject only to the Court being satisfied that a restraining order exists in relation to the subject property, that the restraining order has been in place for at least 6 months and that the Court is satisfied that the applicant has taken reasonable steps to identify and notify persons with an interest in the property. In the absence of an application for exclusion from the restraining order, the applicant for forfeiture does not have to establish that the property is either the proceeds of crime or an instrument of crime.
  22. The proposed amendment to s 315A would require the Court to hear the application for exclusion from the restraining order prior to the forfeiture application. If enacted, the amendment would require a respondent to a forfeiture application to first persuade a Court that his or her interests in the subject property ought be excluded from the restraining order because the interest in question is neither the proceeds of crime nor an instrument of crime (s 29(2)(c)). In such an application, the onus is on the respondent to satisfy the Court that his or her interest ought be excluded from the restraining order. Further, the individual is required to fulfil this onus when (at that stage of the proceeding) all the applicant authority has been required to show to obtain the restraining order is that there are reasonable grounds

to suspect that the property is either proceeds of crime or an instrument of crime. "Suspicion" is, of course, a low threshold.

23. It is submitted when an applicant authority is making application for forfeiture, in circumstances where the respondent has not been convicted of, nor charged with, an offence, the onus should be on the applicant authority to make its case for forfeiture at the commencement of proceedings. A restraining order can be obtained on the basis of police "suspicion" and by reliance on evidence that would not be admissible in a contested trial. By hearing the applicant authority's forfeiture application first, as T Forrest J did in *Zhang*, the Court can determine on the basis of admissible evidence whether it is satisfied that the property in question is the proceeds of crime or an instrument of crime. If it is so satisfied, then the Court can determine if the respondent's interests should be excluded from both the restraining order and the forfeiture order. If the Court is not so satisfied, then it is appropriate that the restraining order be discharged.
24. It should be noted that the test for exclusion from the restraining order (in s 29) and the test for exclusion from the forfeiture order (in s 73) are very similar. To require the application for exclusion from the restraining order be heard before the forfeiture application, rather than after, potentially involves the Court hearing two exclusion applications at separate times. The proposed amendment will cause, rather than prevent, multiple applications.
25. For the reasons stated, the Criminal Bar Association opposes the proposed amendment to section 315A.

## PROPOSED AMENDMENT TO SECTION 319 OF THE ACT

26. The proposed amendments to s 319 seek to limit the grounds for granting a stay of POC Act proceedings ("POC proceedings").
27. The proposed s 319(1) provides that a stay of POC proceedings may be granted if the court considers that it is in the interests of justice to do so. This simply re-states the inherent power of the Courts to control their proceedings and to order a stay in an appropriate case.
28. The proposed amendments appear to be made in response to the High Court's decision in *Australian Federal Police v Zhao* [2015] HCA 5.<sup>2</sup>
29. CBA submits, with respect, the High Court's decision, based on the requirements to ensure a fair trial of a person charged and to avoid multiple proceedings, was correct and, accordingly, legislative interference is not justified.
30. The proposed s 319(2) purports to prescribe circumstances where a stay must not be granted. It is submitted it does so in a way that unduly curtails the Court's power and duty to ensure fairness to all parties.
31. Section 319(2) provides *inter alia* that a Court must not order a stay of proceeds of crime proceedings on the grounds that there are concurrent criminal proceedings where the circumstances of each proceeding are the same or substantially similar (see s 319(3)).
32. Proposed s 319(2)(c) provides that the Court must not stay a proceeds of crime proceeding on the grounds that (i) a person may consider it necessary to give evidence ... in the proceeds of crime proceedings; and (ii) the evidence is or may be relevant (to whatever extent) to a matter that is, or may be, at issue in the criminal proceedings ... .

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<sup>2</sup> *Ibid* para 7, 46.

33. The proposed amendments in s 319(2)-(5) would substantially restrict the Court's power to stay POC proceedings where there are concurrent criminal proceedings which overlap and where the continuation of the POC proceedings involves a risk of prejudice to a person in his or her criminal trial.
34. Paragraph 49 of the Explanatory Memorandum states:

"The amendments clarify that proceedings under the Act may only be stayed where the granting of a stay is the only means of addressing the circumstances (i.e. the prejudice that may result to a concurrent or subsequent criminal trial)."
35. It is submitted the proposed amendments do not achieve that purpose. To the contrary, the proposed amendments proscribe the Court's inherent power to order a stay where there is a risk the concurrent POC proceedings would prejudice a pending criminal trial.
36. It is submitted the proposed amendments amount to a grave infringement of the rights of an accused to a fair criminal trial. The proposed amendments will compel a person charged with a criminal offence, who wishes to defend POC proceedings, to give evidence in the POC proceedings in advance of his or her criminal trial about matters to which the criminal trial relates.
37. It is submitted the proposed amendments would put a defendant significantly at risk of prejudice in his or her criminal trial by requiring him to reveal information in a POC proceeding about his defence.<sup>3</sup>
38. This not only subverts his or her right to silence but fundamentally alters the adversarial process<sup>4</sup> which is not warranted in the circumstances.
39. The public interest in determining proceeds of crime proceedings expeditiously should not displace long-held fundamental principles underpinning the adversarial system and the right to a fair trial.
40. Further, the proposed amendments fail to give to a person charged with a criminal offence adequate protections against disclosure and use of information he or she would be compelled to give in order to defend a POC proceeding.
41. Although Section 319A allows for a closed court, this is no safeguard against disclosure when the Commissioner of the Australian Federal Police is a party to the POC proceedings.
42. In the event of a stay until conclusion of concurrent criminal proceedings there is no prejudice to the Commissioner from a delay in continuation of forfeiture proceedings.<sup>5</sup>
43. For the reasons stated, the Criminal Bar Association opposes the introduction of s 319(2)-(6).

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<sup>3</sup> *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5, per French CJ, Hayne, Kiefel, Bell and Keane JJ, at [43]

<sup>4</sup> As explained by Hayne and Bell JJ in *X7 v Australian Crime Commission* (2013) 248 CLR 92, at [102][118].

<sup>5</sup> *Zhang*, at [50]