

LITIGATION UNDER THE *CONFISCATION ACT 1997*

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1. Introduction

This paper provides practical guidance to practitioners engaged in litigation under the *Confiscation Act 1997* (*Confiscation Act*). The *Confiscation Act* has for many years been invoked in drug related offences. However, its operation extends to any indictable (and even some summary) offences. Prosecutions under the *Confiscation Act* are increasing. It is now common to see restraining orders being made in, amongst others, dishonesty and sex offences. Additionally, there has been a significant increase in ‘civil forfeiture’ proceedings in recent times. This increase in litigation brings with it a variety of challenges for practitioners.

This paper provides an overview of:

- (a) the nature of restraining orders and how they are obtained;
- (b) the three types of forfeiture which operate under the *Confiscation Act*;
- (c) exclusion applications;
- (d) forfeiture applications;
- (e) the relevant rules of procedure;
- (f) the evidentiary onus in confiscation litigation;
- (g) the relationship between confiscation and sentencing;
- (h) the manner in which costs are awarded in confiscation litigation; and

- (i) the key issues that solicitors ought to consider in taking instructions from clients (such as key dates relevant to limitation periods).

2. Restraining orders

2.1 Overview

The nature of a restraining order is described in s.14 of the *Confiscation Act* as follows:

14 Restraining orders

- (1) *A restraining order is an order that no property or interest in property, that is property or an interest to which the order applies, is to be disposed of, or otherwise dealt with by any person except in the manner and circumstances (if any) specified in the order.*

A restraining order operates *in rem* (against the property), not *in personam* (against the person). In *DPP v Navarolli and Mokbel* [2005] VSC 395, Gillard J stated:

*It is noted that the order is in respect of property, or an interest in the property. It is not an order restraining a person dealing with the property. But of course the effect of an order is to restrain any person from dealing with the property, except as provided by the order itself.*¹

The expression *dealing with property* is explained in s.11 of the *Confiscation Act* as follows:

11 Meaning of dealing with property

For the purposes of this Act, dealing with property of a person includes—

- (a) *if a debt is owed to that person, making a payment to any person in reduction of the amount of the debt; and*
- (b) *removing the property from Victoria; and*

¹ Although Gillard J's decision was overturned on appeal (see *Navarolli v DPP (Vic)* [2005] VSCA 323), his Honour's characterisation of a restraining order was undisturbed by the appeal.

- (c) *receiving or making a gift of the property; and*
- (d) *creating or assigning an interest in the property; and*
- (e) *using the property to obtain or extend credit; and*
- (f) *using credit secured against the property.*

Commonly, the DPP restrains real estate which is security for certain loan facilities. Where such loan facilities include a redraw mortgage facility it would be a breach of a restraining order to draw against the facility (because its effect would be to diminish the equity of the restrained property).

The DPP also commonly restrains motor vehicles. In most instances, restrained motor vehicles are not seized by police and may be driven provided that they are not driven outside of Victoria.

The knowing contravention of a restraining order constitutes an offence punishable by imprisonment (10 years maximum) or monetary fine (up to 1,200 penalty units).²

2.2 The basis for obtaining a restraining order

There are two broad areas in which restraining orders operate; ‘charged based restraining orders’ and ‘civil forfeiture restraining orders’. The basis for obtaining restraining orders under each are different.

2.3 Charge based restraining orders

Most of the restraining orders obtained under the *Confiscation Act* are ‘charge based restraining orders’, being restraining orders made on the basis of a person being charged or convicted with criminal offences.

If a person has been or is about to be charged with a Schedule 1 or a Schedule 2 offence, the DPP³ has the power to restrain property which is either:

² *Confiscation Act*, s.29(1).

- property in which the defendant has an *interest*; or
- *tainted property*.⁴

There remains a common misconception that only tainted property may be restrained. The DPP is obliged to satisfy the Court that property sought to be restrained for forfeiture (as opposed to automatic forfeiture - discussed at paragraph 3 below) is tainted property. Insofar as property is restrained for automatic forfeiture, to satisfy a pecuniary penalty order or an order for restitution or compensation under the *Sentencing Act* 1991, it is not necessary for the DPP to show that property sought to be restrained is tainted property. It is sufficient if the DPP can demonstrate that the defendant has an interest (as to 'interest' see below) in such property.

An application for a restraining order is made under s.16 of the *Confiscation Act*. An application must be supported by an affidavit sworn by a member of the police force. The affidavit generally sets out the nature of the alleged offending and the nexus between the alleged offender and the property sought to be restrained (either by showing that the property is tainted property or that the alleged offender has an interest in it (or both)).

2.4 Civil forfeiture restraining orders

Pursuant to section 16(2)(a) of the *Confiscation Act*, the DPP may apply for a restraining order if a member of the police force suspects on reasonable grounds that the property is tainted property in relation to a Schedule 2 offence. Such restraining order can be obtained despite the fact that no charges have been laid (or might ever be laid) against any defendant. Further, such restraining order can be obtained against property even after a defendant has been acquitted.⁵

³ A prescribed person may apply for a restraining order. Other than in the Magistrates' Court, restraining orders are sought by the DPP.

⁴ *Confiscation Act*, s.16.

⁵ *DPP v Ali & Anor* [2009] VSCA 162.

An application for a civil forfeiture restraining order must be supported by an affidavit of a member of the police force setting out any relevant matters and stating that the member suspects that the property is tainted property in relation to a Schedule 2 offence and setting out the grounds on which the member has that suspicion.⁶

The court must make a restraining order if it is satisfied that:

- (a) the deponent of the affidavit supporting the application does suspect that the property is tainted property in relation to a Schedule 2 offence; and
- (b) there are reasonable grounds for that suspicion.⁷

Where a restraining order is made for the purposes of civil forfeiture, the DPP may, under section 37 of the *Confiscation Act*, make application for a civil forfeiture order. Such application is determined under section 38 of the *Confiscation Act*.

This paper does not deal specifically with the exclusion tests relating to civil forfeiture restraining orders. However, such tests are set out in s.24 of the *Confiscation Act* and largely mirror the exclusion tests contained in ss.21 and 22 of the *Confiscation Act*, which are discussed in this paper. However, one important distinction between civil forfeiture and automatic forfeiture arises from the operation of s.45 of the *Confiscation Act*. That section provides that questions of hardship are relevant when a court determines whether to make a civil forfeiture order. The question of hardship cannot be raised in the context of automatic forfeiture under the *Confiscation Act*.

2.5 Duty of full disclosure

It is a well known principle that an applicant in an *ex parte* application must make full and frank disclosure to the court of all matter bearing upon the application,

⁶ *Confiscation Act*, section 16(5).

not only those matters in support of the application. In *Moloney v AG of Victoria & DPP* [2010] VCC, Judge Saccardo considered these principles in the context of an *ex parte* application for a restraining order by the DPP. The facts were as follows; Mr Moloney was charged with and convicted of a Schedule 2 (automatic forfeiture) offence (and other related Schedule 1 offences) pertaining to the cultivation of cannabis. A restraining order was made after Mr Moloney was charged and, after his conviction of a Schedule 2 offence (cultivation of cannabis in a commercial quantity), the restrained property was automatically forfeited since no application for exclusion had been filed by him. After automatic forfeiture occurred, Mr Moloney sought to have the restraining order declared void, alternatively, have it set aside on the basis that the affidavit in support of the application for the restraining order contained significant inaccuracies; namely that it alleged that Mr Moloney had been charged with certain offences which the DPP had agreed not to pursue by the time the restraining order was sought.

The Court found that the deponent of the affidavit in support of the application for the restraining order had a duty to inform the Court of the fact that certain charges were not being pursued. The Court found that the deponent had breached that duty. However, the breach of the duty did not render the restraining order void *ab initio*. However, the breach would have entitled Mr Moloney to an order (under s.26 of the *Confiscation Act*) to have the restraining order set aside (if the restraining order still operated). The Court found that in circumstances where automatic forfeiture had already occurred, there was no longer any power to set aside the restraining order – since it was no longer in force.

2.6 Inter partes re-hearing

Applications for restraining orders are generally brought *ex parte*.⁸ The court has the power to compel the DPP to give notice of any application for a restraining order under s.17 of the *Confiscation Act*. That section was considered by Whelan

⁷ *Confiscation Act*, section 18(2).

⁸ There was much confusion in 2006 about whether, when *ex parte* restraining orders are sought by the DPP, they should be granted permanently or only on an interim basis. That confusion arose out of decisions of the Court of Appeal in *Navarolli v DPP* [2005] VSCA 323 and *DPP v Tien Duc Vu* [2006] VSCA 188.

J in *DPP v Latorre*,⁹ where his Honour held that, on an application for a restraining order, there is a presumption against the giving of notice to persons whose property is to be restrained.

An important question which remains unresolved is whether a person whose property has been restrained has a right to approach the court and require that the DPP's application for a restraining order be re-heard *inter partes*, so as to submit that the restraining order should not have been made. Absent a right to have an application for a restraining order re-heard *inter partes*, a person whose property is restrained could only appeal the making of the order or seek to challenge the restraint by making an application for exclusion under, for example, s.20 of the *Confiscation Act*.

It has always been the case that a person whose proprietary rights had been interfered with by an *ex parte* injunction could come back before the court *inter partes* to make submissions about the *ex parte* order.¹⁰ It is presently unclear whether such a right is ousted by the *Confiscation Act*. In *DPP v Tat Sang Loo* [2007] VSC 343 the liquidator of a company sought to have a restraining order application re-heard *inter partes*. The DPP did not take issue with the liquidator's attempt to seek such re-hearing. On the re-hearing of the restraining order application, the restraining order was affirmed by Osborn J.¹¹

The question of the right to an *inter partes* re-hearing was recently considered by the High Court under the equivalent New South Wales legislation, namely the *Criminal Assets Recovery Act 1990 (CAR Act)*. In *International Finance Trust Co Ltd v New South Wales Crime Commission* [2009] HCA 49, the High Court delivered four separate judgments, one by French CJ, a joint judgment by

⁹ [2006] VSC 398.

¹⁰ *Taylor v Taylor* (1979) 143 CLR 1; 25 ALR 418; *Savcor Pty Ltd v Catholic Protection International APS* [2005] VSCA 213; *Duck Boo International Co Limited v Mizzan Pty Ltd* [2006] VSCA 241.

¹¹ The Court of Appeal later confirmed the decision of Osborn J to maintain the restraining order (see *Bow Ye Investments Pty Ltd (in liq) v DPP* [2009] VSCA 149) and the High Court refused the liquidator special leave to appeal.

Gummow and Bell JJ, a judgment by Heydon J (who collectively comprise the majority) and a joint dissenting judgment by Hayne, Crennan and Kiefel JJ.

In that case, the appellants challenged the constitutional validity of section 10(3) of the CAR Act, which compelled the Supreme Court of New South Wales to make a restraining order in circumstances where the New South Wales Crime Commission (**Commission**) made application for a restraining order *ex parte* and satisfied the relevant affidavit requirements.

In short, the issue was whether legislation which compelled the making of such a restraining order offended against the constitutional principle that there be a separation of powers between the executive and judicial functions. The question was posed by Hayne, Crennan and Kiefel JJ, at [103], as follows:

Do the statute's requirements that the Supreme Court freeze dealings in any property of a person on ex parte application by the executive, and proof of mere suspicion that the person has committed a crime (based on articulated grounds and found by the Court to be reasonable), require the Supreme Court to engage in activity repugnant to the judicial process to such a degree that the statute is beyond the legislative power of the State?

French CJ did not directly address the question of whether a person whose property was restrained had a right to an *inter partes* re-hearing.

Gummow and Bell JJ found that section 10(3) of the CAR Act was invalid.

Critical to their Honours' finding that section 10 was invalid was a finding that a person affected by a restraining order does not have the right to have the application for the restraining order reheard *inter partes*. In that regard, Gummow and Bell JJ relied upon the decision of the New South Wales Court of Appeal in *New South Wales Crime Commission v Ollis* (2006) 65 NSWLR 478. At [90], their Honours reproduced the following quote from *Ollis*:

It is not consistent with the scheme of the Act that, when a restraining order is made, there can be a further hearing at which the same Judge or another Judge can be asked to determine on the same material whether

there are reasonable grounds for the suspicion; nor that there can be a further hearing at which further material is put before the same Judge or another Judge by the defendant and the Judge is asked to determine on the enhanced material whether there are reasonable grounds for the suspicion. The making of the restraining order can be challenged on appeal, on the contention that the Judge was in error in determining that there were reasonable grounds for the suspicion; or an application can be made for an exclusion order.

Heydon J concluded that section 10(3) of the CAR Act was invalid. Heydon J engaged in a detailed analysis of the adversarial system which is premised upon each party to a dispute having the ability to put before the Court their respective positions.

At [143], his Honour stated that:

The experience teaches that commonly one story is good only until another is told. Where a judge hears one side but not the other before deciding, even if the side heard acts in the utmost good faith and makes full disclosure of all that that side sees is relevant, there may be considerations which that side had not entertained and facts which that side did not know which, if brought to the attention of the judge, would cause a difference in the outcome.

The person most likely to have thought of cogent considerations, and to know the relevant facts, is the person whose interests are in jeopardy, that is the party opposing the decision. Therefore we shall avoid bad decisions best if we ensure that each potential decision, before it is finally decided, is exposed to what is likely to be the strongest possible criticism of it.

Having analysed the need for both parties to have an opportunity to put before the Court all matters relevant to the dispute, at [152] his Honour stated that:

Section 10(2) of the Act provides that the Commission “may” apply for a restraining order ex parte. Section 10(3) provides that if the Commission makes an application for a restraining order ex parte, the Supreme Court “must” make that order if the affidavit relied on by the Commission satisfies stipulated conditions. That is, the Supreme Court has no discretion to adjourn the hearing briefly while notice is given to the person affected. Although this is not by itself repugnant of the judicial process in a fundamental degree, it is relevant to whether one other aspect of the legislation is.

Heydon J based his finding that section 10(3) was invalid upon the fact that the Commission was entitled to obtain a restraining order *ex parte* whilst there was no mechanism within the CAR Act to apply for a speedy dissolution of that restraining order.

At [154], his Honour stated that:

A duty in the Supreme Court to grant an ex parte restraining order for a short period pending an application by the defendant to oppose its continuation, or dissolve it, is not repugnant to the judicial process in a fundamental degree. But the practical desirability of ensuring that assets not be disposed of before an application for a restraining order comes to Court is one thing. Creating a capacity in the Commission to retain a restraining order it has obtained ex parte without there being any procedure by which the defendant may apply to have it speedily dissolved is another.

His Honour concluded at [155] that:

If there is no procedure by which the person subject to a section 10(2) restraining order made ex parte may approach the Court to have it set aside once that person has learned of the order, the effect of section 10 is to compel the Supreme Court of New South Wales to engage in activity which is repugnant to the judicial process in a fundamental degree.

In making such finding, his Honour determined, at [160], that there was no provision within the CAR Act for a rehearing of the application for the restraining order *inter partes*.

Hayne, Crennan and Kiefel JJ dissented and found that section 10 of the CAR Act was valid. Their Honours' conclusion was based upon the premise that a person affected by an *ex parte* restraining order always has the right to have the application reheard *inter partes*, even if there are no express mechanisms within *the Confiscation Act* to do so. That being so, the judicial function of the Court is preserved.

At [119], their Honours stated that:

... if the application for a restraining order is made without notice of the application being given to the person affected, any person who is affected by the order may apply for reconsideration of the restraining order by the judge who made the order or by another judge. On that application for reconsideration of the order made ex parte, the person seeking to argue against maintenance of the order may agitate any aspect of the issues that determine whether the Supreme Court must make a restraining order.

Hayne, Crennan and Kiefel JJ expressly stated, at [124], that the decision of Ollis “*should be overruled*”.

At [128], their Honours stated that:

Neither section 10(2), providing for a restraining order to be sought ex parte, nor the provisions of section 12, enabling the making of various forms of orders ancillary to the making of a restraining order, shows that the Act should be read as inferentially excluding applications by the party affected by a restraining order, after the order has been made, to contest whether it should have been made or it should continue and to adduce evidence in support of that party’s case. Indeed, absent express and clear indication of that intention (“reasonably plain intendment”), the CAR Act should not be construed as working such a fundamental alteration to civil procedure as would be required to conclude that an order made ex parte should not be open to subsequent review and reconsideration on the application of a party adversely affected by it.

In summary, three judges of the High Court found that there was no scope for an *inter partes* re-hearing, three judges found that there was a right to an *inter partes* rehearing and the Chief Justice did not express a view on the matter. In due course the matter will undoubtedly be resolved. It is noteworthy that almost all the restraining orders, when made, grant liberty to apply. The grant of liberty to apply may be an implicit acknowledgement of the fact that a person affected by the order can approach the court, other than by an exclusion application, and argue that the order ought to be varied in same way.

In a practical sense, the scope to challenge the making of a restraining order is relatively narrow. The threshold which the DPP must meet in obtaining restraining orders is low. Under ‘charged based restraining orders’, all the DPP must demonstrate is that the defendant has been or is about to be charged and

either has an interest in the property sought to be restrained or that such property is tainted property. However, the Court, in making a restraining order, must be satisfied that there are 'reasonable grounds for making the restraining order'.¹²

In *DPP v Grimoli*¹³ the DPP restrained, amongst other things, a property which was owned by three groups of persons as tenants in common in equal shares. The defendant was one of the six owners. It was argued, on behalf of the five third parties, that there were no 'reasonable grounds' to restrain their interests in the property. Judge Dyett held that despite the fact that the DPP made no allegation against the five third parties it was nonetheless reasonable for the DPP to restrain the whole of the property and, consequently, the interests of the five third parties. Unfortunately, the judgment does not disclose the basis on which the Court determined that there were 'reasonable grounds'. The issue is likely to arise again in the future since it has, to date, not been sufficiently considered by a superior court.

The scope to challenge a restraining order made for the purpose of civil forfeiture is far greater. As set out above, in order to obtain a civil forfeiture restraining order, there must be evidence before the court that a member of the police force suspects on reasonable grounds that the property is tainted property in relation to a Schedule 2 offence. There may well be cases where, in an *inter partes* rehearing of a restraining order application, it is possible to throw doubt on such suspicion.

2.7 Undertaking as to damages

A civil litigant seeking an injunction is compelled to provide an undertaking as to damages to the court. The position is similar under *the Confiscation Act*. Section 14(7) of *the Confiscation Act* provides as follows:

(7) *The court may refuse to make a restraining order if the DPP or another person or body on behalf of the State refuses or fails to give to the court any*

¹² *Confiscation Act*, s.18(1)(c).

¹³ Unreported, Judge Dyett, CCV, 21 April 2005.

undertakings that the court considers appropriate concerning the payment of damages or costs in relation to the making and operation of the order.

Although the subsection speaks of a discretion, in practice all restraining orders contain an undertaking as to damages.¹⁴ It is important to have regard to the particular form of the wording of the undertaking. Some restraining orders refer to damages that the ‘respondent’ may suffer. Such an undertaking is inadequate since restraining orders are made against property (i.e. they operate *in rem*) and, therefore, there are no ‘respondents’ to restraining orders. The undertaking should extend to any person who may suffer damage arising from the restraining order. If it does not, it should in all likelihood be challenged. That is so because the only way to seek compensation arising from the making of a restraining order is through the undertaking and, if the undertaking is too narrow, it may prevent its subsequent enhancement.

The enforcement of the DPP’s undertaking as to damages under *the Confiscation Act* was considered by Judge Saccardo in *Moloney v AG of Victoria & DPP* [2010] VCC. The facts of the case are set out at paragraph 2.5 above. Judge Saccardo ordered the State of Victoria to pay damages equal to the value of Mr. Moloney’s house which had been automatically forfeited. The decision helpfully sets out the relevant principles applicable to the enquiry into damages arising from an undertaking as to damages given upon an application for a restraining order.

The principles can be summarised as follows:

- A failure to make full disclosure in response to which the court decides to discharge an injunction does not prevent the making of a new application for the same injunction which the court may grant.

¹⁴ See the observations of the WA Court of Appeal in *McCleary v Commonwealth Director of Public Prosecutions* (1998) 20 WAR 288 for a detailed discussion of the enforcement of an undertaking as to damages.

- The onus is upon an applicant seeking damages to show that the loss claimed would not have been sustained but for granting the injunction.
- The loss claimed must be directly caused by the wrongly obtained injunction.
- Effect should be given to the undertaking unless special circumstances exist.
- Special circumstances which may result in the undertaking not being enforced include conduct by the respondent to the injunction such as would render the enforcement of the undertaking inequitable.
- Account is to be taken of all matters that bear upon the justice or injustice of enforcing the undertaking.
- Unreasonable delay can be a relevant circumstance which acts as a disqualifying factor in respect of the making of an award of damages.
- There is little to be gained from an examination of the authorities dealing with causation of damage in contract, tort or other situations; the court is better advised to look at the purpose which the undertaking as to damages is to serve and to identify the causal connection or standard of causal connection which is most appropriate to that purpose.
- That in a proceeding of an equitable nature, it is generally proper to adopt a view which is just and equitable or fair and reasonable in all the circumstances, rather than to apply a rigid rule. However the view that the damages should be those which flow directly from the injunction and which could have been foreseen when the injunction was granted, is one which will be just and equitable in the circumstances of most cases.

In the decision delivered 19 May 2010 (referred to at paragraph 2.5 above), Judge Saccardo determined that the DPP had breached its duty to make full disclosure to the Court when obtaining the restraining order over Mr. Moloney's home. The application for the restraining order had been made *ex parte*. Mr. Maloney did not become aware of his ability to have the restraining order set aside until after the house had already been automatically forfeited to the State of Victoria. His attempt to have the restraining order declared void *ab initio* failed.

The Court found that Mr. Maloney would have been entitled to have the restraining order set aside. However, it could not be set aside because automatic forfeiture had already occurred. Interestingly, the Court ordered damages against the State of Victoria despite the fact that Mr. Maloney was convicted of a Schedule 2 (automatic forfeiture) offence and the fact that Mr. Maloney could not have excluded the property from a restraining order, had one been lawfully made.

In summary, the Court was not satisfied that the DPP would have made a subsequent application for a restraining order or, if a subsequent application had been made, the Court was not satisfied that it would have succeeded. As at the date of this paper, there is an appeal pending by the DPP.

2.8 Property in which the defendant has an interest

The terms 'property' and 'interest' are very broadly defined in s.3 of the *Confiscation Act*. Property includes real and personal property and includes an interest in property. An interest in property may be either legal or equitable and includes a right, power or privilege over or in connection with property. Hence, the definition is extremely wide reaching.

Most commonly, the DPP will seek to restrain property which is valuable and either liquid, such as monies in cash or bank accounts, or property which is readily able to be converted to cash, such as real estate and motor vehicles. By reason of the breadth of the definition of 'property', there is no restriction on the

nature of property which may be restrained and, for example, livestock, greyhounds and racehorses can be (and have been) restrained.

Where property sought to be restrained is in some way registrable, such as real estate, and the defendant is, either alone or with one or more others, a registered owner of the property, such property is liable to be restrained. The issues become more complicated when a defendant's interest is merely an equitable interest in property, such as property held on express, constructive or resulting trust. It is clear that such equitable interests (or property in which a defendant has an equitable interest) may also be restrained.

Even if a defendant has no obvious legal or equitable interest in property, the DPP may still seek to restrain it if it can satisfy the court that such property is under the 'effective control' of the defendant. Section 10(a) of the *Confiscation Act* deems a defendant to have an 'interest' in property which is under the defendant's effective control. For a discussion of effective control, see paragraph 4.3(d) below.

Additionally, pursuant to s.10(b) of the *Confiscation Act*, the DPP may restrain property which a defendant has dispossessed. Where the restraining order is sought for the purpose of automatic forfeiture, the DPP may restrain all 'gifts' made by the defendant to another person at any time. Where the restraining order relates only to Schedule 1 offences, only 'gifts' made in the six years prior to the application for the restraining order may be restrained.

The expression 'gift' is defined in section 3 of the *Confiscation Act* and includes a transfer for a consideration significantly less than the greater of the prevailing market value or the consideration paid by the defendant.

2.9 Tainted property

The expression '*tainted property*' is defined in s.3 of the *Confiscation Act*. This is a pivotal definition in the *Confiscation Act*. The most important aspects of that

definition provide that tainted property, in relation to an offence, means property that:

- (a) *was used, or was intended by the defendant to be used in, or in connection with, the commission of the offence;*

Part (a) of the definition of tainted property focuses on the nexus between the offending and the property. In Victoria, the question of the extent of the nexus (whether substantial or not) has not yet been resolved. As was stated by Judge Morrow in *DPP v Wright*:¹⁵

[The] authorities do not seem to be consistent and range from the view of the Court of Criminal Appeal in New South Wales that the Crown “does not have to establish a substantial connection between the property and the offence charged in order to constitute the property “tainted property” – R v Hadad (1989) 16 NSWLR 476 and the decision of the Supreme Court of Queensland in Re George (1992) 2 Qd.R.351 where that Court held that the connection with the offence and the defendant’s property had to be “substantial and real”.

In some cases, the nexus between the offending and the property is relatively direct as with, for example, a house which has been partially converted for the purpose of hydroponic cultivation of cannabis. Such a house would clearly be used in or in connection with the offence of cultivation of cannabis and, therefore, be ‘tainted property’.

The most authoritative Victorian decision on this issue is *DPP v Selcuk*¹⁶. In that case, Hollingworth J considered the required nexus between the offending and the property. There, the defendant had been charged with intentionally causing serious injury. The defendant had, with another person, driven around Coburg to locate the victim and, upon locating him, had seriously assaulted him. The victim later died. A question arose whether the car was used, or was intended by the defendant to be used in,

¹⁵ Unreported, Judge Morrow, CCV, 13 May 2004.

¹⁶ [2008] VSC 37.

or in connection with, the commission of the offence. After reviewing the interstate authorities (on the basis that there is little Victorian authority on the subject), Hollingworth J concluded as follows:¹⁷

In the end, it is not necessary for me to choose between the two different approaches, because I am satisfied on the particular facts of this case that there was a substantial or direct connection between the offence and the car. Mr Selcuk asked his brother to come over and drive him around in the car, for the specific purpose of looking for Mr Duran. Although it is not clear on the evidence whether the assault weapon (the baseball bat) was placed in the car at Mr Selcuk's house, or whether it was already in the car, Mr Selcuk got out of the car at the café, armed with the baseball bat and threatening to kill Mr Duran. Unable to locate him at the café, Mr Selcuk got back in the car with the baseball bat and continued looking for Mr Duran, with the clear intention of using the baseball bat as a weapon when he found him. The car was also used to conceal the weapon as Mr Selcuk travelled around looking for his victim. When the Selcuk brothers came upon Mr Duran, Asim Selcuk parked the car in the intersection, ready for a quick getaway after the attack. After the assault, the brothers fled the scene in the car.

In the circumstances, the DPP has persuaded me that the car was used "in connection with" the offence. The car provided a means of concealment for the weapon used to commit the offence, the means by which Mr Selcuk hunted for his victim with the clear intention of attacking him, and the intended and actual getaway car. It follows that the car is "tainted property" within the meaning of the Act.

There are many cases where the nexus between the offending and the property has been considered, including:

- *R v Hadad*:¹⁸ A vehicle was used to transport heroin and, while being transported, it was concealed within the vehicle. The vehicle was held to be tainted property on the basis that McInerney J held that the legislature had not intended that there be a substantial connection between the property and the use.

¹⁷ At [41].

¹⁸ (1989) 16 NSWLR 476.

- *R v George*:¹⁹ Land was used to dry (but not grow) cannabis. It was held that a substantial connection is required between the use of the land and the offence. The Court found that such a substantial connection existed by reason of using the land to dry the cannabis.
- *R v Rintel*:²⁰ Drugs were stored at a house and the defendant used his car to transport the drugs. The car was held to be tainted property but the house in which the drugs were stored was held not to be tainted property. Pidgeon J stated that it would be beyond the intention of the legislation to assume that property is liable to forfeiture every time an illegal activity is carried out on such property. His Honour did state that cultivation of drugs on land would be a clear use of the land in connection with the offence.
- *DPP (NSW) v King*:²¹ A young girl was sexually assaulted on a yacht. It was held that the yacht was not used in connection with the sexual assault despite the fact that a victim in such circumstances cannot escape the assailant, cannot be heard if she calls for help and the yacht provides the absolute privacy within which such an offence can take place. This can be contrasted with the case of *Queen v Robert Garner*²² where a young boy was sexually assaulted on a house boat and it was held that the house boat was used in connection with the offending as providing an ‘efficient tool of seduction’.
- *DPP v Milienou*:²³ A house was used to store a large volume of stolen clothes. It was held that the house was not used in connection with the offence of larceny since there was an insufficient temporal connection between the offending and the use of the house.

¹⁹ [1992] 2 Qd R 351.

²⁰ (1991) 3 WAR 527.

²¹ [2000] NSWSC 394.

²² Judge Kelly, unreported, CCV, 26 April 1999.

²³ (1991) 22 NSWLR 489.

There are an endless number of varied and interesting scenarios. Consider, for example, the situation where a house is used as security for a loan in circumstances where the loan is obtained in reliance upon false employment records. In such a case it may be strongly arguable that the security property was used in connection with the offence of obtaining a financial advantage by deception, which, if the loan exceeds \$50,000, is an automatic forfeiture offence.

There is some ambiguity about whether the ‘use’ of the property is referable to the use by the defendant only or the use by any person.²⁴

- (b) *was derived or realised, or was substantially derived or realised, directly or indirectly, from property referred to in paragraph (a)*

Part (b) of the definition of tainted property catches the conversion of an asset from one form to another. For example, if the houseboat in *Garner’s* case had been sold and the monies used to purchase a car, then that car would have been derived or realised (or substantially so) from the houseboat and, as a result, be tainted property despite the fact that the car was not used in or in connection with a sexual assault.

- (c) *was derived or realised, or was substantially derived or realised, directly or indirectly, by any person from the commission of the offence*

Part (c) of the definition of tainted property comes into play where it is alleged that the defendant has gained financially from the offending and used such gains to acquire assets. This issue commonly arises in drug trafficking cases, but can also be of relevance to other crimes such as theft, obtaining property by deception and obtaining a financial advantage by deception.

²⁴ See discussion by Smith J in *DPP v Ali* [2008] VSC 167 at [21] – [37]. Note that the Court of Appeal reversed Smith J’s decision (see *DPP v Ali* [2009] VSCA 162), but this point was not argued.

The *Confiscation Act* does not provide any guidance as to the meaning of the expression ‘*substantially derived or realised*’. It is clear that it is not necessary for the whole of the property to be derived or realised from the commission of the offence. It is sufficient if the property was substantially derived or realised from the commission of the offence.

There has to date been no judicial consideration in Victoria of the threshold at which property will be regarded as substantially derived or realised from the commission of the offence. For example, if half of the purchase price of a house comes from an inheritance and the balance of the purchase price stems from trafficking drugs, is that house substantially derived or realised from the drug trafficking? What if half of the value of a house is derived from a rising property market whilst the balance was funded from thefts? What if the proportions changed somewhat?

In *Gregory John Blake and Another*²⁵ the question for the Court was whether a house was ‘derived, directly or indirectly by any person from any unlawful activity.’ The reasoning in *Blake’s Case* may be relevant to this part of the definition of tainted property and suggests that the threshold is at least as low as 50%. Loveday J stated that:

I have come to the conclusion that although a substantial amount of the purchase [sic] of the [property] was derived from a lawful activity, nevertheless, the major portion of the purchase price was derived from an unlawful activity. The half share purchased in 1984 was derived virtually wholly from unlawful activity and some of the loan paid off between 1973 and 1987 was derived from unlawful activity. It is, I concede, a difficult question as to where the dividing line should be drawn. Neither counsel has suggested that if a very small portion, for example 1%, of the purchase price was derived from an unlawful activity, this would prevent the finding in the applicant's favour. However, if I conclude, as I have done, that the majority of the purchase price for the majority of the interest in the property was derived by Mr and Mrs Blake from unlawful activities then I could not be satisfied that in respect of the [property] the applicant has satisfied the onus that lies upon him.

²⁵

(1992) 60 A Crim R at 257.

[Underlining added]

The derivation of property may be direct or indirect. In *DPP (Cth) v Jeffrey*,²⁶ Hunt CJ at CL considered whether property which was acquired, at least in part, with funds which should have been paid to the tax office was directly or indirectly derived from the commission of an offence (being the offence related to the non-payment of tax). His Honour stated, at page 321, that:

The failure to furnish returns led directly to the availability to the applicant of the funds which would otherwise have been payable as tax if returns had been furnished. Property acquired with those funds is indirectly derived from the failure to furnish returns.

3. The three types of forfeiture

3.1 Overview

There are three ways in which forfeiture can occur under the *Confiscation Act*, namely:

- (a) discretionary forfeiture of tainted property by application made by the DPP under s.32 of the *Confiscation Act* within 6 months of the date of conviction of a Schedule 1 offence;²⁷
- (b) automatic forfeiture of restrained property under s.35 of the *Confiscation Act* within 60 days of conviction of a Schedule 2 offence;
- (c) ‘discretionary’ civil forfeiture of restrained property on the application of the DPP made under s.37 of the *Confiscation Act*.

²⁶ (1992) 58 A Crim R 310.

²⁷ The date may be extended by leave of the Court; *Confiscation Act*, s.31(2).

Apart from forfeiture, property may also be lost if it is used to satisfy a pecuniary penalty order or an order for restitution or compensation under the *Sentencing Act* 1991.

3.2 Discretionary conviction based forfeiture applications

Where a defendant is convicted of a Schedule 1 offence, the DPP may, within 6 months of the conviction, apply for a forfeiture order in respect of tainted property.²⁸ Although the DPP can apply for an extension of time within which to apply for forfeiture, such extension will not be granted where the failure to make the application in time results from an oversight on the part of the DPP.²⁹ Unlike the automatic forfeiture regime, where the DPP makes an application for forfeiture, the Court has discretion whether or not to order forfeiture of tainted property. In exercising that discretion, the Court may take into account any material it thinks fit.³⁰

The *Confiscation Act* expressly provides that, in the exercise of the Court's discretion, the Court may have regard to the use that is ordinarily made of the tainted property, any hardship that may reasonably be likely to be caused to any person by the forfeiture order and, where the application is brought by a third party, those matters which that third party could rely upon in seeking exclusion of tainted property.³¹

In addition to the discretionary matters expressly set out in the *Confiscation Act*, the Courts have set out further criteria. Of particular importance in Victoria is the decision of Warren CJ in *DPP v Tran*,³² where her Honour quoted the following passage from the decision of the Court of Appeal in NSW in the case of *Lake*.³³

²⁸ *Confiscation Act*, s.32.

²⁹ *Savvinos v DPP* [1996] VR 43.

³⁰ *Confiscation Act*, s.33(4).

³¹ *Confiscation Act*, s.33(5).

³² [2004] VSC 218.

³³ (1989) 44 A Crim R 63 (per Kirby P as he then was) at 66-67.

In considering hardship, it is necessary to bear in mind that, of necessity, in achieving its object, the Act will cause a measure of hardship in the deprivation of property. Indeed that is its intention. ... The provision for relief [under the Act] must not be so interpreted as to frustrate the achieving of the purpose of Parliament in enacting the exceptional provisions of that Act. Something more than ordinary hardship in the operation of the Act is therefore meant. [Emphasis added]

Further, Warren CJ referred to the decisions of the Court of Criminal Appeal of South Australia in *Taylor v The Attorney-General of South Australia*³⁴ and the decision of the Court of Criminal Appeal of Victoria in *Winand*³⁵ and considered the following matters in the exercise of her discretion in that case:

- the value of the property;
- the nature of the offender's interest in the property;
- the value of the drugs involved or the size of the crop;
- whether the property was acquired with the proceeds of the sale of drugs;
- the utility of the property to the offender;
- the length of ownership of the property;
- the extent to which the property is connected with the commission of the offence;
- the fact that forfeiture is intended as a deterrent;
- the interests of innocent third parties;
- the nature and gravity of the offence;
- the degree of the offenders involvement in the offence;
- the offenders antecedents;
- the value of any other property confiscated;
- the penalty imposed; and
- the extent (if any) to which the retention of the property might bear on the offender's rehabilitation.

³⁴ (1991) 53 A Crim R 166 at 175-179.

³⁵ (1994) 73 A Crim R 497.

Kaye J in *DPP v Nikolaou*³⁶ also considered the principles that ought to guide the courts in determining applications for forfeiture. In that case, the DPP sought forfeiture of a house that was used to hydroponically cultivate cannabis. The hydroponic system was sophisticated with high power lights and an electricity bypass. The respondent (and defendant) was the sole owner of the property, having inherited it from his parents.

The respondent had admitted growing the cannabis for the purpose of resale and admitted making some such sales. In refusing forfeiture, Kaye J observed that the following matters were relevant to the exercise of his discretion:

- If opposing forfeiture on the grounds of hardship, it is necessary to show hardship other than what might be expected to arise from the ordinary operation of the *Confiscation Act*.
- The gravity of the offending, the degree to which the property in question was used for the purpose of the offending and the potential effect of forfeiture on the offender and innocent third parties.
- Whether forfeiture would be disproportionate to the nature and gravity of the offence.

The refusal to order forfeiture in *Nikolaou* followed in the footsteps of two other refusals by the Supreme Court to order forfeiture of real property; see *DPP v Smith*³⁷ and *DPP v Gyurcik*.³⁸ To date, no Victorian court has ordered forfeiture of real property under the *Confiscation Act*. Having said that, a lot of real property has been automatically forfeited in Victoria.

³⁶ [2008] VSC 111.

³⁷ [2007] VSC 98.

³⁸ [2007] VSC 424.

3.3 Automatic forfeiture

Where a defendant is convicted of a Schedule 2 offence, all property which is restrained and not the subject of an exclusion order will be forfeited 60 days after the date of conviction. As to the date of conviction, see paragraph 5 below.

Although a literal reading of s.35 of the *Confiscation Act* requires that there be an exclusion order made within 60 days of the date of conviction, it has not been challenged that the making of an application for exclusion within those 60 days is sufficient to prevent automatic forfeiture. The matter was recently considered by Cavanough J in *DPP v Horsley*. No written reasons were given by his Honour, but the Court was satisfied that the making of an application was sufficient. It is simply not realistic to expect that exclusion orders could be made within 60 days of conviction, taking into account the complexity of litigation and the time it takes for proceedings to come to trial, be heard and determined.

In contrast to discretionary forfeiture (where only tainted property is liable to forfeiture), all restrained property, even if not tainted property, is liable to forfeiture to the Minister³⁹ upon conviction of a Schedule 2 offence unless it is excluded by an exclusion order made under s.22 of the *Confiscation Act*.

3.4 Civil forfeiture applications

Where a restraining order is made for the purpose of civil forfeiture, the DPP must make an application for civil forfeiture within 90 days of the date on which the restraining order is made, failing which the restraining order ceases to operate.⁴⁰

As with discretionary conviction based forfeiture, a person who has an interest in property sought to be forfeited by the Crown can seek an exclusion order by making an application for exclusion under s.20(1) of *the Confiscation Act*. The

³⁹ Being the Attorney General.

⁴⁰ S.27(2) of *the Confiscation Act*.

applicable exclusion test is set out in s.24 of *the Confiscation Act* and largely mirrors the test applicable to automatic forfeiture applications set out at paragraphs 4.2 and 4.3 below. Additionally, an application for civil forfeiture can be opposed on the grounds of hardship.⁴¹

The question of hardship in the context of civil forfeiture was considered by Hargrave J in *DPP v Khodi & Dounia Ali* [2010] VSC 503. The decision is the fourth ‘Ali’ decision under *the Confiscation Act*. The facts were as follows: Mr Ali and his co-offenders had been charged with certain drug offences, said to have been committed on Mr Ali’s farm property. The farm property was restrained under the conviction based (as opposed to the civil forfeiture based) regime under *the Confiscation Act*. Mr Ali was subsequently acquitted but his co-offenders were convicted of Schedule 2 (automatic forfeiture) offences. Upon acquittal of Mr Ali, the restraining order ceased to operate over the farm property as a result of s.27(3)(b) of *the Confiscation Act*.

After the restraining order ceased to operate, the DPP sought to restrain the same farm property again, this time relying upon civil forfeiture. The application was opposed and, at first instance, the DPP’s application was refused by Smith J. The DPP appealed to the Court of Appeal and succeeded (3:0), thereby obtaining, for the second time, a restraining order over the farm property (albeit for a different purpose – solely civil forfeiture).

Exclusion applications were made by Mr and Mrs Ali in respect of their respective (asserted) interests in the restrained property. Concurrently, the DPP sought civil forfeiture of the farm property. The decision of Hargrave J dealt with the exclusion application of Mrs Ali (the application by Mr Ali was withdrawn) and the DPP’s application for civil forfeiture. It was necessary to determine whether Mrs Ali had a beneficial interest in the property capable of being excluded. Without going into the detail of the evidence, his Honour found that

⁴¹ S. 38(2) and 45 of *the Confiscation Act*.

Mrs Ali had no legal or equitable interest in the property. In coming to that conclusion, his Honour analysed various trust principles.

Having found that Mrs Ali had no interest in the farm property, his Honour went on to determine whether the property should be excluded from civil forfeiture on the grounds of hardship, relying upon section 38(2) of the *Confiscation Act*. That section permits the court to exclude particular property or any particular interest in property from the operation of a civil forfeiture order if satisfied that otherwise hardship may be reasonably be likely to be caused to any person by the order. It must be remembered that this hardship discretion only comes into play in discretionary (but not automatic) forfeiture cases.

Hargrave J determined that “*in exercising the court’s discretion, the fact that it is an all or nothing discretion [under s.38(2)] is an important matter to be taken into account*”. His Honour observed that:

There will be cases where the court takes the view that total forfeiture would be unduly harsh in all the circumstances, but the conduct of the owner of the relevant interest is such that the ends of the civil forfeiture regime would be defeated if the whole of the property was excluded from the operation of a civil forfeiture order. In such cases, the further discretion arising under section 45(1) of the [Confiscation] Act, which permits the court to order payment of a specified amount out of the forfeited property in order to avoid hardship to any person, is enlivened.

His Honour determined that guidance can be obtained from the approach adopted by the courts in connection with discretionary forfeiture, relying upon cases such as *Lake v R* (1989) 44 A Crim R 63, *Taylor v Attorney-General for the State of South Australia* (1991) 55 SASR 462 and *R v Winand* (1994) 73 A Crim R 497. Those cases stand for the proposition that something more than ordinary hardship in the operation of the *Confiscation Act* is required to invoke the hardship discretion. His Honour determined that Mr Ali’s involvement in the illegal drug manufacturing was such that the discretion ought not be exercised to exclude the property.

Having determined that the specific civil forfeiture hardship discretion was not to be exercised, his Honour then considered whether to make an order under s.45 of the *Confiscation Act* which enables the court, if satisfied that hardship may reasonably be likely to be caused to any person by a forfeiture order or a civil forfeiture order, to make an order that the person is entitled to be paid a specified amount out of forfeited property, being an amount that the court thinks is necessary to prevent hardship to the person. After having heard evidence about the cost of renting alternative accommodation, his Honour determined that Mrs Ali should receive the sum of \$125,000 (approximately 40% of the anticipated sale proceeds of the property) so as to alleviate her hardship.

Interestingly, the Court made an order to pay money to Mrs Ali in circumstances where it had been found that she had no interest in the property. In other words, the court recognised that even though a person may not have an interest in a particular property, they can still suffer hardship from its forfeiture (through the loss of the accommodation).

4. Exclusion applications

4.1 General

With effect from 26 September 2007, the *Confiscation Act* was amended to expressly provide that an applicant for exclusion is only able to exclude their interest in property. That amendment to the *Confiscation Act* operates retrospectively. The amendment is intended to overcome the effect of the decision in *DPP v Phan Thi Le*⁴², where a majority of the Court of Appeal (Maxwell P and Chernov JA, Neave JA dissenting) found that an applicant for exclusion was entitled to exclude the whole of the property, and not only their interest in it.⁴³

⁴² [2007] VSCA 18.

⁴³ The High Court granted the DPP special leave to appeal the decision. The appeal was heard in August 2007, but as at the date of writing this paper, the decision has not been delivered.

The decision whether to make an exclusion application or not will depend, in part, on whether property has been restrained for the purposes of forfeiture or automatic forfeiture. If property is restrained for the purposes of forfeiture only (being in relation to a Schedule 1 offence which is not a Schedule 2 offence⁴⁴), it may be preferable to simply oppose the DPP's application for a forfeiture order rather than to also make a separate exclusion application. The decision whether, in the context of Schedule 1 offences, to make an exclusion application or merely to oppose forfeiture will often depend on whether the restraining order has been obtained for the purpose of compensation and/or a pecuniary penalty order. If, for example, it has been obtained for the purpose of compensation then a third party with an interest in restrained property will, through obtaining an exclusion order, receive restrained property in priority to a victim of the offending. That is so because a third party does not have to demonstrate that the restrained property is not required to satisfy a compensation order. The position is not so when acting for a defendant.

A further matter to take into account when considering making an exclusion application is the likelihood of success. When acting for the defendant (as opposed to a third party), it is not possible to exclude tainted property. Where, for example, a defendant has been convicted of cultivating cannabis within his home using a hydroponic setup, that defendant will not be able to satisfy the Court that the home is not tainted property and, consequently, an application for exclusion by the defendant in respect of that home has no prospect of success. However, where less than a commercial quantity of cannabis was cultivated and the defendant is convicted of the cultivation offence, it may still be possible to defeat the DPP's application for forfeiture by relying on the discretionary considerations, such as hardship. Discretionary considerations are discussed in paragraph 3.2 above.

Applications for exclusion of property from restraining orders are made under s.20 of the *Confiscation Act*. Application for exclusion must be made within 30

⁴⁴ Each Schedule 2 offence is also a Schedule 1 offence.

days after the restraining order is served.⁴⁵ The Court has the power to extend the 30 day period if it is in the interests of justice to do so.⁴⁶

The party seeking to have property excluded from a restraining order bears the burden of proof and must satisfy the Court of the various conjunctive exclusion tests which are contained in s.21 and s.22 of the *Confiscation Act*. Any question of fact is to be decided on the balance of probabilities.⁴⁷ Exclusion applications are civil proceedings but the civil procedure rules do not apply.⁴⁸

Where exclusion is sought in the context of a Schedule 1 offence, the exclusion test is set out in s.21 of the *Confiscation Act* and where exclusion is sought in relation to a Schedule 2 offence, the exclusion test is set out in s.22 of the *Confiscation Act*. The exclusion tests set out in ss.21 and 22 of the *Confiscation Act* are essentially identical.⁴⁹ Section 24 of the *Confiscation Act* contains the exclusion tests applicable to civil forfeiture restraining orders.

4.2 Exclusion by defendant and third parties

The scope for exclusion is reduced for defendants. However, defendants and third parties can apply to exclude restrained property and a Court may⁵⁰ make an exclusion order under s.22(a) of the *Confiscation Act* if the following four conjunctive requirements are satisfied:

(a) the property was lawfully acquired

⁴⁵ *Confiscation Act*, s.20(1)(A). That requirement is not enforced in respect of restraining orders made prior to 1 January 2005.

⁴⁶ *Confiscation Act*, s.20(1)(B).

⁴⁷ *Confiscation Act*, s.132.

⁴⁸ *Confiscation Act*, s.133.

⁴⁹ Note that, after the occurrence of automatic forfeiture or the making of a forfeiture order, a third party can make application for exclusion of forfeited property under ss.49 and 51 of the *Confiscation Act*.

⁵⁰ The word “may” does not confer a discretion to exclude. Provided that the exclusion requirements are met, an applicant for exclusion is entitled to an exclusion order. *DPP v Phan Thi Le* [2007] VSCA 18 at [16].

This focuses on the acquisition itself, as opposed to whether or not the funds used to acquire the property were derived from illegal activities.⁵¹ For example, property which was stolen will not have been lawfully acquired.

(b) *the property is not tainted property*

Refer to paragraph 2.9 above.

(c) *the property is not derived property*

With effect from 26 September 2007, the *Confiscation Act* was amended to include this further limb of the exclusion test. This limb of the exclusion test does not apply to applications for exclusion which were made⁵² prior to 26 September 2007.

The expression ‘derived property’ is defined to include property:

- (1) used in, or in connection with, any unlawful activity by the defendant or the applicant for an exclusion order; or
- (2) derived or realised, or substantially derived or realised, directly or indirectly, from any unlawful activity by the defendant or the applicant for an exclusion order; or
- (3) derived or realised, or substantially derived or realised, directly or indirectly, from property of a kind referred to in sub-paragraphs (1) and (2) above.

The expression ‘unlawful activity’ means an act or omission that constitutes an offence against a law in force in the Commonwealth,

⁵¹ The second requirement, namely that the property is not “tainted property”, focuses on the source of the funds used to acquire the property.

Victoria or another State, a Territory or a foreign country punishable by imprisonment.⁵³

The breadth of the definition of ‘derived property’ has the potential to cause significant difficulties for applicants for exclusion. Courts may refuse to make exclusion orders despite the fact that the unlawful activity was in no way related to the charges which founded the making of the restraining order. One area of particular concern is unlawful activity resulting from breach of revenue laws. If, for example, an applicant commits an offence by failing to declare taxable income and that income is used to acquire assets which are subsequently restrained in respect of an unrelated offence, will exclusion orders be denied on the basis that the property was derived or realised, or substantially derived or realised, directly or indirectly, from unlawful activity? There is some precedent for this already in New South Wales; see *DPP (Cth) v Jeffrey*.⁵⁴

An absurd result could arise under road safety legislation. The unlicensed driving of a motor vehicle is punishable by imprisonment.⁵⁵ A vehicle driven by an unlicensed driver is used in or in connection with that offence. If the vehicle is some years later restrained because, for example, the same unlicensed driver is a defendant in respect of an unrelated offence (an offence not related to the unlicensed driving – such as the cultivation of a commercial quantity of cannabis), the vehicle, once restrained in respect of the later offending, could not be excluded from the restraining order and, upon conviction, would be automatically forfeited to the Minister. It is difficult to conceive that Parliament intended the *Confiscation Act* to have such operation.

⁵² The reference to “made” is a reference to the date of filing of the notice of application for exclusion.

⁵³ *Confiscation Act*, s.3.

⁵⁴ (1992) 58 A Crim R 310 at 321.

⁵⁵ *Road Safety Act* 1986, s.18.

- (d) the property will not be required to satisfy any pecuniary penalty order or an order for restitution or compensation under the Sentencing Act 1991

It is often difficult to satisfy this requirement before the conclusion of the criminal proceedings. The DPP may apply for a pecuniary penalty order at any time within 6 months of conviction and victims may make compensation applications under the Sentencing Act 1991 at any time within 12 months of conviction. A court hearing an exclusion application will not wish to speculate whether at some future point the restrained assets may be required to satisfy a pecuniary penalty order or order under the *Sentencing Act 1991*.

It is possible to make application under s.23 of *the Confiscation Act* to obtain a “quasi” exclusion order, being an order that so much of the property that is not required to satisfy any pecuniary penalty order or an order for restitution or compensation under the Sentencing Act 1991 is excluded.

4.3 Exclusion by third parties only

In addition to the exclusion test in paragraph 4.2 above (to which defendants are restricted) a Court can make an exclusion order in favour of third parties, excluding tainted property, provided that the exclusion test in s.22(b)(i) is satisfied. That test is as follows:

- (a) the applicant was not, in any way, involved in the commission of the Schedule 2 offence

The fact that an applicant is not charged with the Schedule 2 offence (or a related offence) is not sufficient to satisfy the Court that the applicant was not in any way involved in the commission of the Schedule 2 offence.

In *Hong Yen Le v DPP* [2007] VSCA 72, the Court of Appeal (Maxwell P, Eames and Nettle JJA) examined the expression ‘in any way involved in the commission of’ the relevant offence, as that expression is used within the various exclusion tests throughout the *Confiscation Act*.⁵⁶

The facts of the case were as follows: Mr and Mrs Le lived in a residential property in suburban Melbourne. Two of the three bedrooms of the property had been converted to cultivate cannabis. Mr Le was charged with and convicted of trafficking a commercial quantity of cannabis. Mrs Le was not charged with any offences despite the fact that she lived in the property and the Court below, in the confiscation proceedings, found that she had knowledge of the cultivation of cannabis at the property.

Mrs Le made an application for exclusion under s.20 of the *Confiscation Act*. Because the property was clearly ‘tainted property’, she was obliged to satisfy the Court on the balance of probabilities that, amongst other things, she was not, in any way, involved in the commission of trafficking a commercial quantity of cannabis.⁵⁷

The Court below found, relying upon a decision of the Court of Appeal of New Zealand, that Mrs Le’s knowledge of the cultivation, in conjunction with her failure to take any preventative steps to cause her husband to cease cultivating cannabis at the property, resulted in her being ‘involved’ in the offence for the purposes of the *Confiscation Act*.

Mrs Le appealed, relying upon the principles in DPP Reference No. 1 of 2004, *R v Nguyen* (2005) 12 VR 299, arguing that she was not ‘involved’ in the commission of trafficking a commercial quantity of cannabis because she had no knowledge of at least one element of the offence of

⁵⁶ See ss.21, 22, 24, 50 and 52.

⁵⁷ S.22(b)(i)(A) of the *Confiscation Act*.

trafficking in a commercial quantity of cannabis, namely knowledge that the cannabis was of a commercial quantity.

Nettle JA, with whom Maxwell P and Eames JA agreed, stated, at [22]:

...I accept the Applicant's contention that, in a case like the present, an applicant could not be said to have been involved in an offence of trafficking in a commercial quantity of cannabis if he or she did not know or believe that the offender was cultivating the cannabis for sale or did not know or believe that there was a real or significant chance that the quantity of cannabis was not less than a commercial quantity.

...

... knowledge includes wilful blindness and "wilful blindness" includes the actions of a person who deliberately refrains from making enquiries because he or she prefers not to have the result, or who otherwise wilfully shuts his or her eyes for fear that they may learn the truth.

However, because the whole of Mrs Le's evidence had been rejected by the Judge below as being unreliable and the Court below found that she had knowledge of the cannabis in the two bedrooms, she was unable to satisfy the Court that she had a belief that the quantity of cannabis cultivated was less than a commercial quantity. Consequently, leave to appeal was refused.

- (b) where the applicant acquired the interest before the commission, or alleged commission, of the Schedule 2 offence, the applicant did not know that the defendant would use, or intended to use, the property in, or in connection with, the commission of the Schedule 2 offence

This part of the test is only relevant where the applicant's interest in the property was acquired before the commission or alleged commission of the Schedule 2 offence. It is a subjective test and, as such, the applicant must satisfy the Court that he or she did not have such knowledge at the

relevant time. Applicants are usually able to satisfy this test by making a simple assertion, if it is the fact, that they had no such knowledge.

- (c) where the applicant acquired the interest at the time of or after the commission, or alleged commission, of the Schedule 2 offence, the applicant acquired the interest without knowing, and in circumstances such as not to arouse a suspicion, that the property was tainted property or derived property

This part of the test is only relevant where the applicant's interest in the property was acquired at the time of or after the commission or alleged commission of the Schedule 2 offence. The test includes both a subjective and an objective element to avoid situations of wilful blindness. For example, where a husband, unbeknown to his wife, makes money from trafficking in drugs and purchases lavish gifts for his wife, the wife may find it difficult to satisfy the Court that she acquired her interest in the gifted property in circumstances such as not to arouse a reasonable suspicion that the gifts were tainted property.⁵⁸

In *DPP v Phan Thi Le*⁵⁹ the Court stated that:

The “reasonable suspicion” provision...is concerned with whether the circumstances in which the applicant acquired her interest in the property were such as to arouse in her a reasonable suspicion that the property had been used in connection with the trafficking. Plainly, the word “reasonable” imports an objective test. This means that it will not avail an applicant to say “I had no suspicion” if a reasonable person in her circumstances, and knowing what she knew, would have formed a suspicion. But if, in those circumstances and knowing what she knew, a reasonable person would not have formed a suspicion, that is the end of the matter.

In *McMunn v DPP* [2010] VSCA 330, the Court of Appeal (Maxwell P, Weinberg and Mandy JJA) considered this limb of the exclusion test. The

⁵⁸

In the case of gifts, the wife is also likely to fail under s.22(i)(b)(E) on the basis that the interest was acquired from the defendant and that it was not acquired for sufficient consideration.

facts were as follows: Cornelia McMunn was the wife of the offender, John McMunn; John McMunn had, throughout the course of their marriage, engaged in a long history of dishonest offending, had been imprisoned on numerous occasions and was described by one sentencing judge as a career conman.

In 1998, three years after his release from prison (in respect of offences that had nothing to do with the subsequent restraining order), Mr and Mrs McMunn decided to buy a new family home. At that time, they were living in a home which Cornelia McMunn had inherited. They agreed between themselves that the inherited property would be sold and that Cornelia McMunn would pay half of the proceeds of sale of that property towards the purchase price of the new family home. John McMunn had told his wife that he would be getting about \$400,000 from the sale of software which he was going to contribute towards the purchase of the new family home to fund the balance.

The new family home was subsequently purchased and, because settlement of the sale of the inherited property had at that time not taken place, the entire deposit and settlement proceeds were provided by John McMunn from the sale of software (so he told his wife). Subsequently, Cornelia McMunn did pay to her husband half of the sale proceeds of the inherited property, as she had earlier agreed with him.

John McMunn was subsequently charged and convicted with obtaining a financial advantage by deception. The quantum of the deceptions were such that the convictions were of Schedule 2 (automatic forfeiture) offences. After Mr McMunn was charged, the new family home was restrained by the DPP for, amongst other things, automatic forfeiture.

Cornelia McMunn made an application for exclusion, seeking to exclude her half interest in the family home. It was conceded at first instance before Harper J that the property was ‘tainted property’, it having been derived, or substantially derived, from the commission of John McMunn’s offending.

In the circumstances, Mrs McMunn was required to satisfy the exclusion test set out in section 22(b) which required her, amongst other things, to demonstrate that “*where the applicant acquired the interest at the time of or after the commission, or alleged commission, of the Schedule 2 offence, the applicant acquired the interest without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was tainted property*”.

Harper J dismissed the application for exclusion and stated that:

I cannot be satisfied that Mrs McMunn acquired her interest in the Bendall Street property in circumstances such as not to arouse a reasonable suspicion that the property was tainted. No person dealing with Mr McMunn and knowing of his criminal history as at the end of 1994 could sensibly rely on his honesty in relation to any issue or dealing of any financial magnitude, especially if it was financially opportune for him to be dishonest.

In dismissing the appeal, Maxwell P (with whom Weinberg and Mandy JJA agreed) referred to Harper’s reasons (as set out above) and observed at [8]:

As those paragraphs made clear, his Honour was addressing the question posed by the section, which is whether a reasonable person in the circumstances of Mrs McMunn, knowing what she knew, would have formed a suspicion that the property was tainted property. It is common ground that that is the test to be applied. It pays attention to what the applicant for exclusion actually knew, but asked the question “would a reasonable person in her position have had a suspicion?”. Mrs McMunn had to satisfy the Judge that the question should be answered in the negative.

At [15], Maxwell P made the following further observation:

As Weinberg JA pointed out in the course of argument, an applicant in a proceeding of this kind may wholly believe in what she says about her state of knowledge, and may believe when she says, “I had no suspicion”. But that will not avail the applicant if a reasonable person in her position would have had a suspicion.

The decision highlights the fact that, where an application for exclusion is pressed by a third party in respect of tainted property, it is critical to carefully consider the question of ‘reasonable suspicion’. In circumstances where the facts would give rise to such suspicion (which, as Weinberg JA, pointed out is a very low threshold) it will be necessary to assert positive facts as to the steps taken by the applicant with a view to alleviating such suspicion.

With effect from 26 September 2007, this part of the exclusion test was amended to include a reference to ‘derived property’. The test, as amended, will only apply to applications for exclusion filed on or after 26 September 2007. For a discussion of the expression ‘derived property’, see paragraph 4.2(c) above.

- (d) *the applicant's interest in the property was not subject to the effective control of the defendant on the earlier of the date that the defendant was charged with the Schedule 2 offence or the restraining order was made in relation to the property*

The concept of effective control is not defined in the *Confiscation Act*. However, as Ashley J stated in *DPP v Tat Sang Loo and another*:⁶⁰

All in all, the Victorian legislation suggests, and the authorities dealing with like legislation show, that effective control means control which is practically effective, even though it is not supported by any proprietary interest or legally enforceable

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[2002] VSC 231.

power; control de facto, not necessarily – though it may also be – control de jure.

Recently, in 24th *Trengganu Pty Ltd & Anor v DPP* [2009] VSC 525, Kaye J considered the expression ‘effective control’. The decision concerns two applications for exclusion. The first application was brought by Vitina Rizzo, the grandmother of the offender, Bartholomew Rizzo.

In 1966, Vitina Rizzo and her husband were the registered proprietors of a property in Box Hill North. After the husband died, Vitina Rizzo remained as sole surviving proprietor of the property. In 2006, Vitina Rizzo agreed to sell the Box Hill North property to Bartholomew Rizzo. Although the property was worth approximately \$430,000, it was sold to Bartholomew Rizzo for \$250,000. The whole of that purchase price was loaned by Vitina Rizzo to her grandson but the transfer of land recorded a consideration of \$430,000. The loan was documented by a solicitor and, clause 4 of the loan agreement, recorded that “*the borrower acknowledges that the lender shall have the right to lodge at the expense of the borrower a caveat over the title to the property*”.

On 25 October 2006, Bartholomew Rizzo became registered as proprietor of the Box Hill North property. Subsequently, a caveat was lodged on behalf of Vitina Rizzo which claimed ‘an equitable interest as chargee’ in the property. Bartholomew Rizzo made a number of partial repayments of the loan but, at the time of hearing of the application for exclusion, \$185,144 remained outstanding.

Bartholomew Rizzo was convicted of Schedule 2 (automatic forfeiture) offences under the *Confiscation Act* and the Box Hill North property was restrained. It was common ground that the property was tainted property.

The DPP opposed the application for exclusion by Vitina Rizzo on two grounds; firstly it was argued that Vitina Rizzo did not have a relevant

interest in the property and, secondly, it was argued that if she did have such an interest, it was subject to the effective control of Bartholomew Rizzo.

Kaye J found that clause 4 of the loan agreement was effective to constitute an equitable charge, in favour of Vitina Rizzo, over the Box Hill North property as security for the outstanding debt owed to her by Bartholomew Rizzo.

As for effective control, Kaye J found that although Bartholomew Rizzo was for all intents and purposes in sole and exclusive control of the property (as one would expect in respect of the registered proprietor), that did not mean that he had effective control over Vitina Rizzo's interest in that property (being her equitable interest arising under the loan agreement).

In other words, a distinction is to be drawn between being in effective control of property (being the relevant test for a pecuniary penalty order) and being in effective control of an interest in property (being the relevant test in respect of an exclusion application).

His Honour noted that the construction for which the DPP contended "*would give rise to harsh consequences, which would be unlikely to have been intended by Parliament*". Consequently, his Honour made an order excluding Vitina Rizzo's interest in the Box Hill North property.

The second application for exclusion concerned a motor vehicle registered to a company called 24th Trengganu Pty Ltd. The company conducted the family business trading under the name *Rizzo's House of Linen*. Bartholomew Rizzo had been an employee of the company for some time. However, he was not a director or officer of the company at the time of his arrest.

The vehicle had been purchased with money which had been provided by Bartholomew Rizzo to the company. Bartholomew Rizzo kept the vehicle at his address and, for all intents and purposes, exercised substantial control over the vehicle. However, the vehicle was registered to the company and was used, from time to time, in the transport of products for the company.

The DPP opposed the application for the vehicle's exclusion on two grounds; firstly, on the basis that the company was not the true owner of the vehicle and therefore had no interest able to be excluded and, secondly, on the basis that Bartholomew Rizzo was in effective control of the vehicle.

Kaye J held that the company was the true owner of the vehicle and, therefore, had an excludable interest.

In respect of effective control, Kaye J found that although Bartholomew Rizzo had the primary use of the vehicle and had a substantial amount of control over such primary use, he did not have the right to use the vehicle solely for his own personal purpose, nor the right to dispose of the vehicle. On that basis, Kaye J found that the company's interests in the vehicle was not under the effective control of Rizzo at the relevant time and, it followed, that the company's application for exclusion succeeded.

See also *DPP v Ferguson* [2006] VSC 484, but note that the judicial commentary about 'effective control' in that case occurred in the context of s.70 of the *Confiscation Act*. That section focuses on effective control over property rather than effective control over an interest in property.

- (e) where the applicant acquired the interest from the defendant, directly or indirectly, that it was acquired for sufficient consideration

With effect from 26 September 2007, the *Confiscation Act* was amended to include a definition of ‘sufficient consideration’. That definition was inserted to overcome the decision in *DPP v Phan Thi Le*⁶¹ where a transfer of land for ‘natural love and affection’ was seen to satisfy the sufficient consideration test. The Court stated that:

*...we consider that the term “sufficient consideration” ... includes both “valuable consideration” and “good consideration”, as those terms have been understood at common law. In the circumstances of this case... “natural love and affection”, stated to be the consideration for the transfer of [the] half interest in the property ...constituted “sufficient consideration” for the purposes of ...the [Confiscation] Act.*⁶²

The expression ‘sufficient consideration’ has been defined, in relation to property, to mean consideration that reflects the market value of the property and does not include any of the following; consideration arising from the fact of a family relationship between the transferor and transferee; if the transferor is the spouse or domestic partner of the transferee, the making of a deed in favour of the transferee; a promise by the transferee to become the spouse or domestic partner of the transferor; consideration arising from love and affection; transfer by way of gift.⁶³

Further, under s.22(b)(ii) of the *Confiscation Act*, a third party may seek to exclude property which is not tainted property if the following two matters can be established:

- (a) *the applicant’s interest in the property is not subject to the effective control of the defendant on the earlier of the date that the defendant was charged with the Schedule 2 offence or the restraining orders made in relation to the property*

⁶¹ [2007] VSCA 18, subsequently upheld on this point by the High Court in *DPP v Le* [2007] HCA 52.

⁶² At [45].

⁶³ *Confiscation Act*, s.3. Further, note that the expression ‘gift’ is also defined in *Confiscation Act*, s.3.

Refer to commentary on effective control at paragraph 4.3(d) above.

- (b) where the applicant acquired the interest from the defendant, directly or indirectly, that it was acquired for sufficient consideration

Refer to commentary on sufficiency of consideration at paragraph 4.3(e) above.

5. Time of conviction

Pursuant to s.35 of the *Confiscation Act*, property which is restrained for automatic forfeiture is automatically forfeited to the Minister (namely the Attorney General of Victoria) 60 days after the date of conviction of the Schedule 2 (automatic forfeiture) offence unless:

- an exclusion application has been made in respect of the property prior to the expiry of those 60 days; or
- an exclusion order has been made in respect of the property.

In *DPP v Nguyen* and *DPP v Duncan*⁶⁴, the Court of Appeal recently affirmed that conviction occurs at the time a person pleads guilty and is arraigned, at which time ordinarily the allocutus is administered. Therefore, the decision affirms the decision of the Court of Appeal in *DPP v McCoid* [1988] VR 982.

Where property of a defendant is automatically forfeited by reason of a failure to file an exclusion application within the 60 day period following conviction, there is a risk that any legal practitioner acting for the defendant will face a claim for professional negligence.

⁶⁴ [2009] VSCA 147.

6. Procedure

Despite the fact that proceedings under the *Confiscation Act* are civil proceedings, the rules regulating civil proceedings do not apply.⁶⁵ Where the confiscation proceedings are conducted in the Supreme Court, the procedure is governed by the *Supreme Court (Criminal Procedure) Rules 2008*. In particular, Order 6 deals with the confiscation of property and proceeds of crime. Importantly, Rule 6.11 provides that evidence in support of an application for a restraining order shall be by affidavit unless the application is brought on for hearing during or at the conclusion of the trial of the defendant. Further, Rule 6.11 provides that evidence in support of an application for an exclusion order shall be by affidavit. There is no express requirement that evidence in respect of a forfeiture application shall be by affidavit, but the Court may, in accordance with Rule 6.11(4), direct that it be by affidavit.

It is the practice that the parties to confiscation proceedings are directed to prepare affidavits and are then, at the hearing, confined insofar as the evidence in chief is concerned, to the affidavit material. Cross-examination and re-examination is generally permitted in respect of that affidavit material.

In the County Court, the *County Court Miscellaneous Rules 1999* govern the procedure applicable to confiscation proceedings. Order 10 deals with confiscation of property. Rule 10.10 provides that the evidence in support of an application for a restraining order shall be on affidavit unless the application is brought on for hearing during or at the conclusion of the trial of the defendant. Further, it provides that evidence in support of an application for an exclusion order shall be on affidavit. The *County Court Miscellaneous Rules 1999* do not specifically require that evidence in respect of forfeiture applications be on affidavit. However, one of the purposes of the Confiscation List (now administered by His Honour Judge Parsons) in the County Court at Melbourne is to provide directions for the case management of confiscation matters. Those orders generally provide that, subject to any direction by the trial judge, the

⁶⁵ *Confiscation Act*, s.133(2).

evidence at the hearing of an exclusion application or forfeiture application be confined to affidavit evidence.

As of 11 December 2008, the County Court has issued a Practice Note in relation to proceedings under the *Confiscation Act* and the *Proceeds of Crime Act 2002* (Cth), which can be downloaded from the County Court website. No such Practice Note exists in the Supreme Court.

7. Evidentiary onus

The affidavit material to be relied on by applicants for exclusion orders or opponents of forfeiture orders must be carefully prepared. It must always be remembered that, in the context of exclusion applications, the applicant for exclusion bears the burden of proof to satisfy the Court that the exclusion order should be made.

The difficulties associated with satisfying the exclusion test⁶⁶ were recognised by Hunt CJ at CL of the Supreme Court of NSW in *DPP v Jeffery*.⁶⁷ In that case, the applicant under the NSW confiscation legislation had to satisfy the Court that certain property was not used in or in connection with any unlawful activity. Hunt CJ at CL stated that the burden of proof is rightly placed upon the applicant because the facts are within his or her knowledge. Further, his Honour stated that the obligation of the applicant is to deny only in general terms the matters required to be proven under *the Confiscation Act* and, provided that the evidence of the applicant is accepted as honest and accurate, the onus of the applicant is discharged by a mere denial. However, Hunt CJ at CL also stated that:

As a matter of practical reality, what such an applicant must do in most cases in order to establish the negative facts ... is not only to deny on oath in general terms that the property was so used in or derived from any such unlawful activities but also to establish what activities it was in fact used in and derived from ... However, in my view it is not necessary for the applicant – in addition to his sworn denial in general terms that the property had been so used in any unlawful activities – to deal specifically

⁶⁶ Being the difficulty associated with having to prove a negative.

⁶⁷ (1992) 58 A Crim R 310

with every kind of unlawful activity which could be imagined in relation to the use of such property ... therefore the applicant – in addition to his sworn denial in general terms that the property had been used in any unlawful activities ... - need deal specifically only with inferences available from the evidence that his property had been used in particular unlawful activities and which tend to contradict his sworn denial.

Hunt CJ at CL also stated that there is an obligation upon the DPP to point to or introduce evidence from which such inferences may become available.

Although, based on the reasoning in Jeffery's case, a mere denial may in some cases suffice to enable the applicant to meet the legal and evidentiary burden, it is at all times preferable to expand beyond a mere denial because the denial, in the absence of further explanation, may not be accepted as honest and accurate.

For example, where real estate of an alleged drug trafficker has been restrained, it would most likely be insufficient to simply assert that the relevant piece of real estate is not tainted property. In order to satisfy the Court of that fact it may be necessary to show how the purchase price was paid and the source of mortgage repayments. To that extent, wage records and bank statements may be required. Alternatively, one may be able to point towards an inheritance.

8. Relationship with sentencing

On 6 September 2007, the Court of Appeal (Maxwell P, Redlich JA and Habersberger AJA) handed down its decision in *R v McLeod* [2007] VSCA 183. The question determined in the appeal was stated by the Court as follows:

[W]here a person is convicted and sentenced for an offence, and there is subsequent forfeiture of property of that person by reason of the conviction, can the forfeiture be relied on in an appeal against sentence as a basis for reopening the sentencing discretion?

The Court unanimously answered the question in the affirmative.

In that case, the sentencing judge in the County Court did not take into account the risk of forfeiture of property in sentencing the offender. The Court held that

the sentencing judge was not obliged to take the risk of forfeiture into account because there was insufficient evidence before him to enable him to make an assessment of the likelihood of forfeiture or its likely effect.

The Court of Appeal stated that an offender who relies on forfeiture (whether it has occurred or is anticipated) as a mitigating circumstance will ordinarily bear the onus of establishing that it should be so regarded.

Despite the fact that no sentencing error was found to exist, the sentencing discretion of the Court of Appeal was enlivened because the subsequent forfeiture of property constituted 'fresh evidence'. As a result, the Court of Appeal re-sentenced the offender and reduced the period of imprisonment. The case of *R v McLeod* contains a detailed exposition on the law of sentencing, as it relates to forfeiture of property and pecuniary penalty orders under the *Confiscation Act 1997*.

For a detailed discussion of the relationship between sentencing and forfeiture, see the report *Sentencing, Parole Revocation and Confiscation Orders: Discussion and Options Paper* prepared by the Sentencing Advisory Council in 2009.

9. Charter of Human Rights and Responsibilities

The question of the interplay between *the Confiscation Act* and the *Charter of Human Rights and Responsibilities Act* (**Charter**) is still largely unanswered. The issue arose for the first time in *DPP v Khodi & Dounia Ali* [2010] VSC 503. The facts of that case are set out in paragraph 3.4 above. In that case, Hargrave J considered:

- a person's right not to have his or her family home arbitrarily interfered with;
- the entitlement of families to be protected by society and the State;
- the right of a child to such protection as is necessary in his or her best interests by reason of being a child.

It was submitted on behalf of Mrs Ali that the hardship discretion (which enables a court to exclude particular property or any particular interest in property from the operation of a civil forfeiture order if satisfied that otherwise hardship may reasonably be likely to be caused to any person by the order⁶⁸) is circumscribed by the relevant human rights and that, unless the making of a civil forfeiture order can be demonstrably justified under the Charter, the court must exclude the property from the operation of the civil forfeiture order.

Hargrave J rejected Mrs Ali's submission, principally on the basis that such construction would be inconsistent with the express terms of section 38(1) of *the Confiscation Act* and would, thereby, defeat the purpose of the legislation.

It is likely that the Charter will raise its head again in litigation under *the Confiscation Act* in due course.

10. Costs

In summary, the position concerning costs is as follows:

- s.133A of the *Confiscation Act* leaves untouched the general costs power to award costs in civil proceedings; see *DPP v Phan Thi Le (No. 2)*.⁶⁹
- s.133A does not preclude the DPP from seeking costs against an unsuccessful litigant even where the application is one that falls within the ambit of s.133A. See *DPP v Ali*⁷⁰ and *Bow Ye Investments Pty Ltd (in liq) v DPP (No. 2)*,⁷¹ (where the Court of Appeal did not follow *DPP v Loo*⁷² and *DPP v McMunn (No 2)*⁷³).

⁶⁸ Section 38(2) of the *Confiscation Act*.

⁶⁹ [2007] VSCA 57.

⁷⁰ [2009] VSCA 243

⁷¹ [2009] VSCA 278

⁷² [2007] VSC 437.

⁷³ [2009] VSC 379.

Practitioners should expect (and warn their clients to expect) that orders for costs will, absent offers of compromise (or similar devices), usually follow the event.

In *Australian Agriculture and Property Development Corporation v DPP* (Cth) [2006] VSC 297, a restraining order was made under the Commonwealth legislation. Third parties made application for exclusion of the restrained property. Before the applications for exclusion could be heard, the defendant consented to certain orders being made, including pecuniary penalty orders, which then resulted in the exclusion proceeding being futile. The applicants for exclusion then sought costs against the DPP (Cth) in respect of the exclusion applications. The application for costs was dismissed. At [8] and [9], Hargrave J made the following observation:

The relevant principles are not in doubt. In a similar context, McHugh J stated in Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; ex parte Lai Qin:

“In most jurisdictions today, the power to order costs is a discretionary power. Ordinarily, the power is exercised after a hearing on the merits and as a general rule the successful party is entitled to his or her costs. Success in the action or on particular issues is the fact that usually controls the exercise of the discretion. A successful party is prima facie entitled to a costs order. When there has been no hearing on the merits, however, a court is necessarily deprived of the factor that usually determines whether or how it will make a costs order.

In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties. To do so would burden the parties with the costs of a litigated action which by settlement or extra-curial action they had avoided. In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action. ...

Moreover, in some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried. This is perhaps the best explanation of the

unreported decision of Pincus J in South East Queensland Electricity Board v Australian Telecommunications Commission where his Honour ordered the respondent to pay 80 per cent of the applicant's taxed costs even though his Honour found that both parties had acted reasonably in respect of the litigation. But such cases are likely to be rare.

If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings. This approach has been adopted in a large number of cases.” (Citations omitted.)

Further, the principles were summarised by Redlich J (as he then was) in Jeruth Pty Ltd v Haybale Pty Ltd & Ors:

“If a supervening event or compromise so removes or modifies the issues in dispute that it cannot be said that one side has won, the Court should not attempt to assess the merits of the case. This is particularly so where the issues are complex or questions of credit are involved. If it is clear on the undisputed facts that one party would almost certainly have succeeded if the matter had been fully tried, the Court may make an order in favour of that party.

Where it is not clearly discernible that a party would have won and it appears that both parties have acted reasonably in commencing and defending the proceedings until the litigation was compromised or became futile, the Court would usually make no order as to costs. But where the Court concludes that a party has acted unreasonably prior to or during the course of the litigation the making of a costs order against it may be justified.

It is not in doubt that a party may rely upon matters of undisputed fact disclosed by the pleadings, affidavits, discovered documents or interlocutory relief granted in the course of proceedings to establish that the party acted reasonably and would have succeeded had the matter been tried... Such a course is appropriate where the hearing can be of relatively short compass and those matters that are not in dispute readily identified. The boundaries of such an inquiry must be strictly observed to ensure that an inappropriate use of Court resources does not occur.” (Citations omitted.)

[Footnotes omitted]

11. Practical considerations in taking instructions

When taking instructions from a client in a proceeding under the *Confiscation Act*, practitioners ought to consider each of the following matters:

- (a) Client - Determine whether your client is the defendant or a third party claiming an interest in restrained property. Different exclusion tests apply and defendants cannot exclude tainted property.
- (b) Conflict - Consider issues of conflict in acting for defendants and third parties.
- (c) Property Interest Declarations - Ensure that the property interest declarations are completed and returned to the Criminal Proceeds Squad within 14 days of service of the restraining order (s.19B of the *Confiscation Act*). At the time of completing the property interest declaration, thought must be given to all potential interest in the property (whether legal or equitable – such as interests under resulting or constructive trusts) so as to avoid inconsistency with later exclusion applications.
- (d) Date of Conviction - Determine whether there has been a ‘conviction’ within the meaning of the *Confiscation Act*. A person is ‘convicted’, in the case of a plea, on the date that the person is arraigned even if the plea in mitigation and sentence occurs at some later time. In the case of a defendant, any application for exclusion must be made within 60 days of the date of conviction.
- (e) Police Affidavit - Obtain a copy of the affidavit in support of the application for the restraining order and the exhibits from the OPP.

- (f) Living Expenses - Consider whether it is necessary to make application for variation of the restraining order under s.26 of the *Confiscation Act* to enable reasonable living and business expenses to be paid out of restrained property. Note that variations are not permitted to release money for legal fees. See s. 14(5) of the *Confiscation Act*.
- (g) Legal Aid - Consider whether it is necessary to make application for Legal Aid under s.143 of the *Confiscation Act*.
- (h) Application for Exclusion - File any application for exclusion within 30 days of the date that the restraining order is served. If that is not possible, then file the application as soon as possible and seek an extension of time under s.20(1B) of the *Confiscation Act*. Note that the Court cannot extend the time after automatic forfeiture has already occurred. It may not be necessary to file an application for exclusion if only Schedule 1 offences are charged.
- (i) Timing of Application - Consider whether it is preferable to have any exclusion application heard before the criminal charges are determined or whether the application ought to be stayed pending the outcome of the criminal prosecution. Note that, when acting for a defendant, it may not be possible to exclude property until after the criminal charges are determined and it is known whether a pecuniary penalty order or compensation or restitution orders will need to be satisfied.
- (j) Undertaking as to Damages - Consider whether the undertaking as to damages contained in the restraining order is sufficiently broad to protect all persons who may suffer damage as a result of the restraining order.
- (k) Sale of Property - Consider whether restrained property should be sold pending the hearing of the exclusion application. The DPP will generally consent to a sale provided that the net proceeds of sale are held by the Department of Justice pending the finalisation of the proceedings under

the *Confiscation Act*. If a sale is contemplated, a variation of the restraining order under s.26 of the *Confiscation Act* is required.

- (l) Evidence - Consider what documents will be required to support any application for exclusion, such as bank statements, sale of land contracts, loan applications, tax assessment notices etc.

12. Conclusion

The *Confiscation Act* provides the DPP with the power to cast a wide net over assets. Once within that net, persons who claim an interest in restrained assets bear a heavy onus to have property excluded. Since the evidence on which the Court will determine applications is generally confined to affidavit evidence, much thought needs to be given to the evidence to be adduced at the outset. That, in turn, often requires a thorough analysis of many areas of the law, including criminal, property, trust, equity and corporations' law.

13. About the author

Christian is a barrister at the Victorian Bar with extensive experience in confiscation proceedings. He is regularly briefed to advise and appear on behalf of the DPP and applicants for exclusion. Christian has appeared in all Victorian State and Commonwealth Courts.

Before coming to the Bar, Christian was a partner with Deacons (now Norton Rose). Through his commercial experience, he has a detailed knowledge of property, equity and trust issues, all of which are relevant to and impact on proceedings under the *Confiscation Act*.

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