LITIGATION UNDER THE

CONFISCATION ACT 1997 (Victoria)

Paper current as at 26 February 2012

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1. Introduction

This paper provides practical guidance to practitioners engaged in litigation under the *Confiscation Act* 1997 (***Confiscation Act***). In doing so, it 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*[1], 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.*[2]

2.2 Dealing with Property

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*
>
> *(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.*

As a result of that definition, where restrained real estate is security (i.e. by mortgage or charge) for loan finance (such as a line of credit), it would be a breach of the restraining order (i.e. a dealing with property) to draw further on the loan.

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1 [2005] VSC 395

2 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.

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).[3]

2.3 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 regime are different.

2.4 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 having been being charged or convicted with criminal offences.

The extent of property which may be restrained by the Director of Public Prosecutions (**DPP**) depends on the purpose for which the restraining order is made. Where the DPP seeks to restrain property for the purpose of forfeiture (as opposed to automatic forfeiture), the DPP must show that the property is tainted property.[4] The concept of 'tainted property' is central to the *Confiscation Act* and essentially means property either used in or in connection with an offence or wholly or substantially derived from the commission of an offence. The concept of 'tainted property' is discussed further in paragraph 2.11.

The fact that only tainted property can be restrained for forfeiture (as opposed to automatic forfeiture) is frequently overlooked by judges who regularly make restraining orders for the dual purpose of forfeiture and automatic forfeiture

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3 *Confiscation Act*, s.29(1).

4 See *DPP v Grillo* [2007] VSC 473, where Robson J restrained different property in the restraining order for different purposes.

without regard to whether there is any evidence that the property is in fact tainted property.

To the extent that a restraining order is made for the purpose of automatic forfeiture, compensation and/or satisfaction of a pecuniary penalty order, the DPP may restrain any property in which the defendant has an interest and/or which is tainted property.[5]

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)).

Provided that the DPP proves, by the police officer's affidavit, that a person has been charged and that such person either has an interest in property sought to be restrained or that such property is tainted (in the case of Schedule 2 offences) or that a person has been charged and that property is tainted (in the case of Schedule 1 offences which are not Schedule 2 offences), the Court has no residual discretion to refuse to make a restraining order. In other words, upon that occurring, the DPP has satisfied the Court that there are reasonable grounds for the making of the restraining order.[6]

2.5 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

5 *Confiscation Act*, s.16.
6 *DPP v Moloney* [2011] VSCA 278, [44] – [47].

(or might ever be laid) against any defendant. Further, such restraining order can be obtained against property even after a defendant has been acquitted.[7]

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.[8]

The court must make a restraining order if it is satisfied that the deponent of the affidavit supporting the application does suspect that the property is tainted property in relation to a Schedule 2 offence and there are reasonable grounds for that suspicion.[9]

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. The exclusion test for civil forfeiture restraining orders is set out in s.24 of the *Confiscation Act* and largely mirrors 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*, which 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*.

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7 *DPP v Ali* [2009] VSCA 162.

8 *Confiscation Act*, section 16(5).

9 *Confiscation Act*, section 18(2).

2.6 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 material matter bearing upon the application, not only those matters in support of the application.[10] If the DPP does not make full disclosure, the restraining order is liable to be set aside.[11]

2.7 Access to affidavit

A person whose property has been restrained in the course of an *ex parte* application made by the DPP is generally entitled to obtain a copy of the affidavit relied upon by the DPP in obtaining the order. A failure to furnish such affidavit contravenes the principles of natural justice.[12]

2.8 *Inter partes* re-hearing

Applications for restraining orders are generally brought *ex parte*.[13] 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*. In practice, notice is only very rarely given. As to the giving of notice before a restraining order is made, see *DPP v Latorre*.[15]

A 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

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10 *DPP v Moloney* [2011] VSCA 278, [39].

11 *Moloney v AG of Victoria & DPP* [2010] VCC 0481 and the cases referred to therein, however noting that the decision was reversed on appeal by reference to the particular facts found.

12 *Mina Vendetti & Anor v DPP* (Supreme Court of Victoria, Court of Appeal, Chernov JA and Bongiorno AJA, 12 March 2004); *Bennett & Coe v DPP (WA)* (2005) 154 A Crim R 279.

13 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.

14 [2007] VCC.

15 [2006] VSC 398.

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.[16] It is presently unclear whether such a right is ousted by the *Confiscation Act*. In *DPP v Tat Sang Loo*[17] 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.[18] The issue of an *inter partes* re-hearing was the subject of detailed consideration by the High Court under the NSW confiscation legislation, namely the *Criminal Assets Recovery Act* 1990 (**CAR Act**) in *International Finance Trust Co Ltd v New South Wales Crime Commission.*[19]

In light of the decision of the Court of Appeal in *DPP v Moloney*,[20] the importance of the issue may be more apparent than real because the threshold that the DPP must reach in order to obtain a restraining order under the 'charge based regime' is so low (i.e. to show the charging of a person and that such person has an interest in property and/or that property is tainted property in the

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

17 [2007] VSC 343.

18 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.

19 (2009) 240 CLR 319. See also the subsequent discussion in *DPP (Cth) v Kamel* (2011) 248 FLR 64.

20 [2011] VSCA 278, [44] – [47].

case of restraining orders made for automatic forfeiture). See also *DPP v Grimoli.*[21]

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 situations where, in an *inter partes* rehearing of a restraining order application, it is possible to throw doubt on the existence of reasonable grounds for holding such suspicion. However, it should be noted that 'suspicion' is, of itself, a low threshold. As Weinberg JA stated in *McMunn v DPP*[22] "suspicion in a state of mind that falls well short of believe, as the High Court made clear in *George v Rockett*[23]*".*

2.9 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 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.[24] It is very important to have regard to

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

22 [2010] VSCA 330.

23 (1990) 170 CLR 104.

24 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 nature of an undertaking and the enforcement of it.

the particular form of the wording of the undertaking. Some restraining orders refer to damages that the 'respondent' may suffer. Alternatively, some restraining orders seem to provide for the payment of damages only to person who are "not in any way involved" in the offending. Either of such forms of undertaking are inadequate and consideration should be given for approaching the Court to seek variation of it.

The undertaking should extend to <u>any person</u> who may suffer damage arising from the restraining order because it is the only basis upon which to seek compensation arising from the making of a restraining order. If the undertaking is too narrow, it may prevent its subsequent enforcement. See *McCleary v Commonwealth Director of Public Prosecutions*[25] and *An Application by Cannon*[26] and *Mansfield v DPP* (WA).[27]

The enforcement of the DPP's undertaking as to damages under *the Confiscation Act* was considered in *Moloney v AG of Victoria & DPP*.[28] Although the decision was reversed on appeal,[29] the principles were not in issue and can be summarised as follows:

(1) The onus is upon an applicant seeking damages to show that the loss claimed would not have been sustained but for granting the injunction.

(2) The loss claimed must be directly caused by the wrongly obtained injunction.

(3) Effect should be given to the undertaking unless special circumstances exist.

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25 (1998) 20 WAR 288.
26 [1999] 1 Qd R 247.
27 (2006) ALR 214.
28 [2010] VCC.
29 *DPP v Moloney* [2011] VSCA 278.

(4) 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.

(5) Account is to be taken of all matters that bear upon the justice or injustice of enforcing the undertaking.

(6) Unreasonable delay can be a relevant circumstance which acts as a disqualifying factor in respect of the making of an award of damages.

(7) There is little to be gained from an examination of the authorities dealing with causation of damage in contract, tort or other situations; it is preferable to look at the purpose for 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.

(8) 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.

2.10 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 seeks to restrain property which is valuable and either liquid, such as monies in cash or standing to the credit of 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 since s 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 4.13 below.

Additionally, pursuant to s.10(b) of the *Confiscation Act*, the DPP may restrain property which a defendant has disposed of. 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 which are not also Schedule 2 offences, only 'gifts' made in the period 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.

In *DPP v Twenty Fourth Trengganu Pty Ltd*[30] Hargrave J (with whom Nettle and Mandie JJA agreed) considered the definition of "interest" in the context of an exclusion application and stated (at [34]) that:

> *... a wide definition promotes the ability of the DPP to restrain any form of interest which a defendant who engages in serious criminal activity may have*.

2.11 Tainted property

The expression '*tainted property*' is defined in s.3 of the *Confiscation Act.* The most important parts of that definition are as follows:

> ***tainted property**, in relation to an offence, means property that—*
>
> *(a) was used, or was intended by the accused to be used in, or in connection with, the commission of the offence; or*
>
> *(b) was derived or realised, or substantially derived or realised, directly or indirectly, from property referred to in paragraph (a); or*
>
> *(c) was derived or realised, or substantially derived or realised, directly or indirectly, by any person from the commission of the offence;*

2.12 Used in or in connection with

Subparagraph (a) of the definition of tainted property focuses on the nexus between the offending and the property. At times the existence of such nexus is clear, such as a property used to hydroponically cultivate cannabis. However, at times, the nexus is more remote, such as where drugs merely happen to be found at a residence.

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30 [2011] VSCA 92.

To date, the Victorian Court of Appeal has not had occasion to consider whether the connection needs to be substantial before property will be tainted property or whether a more remote connection suffices.

Hollingworth J considered the issue in *DPP v Selcuk*[31]. In that case the defendant had been charged with intentionally causing serious injury. The defendant had, with another person, driven a car to locate the victim and, upon locating him, had seriously assaulted him. The question for determination was whether the car was used in, or in connection with, the commission of the offence. Hollingworth J concluded as follows:[32]

> *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.*

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31 [2008] VSC 37.

32 At [41].

The extent of the required connection has been considered by other courts of appeal around Australia. Some examples of such cases are as follows:

(a) In Western Australia, see *DPP (WA) v White.*[33] In that case the question was whether land from which a fatal shot was fired was used in or in connection with the offence. In finding that the land was used in connection with the offence, McLure P (with whom Owen and Buss JA agreed) stated (at [33]);

> *It is clear from the statutory language that the relationship between the use of, or the act or omission on (the conduct), the property and the confiscation offence does not have to be direct and immediate. However, having regard to the consequence of falling within the definition of crime used, it is not sufficient if the relationship be merely tenuous and remote. The requisite relationship would fall between these two extremes and involve matters of degree and judgment. In considering whether the relationship is sufficiently proximate, the purpose and effect of the conduct would be relevant considerations.*

(b) In the Northern Territory, see *Dickfoss v DPP & Anor.*[34] In that case, the Court considered whether, where cannabis was grown in pots placed on the land (but not planted directly in the ground), the land on which the pots were placed was tainted property. Ryley CJ (with whom Southwood and Kelly JJ agreed) stated (at [20]):

> *I agree with the conclusion of the trial Judge that the connection does not have to be substantial. In rejecting this submission his Honour referred to the approach adopted by the majority in Director of Public Prosecutions v George which, his Honour observed, is "not inconsistent with the reasoning in Director of Public Prosecutions (WA) v White both at first instance and on appeal". In Director of Public Prosecutions v George, Doyle CJ observed that there was no basis for qualifying the statutory definition by requiring that any connection be "substantial". To*

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33 [2010] WASCA 47.

34 [2012] NTCA 1.

> *take that approach would be to introduce an expression not used in the provision.*

(c) In South Australia, see *DPP v George.*[35] In that case the Court had to determine whether land used to hydroponically cultivate cannabis was used in or in connection with that offence. Doyle, Vanstone and White JJ stated (at [62] and [63]):

> *There is one thing which I consider to be clear. It is that there is no basis for qualifying the statutory definition by requiring that any connection be a "substantial connection". To take that approach is to introduce an expression which the draftsman has not used. In that respect I agree with Millhouse J and with Debelle J in Taylor v The Attorney-General at 466 and at 472 respectively, and with the majority of the Court of Criminal Appeal of Western Australia in The Queen v Rintel (1990) 3 WAR 527 at 530-531 Malcolm CJ and at 542 Pidgeon J.*
>
> *I also approach the issue of interpretation on the basis that the statutory definition should not be read as referring to or requiring a causal link between the property and the offence. Something less than that may suffice. Nor is it necessary that the property be something that is essential or necessary for the commission of the offence, or something that makes a unique contribution to the commission of the offence. Nor is it appropriate, when the instrument is land, to assign to the land a single or dominant use. There is no reason why land cannot be used in, or in connection with, the commission of an offence when it is also used for other purposes, and when on the objective circumstances it would be described as being used in another manner. Thus, the use of Mr George's land might be described as residential, but it could nevertheless fall within the statutory definition of "instrument".*

See also some older authorities, such as:

- *R v Hadad*:[36] 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 determined that the

[35] (2008) 102 SASR 246.

legislature had not intended that there be a substantial connection between the property and the use. For further cases involving motor vehicles, see *DPP v Debs & Roberts*[37]; *DPP v Hiep Huu Le*[38]; *DPP v Price*[39]; *McKechnie v Middleton*[40] and *R v Shane Alexander Cogley*[41].

- *R v* George:[42] 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.

- DPP (NSW) v King:[43] 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 R v Robert Garner[44] 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:[45] 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.

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36 (1989) 16 NSWLR 476.
37 [2003] VSC 380.
38 [2002] ACTSC 100.
39 (1995) 14 SR (WA) 235.
40 (1992) 8 SR (WA) 346.
41 (Supreme Court of Victoria, Ashley J, unreported, 22 December 1998).
42 [1992] 2 Qd R 351.
43 [2000] NSWSC 394.
44 Judge Kelly, unreported, CCV, 26 April 1999.
45 (1991) 22 NSWLR 489.

See also *Brown v Rezitis*[46]; *R v Lucas*[47]; *Murdoch v Simmonds*[48]; *DPP (QLD) v Brauer*[49]; *R v Spaull & Rush*[50]; *DPP (NT) v Helps & Ottens*[51] and *R v Tarzia*[52].

2.13 Derived or realised from property used in connection with offence

Subparagraph (b) of the definition of tainted property is directed to 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.

2.14 Derived or realised from 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.

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.

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46 (1970) 127 CLR 157.
47 [1976] Crim LR 79.
48 [1971] VR 887.
49 [1991] 2 Qd R 261.
50 [1999] VSCA 18.
51 (Supreme Court of Northern Territory, Martin CJ, unreported, 18 April 1994).
52 (1991) 5 WAR 222.

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 are changed somewhat?

In *Gregory John Blake and Another*[53] the question for the Supreme Court of New South Wales 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 <u>majority</u> 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.*
>
> [Underlining added]

[53] (1992) 60 A Crim R at 257.

The derivation of property may be direct or indirect. In *DPP (Cth) v* Jeffrey,[54] Hunt CJ at CL considered whether property which was acquired, 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;[55]

(b) automatic forfeiture of restrained property under s.35 of the *Confiscation Act* upon the 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*.

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 (Victoria).

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54 (1992) 58 A Crim R 310.

55 The six month period may be extended by leave of the Court; *Confiscation Act*, s.31(2).

3.2 Discretionary conviction based forfeiture applications

If a defendant is convicted of a Schedule 1 offence, the DPP may, within 6 months of the date of conviction,[56] apply for a forfeiture order in respect of tainted property.[57] Although the DPP can apply for an extension of time within which to apply for a forfeiture order, 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.[58] 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.[59]

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.[60]

Although hardship can be taken into account, it must be something more than the ordinary hardship that flows from the loss if property. In *DPP v Tran*,[61] Warren CJ referred with approval to the following passage from the decision of the Court of Appeal in NSW in the case of *Lake:*[62]

> *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*

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56 As to the "date of conviction" see paragraph 5 herein.
57 *Confiscation Act, s.32.*
58 *Savvinos v DPP* [1996] VR 43.
59 *Confiscation Act,* s.33(4).
60 *Confiscation Act*, s.33(5).
61 [2004] VSC 218.
62 (1989) 44 A Crim R 63 (per Kirby P as he then was) at 66-67.

> *provisions of that Act.* *Something more than ordinary hardship in the operation of the Act is therefore meant.* [Emphasis added]

Further, her Honour identified the following matters relevant to the exercise of discretion in a cannabis cultivation case, relying on *Taylor v The Attorney-General of South Australia*[63] and *Winand;*[64] 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.

More recently, in *DPP v Nikolaou*[65] Kaye J considered the question of forfeiture of a house used to hydroponically cultivate cannabis. In that case, the DPP sought forfeiture of a house inherited by the defendant, which was used to hydroponically cultivate cannabis. In refusing forfeiture, Kaye J observed that the following matters were relevant to the exercise of his discretion:

(a) 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.

(b) 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.

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63 (1991) 53 A Crim R 166 at 175-179.

(c) Whether forfeiture would be disproportionate to the nature and gravity of the offence.

See also *DPP v Smith*[66] and *DPP v Gyurcik,*[67] both cases in which the DPP's application for forfeiture of real property was dismissed. For further discussion of the hardship principles, see *R v Lake*[68]; *Frisina v R*[69] and *DPP (WA) v Kizon*[70].

3.3 Automatic forfeiture

Where a defendant is convicted of a Schedule 2 offence, all property which is restrained for the purpose of automatic forfeiture is liable to be automatically forfeited to the Minister (namely the Attorney General of Victoria) under s.35 of the *Confiscation Act* unless excluded through an exclusion order made under s.22 of the *Confiscation Act*. An application for an exclusion order must be made within 60 days from the date of conviction to prevent automatic forfeiture occurring. A defendant cannot apply to exclude property after the expiration of the 60 day period. A third party can make application under s.51 of the *Confiscation Act* for exclusion from automatic forfeiture (as opposed to exclusion from a restraining order).

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 Minister[71] upon conviction of a Schedule 2 offence unless it is excluded by an exclusion order made under s.22 of the *Confiscation Act*.

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64 (1994) 73 A Crim R 497.
65 [2008] VSC 111.
66 [2007] VSC 98.
67 [2007] VSC 424.
68 (1989) 44 A Crim R 63.
69 (1988) 32 A Crim R 103.
70 (1991) 6 WAR 353.
71 Being the Attorney General.

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.[72]

As with discretionary conviction based forfeiture (but in contrast to automatic forfeiture), a person who has an interest in property sought to be forfeited by the DPP can seek an exclusion order by making an application for exclusion under s.20(1) of *the Confiscation Act*. The 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 4.3 and 4.9 below. Additionally, an application for civil forfeiture can be opposed on the grounds of hardship.[73]

The question of hardship in the context of civil forfeiture was considered by Hargrave J in *DPP v Khodi & Dounia Ali*.[74] In that case, 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 conviction based restraining order ceased to operate over the farm property by operation 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. At first instance, Smith J refused the application for the restraining order on the basis that the DPP could not restrain the same property twice. On appeal, the

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72 S.27(2) of *the Confiscation Act*.

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

decision of Smith J was reversed and the DPP obtained a restraining order over the farm property for the sole purpose of civil forfeiture.

Mrs Ali made an application for exclusion. Hargrave J found that she had no interest capable of exclusion; she was not on title and had no equitable interest in the farm property. Despite that fact, his Honour went on to compel the DPP to make a $125,000 payment to Mrs Ali from the sale proceeds of the farm property under s.45 of the *Confiscation Act*. The decision highlights the fact that the courts can recognise the hardship that may be caused by loss of accommodation in circumstances where the applicant had no legal or beneficial interest in the forfeited property.

4. Exclusion applications

4.1 General

Each person with an interest in restrained property must make their own application for exclusion.[75] For a discussion about what may amount to an excludable interest, see *DPP v Twenty Fourth Trengganu Pty Ltd*[76] and the discussion in *Gae v DPP*[77]. Usually, an applicant claims either a legal or beneficial interest (or both) in restrained property. It can at times be difficult to identify the precise interest of an applicant for exclusion. It is, however, critical to identify the interest early and to ensure that an application for exclusion is made by each relevant interest holder. The complication often arises in the context of equitable interests. Common areas of confusion arise is the following contexts:

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74 [2010] VSC 503.

75 Amendments made to the *Confiscation Act* in September 2007 clarified this position. That was necessary following the Court of Appeal's decision in *DPP v Phan Thi Le* [2007] VSCA 18.

76 [2011] VSCA 92, [26]ff.

77 [2011] VSC 658 at [63] ff.

(1) a wife claiming an interest in the family home in circumstances where she is not on title (wrongly assuming that merely by marriage she has an interest in the family home);

(2) a beneficiary under a discretionary family trust (wrongly assuming that they have an interest in trust property)[78];

(3) a beneficiary under a unit trust (wrongly assuming that it is sufficient for the trustee to make an application for exclusion).

Any interest in property restrained for the purpose of automatic forfeiture and which is not the subject of an application for exclusion is automatically forfeited to the Minister 60 days after conviction.

An applicant for an exclusion order must give notice of the application to the DPP and any other person whom the applicant has reason to believe has an interest in the property.[79] Further, where a restraining order has been made for the purpose of compensation, the applicant for an exclusion order must give notice of the application to any person who might seek such compensation. See *Cypott v R*[80] and *Whyte and Victoria Legal Aid v Office of Public Prosecutions*.[81]

4.2 Whether to make an exclusion application

The decision 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 offence[82]), it may be preferable to simply oppose the DPP's application for a forfeiture order

78 *DPP (NSW) v Larsson* (1989) 18 NSWLR 499.
79 *Confiscation Act*, s 20(2).
80 [2003] VSC 41 at [28].
81 [2002] VSCA 130.
82 Each Schedule 2 offence is also a Schedule 1 offence.

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 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.[83]

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 days after the restraining order is served.[84] The Court has the power to extend the 30 day period if it is in the interests of justice to do so[85] and generally will

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83 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.

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

85 *Confiscation Act*, s.20(1)(B).

extend time. As for a discussion of the factors to be taken into account in extending time, see *Finn v DPP*[86] and *Pham v DPP*.[87]

The party seeking to exclude property from a restraining order bears the burden of proof and must satisfy the Court of the various conjunctive exclusion tests. The exclusion test applicable to Schedule 1 offences (which are not Schedule 2 offences)[88] is set out in s.21 of the *Confiscation Act*. The exclusion test applicable to Schedule 2 offences is set out in s.22 of the *Confiscation Act*. Any question of fact is to be decided on the balance of probabilities.[89] Exclusion applications are civil proceedings but the civil procedure rules do not apply.[90]

The exclusion tests set out in ss.21 and 22 of the *Confiscation Act* are essentially identical.[91] Section 24 of the *Confiscation Act* contains the exclusion tests applicable to civil forfeiture restraining orders. Sections 50 and 52 contain exclusion tests by which forfeited property (as opposed to restrained property) may be excluded, save that such applications can only be pursued by third parties (not the defendant). There are time limits for such applications[92] but the court can grant leave to extend time. For a discussion of the principles relevant to an extension of time under these sections, see *Morizio v DPP & Anor*[93] and *Christensen v DPP.*[94]

4.3 The exclusion test for automatic forfeiture

Relevantly,[95] section 22 of the *Confiscation Act* is in the following terms:

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86 [2011] VSC 234.

87 Warren CJ, unreported, S CI 2011 02337, 25 October 2011.

88 Each Schedule 2 offence is also a Schedule 1 offence. *Confiscation Act*, Schedule 1.

89 *Confiscation Act*, s.132.

90 *Confiscation Act*, s.133.

91 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*.

92 *Confiscation Act*, s 49(2) and s 51(2).

93 (Supreme Court of Victoria, Osborn J, unreported, 27 July 2009).

94 [2003] 1 Qd R 496.

95 The section reproduced does not include that part which deals specifically with executors of estates.

22 Determination of exclusion application—restraining order—automatic forfeiture

On an application made under section 20, where the restraining order has been made in relation to a Schedule 2 offence for the purposes of automatic forfeiture—

(a) the court may make an order excluding the applicant's interest in the property from the operation of the restraining order if the court is satisfied that—

(i) the property in which the applicant claims an interest was lawfully acquired by the applicant; and

(ii) the property is not tainted property; and

(iia) the property is not derived property; and

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

(b) where the application is made by a person other than the accused, the court may make an order excluding the applicant's interest in the property from the operation of the restraining order—

(i) if the court is not satisfied that the property in which the person claims an interest is not tainted property or derived property but is satisfied that—

(A) the applicant was not, in any way, involved in the commission of the Schedule 2 offence; and

(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 accused would use, or intended to use, the property in, or in connection with, the commission of the Schedule 2 offence; and

(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 reasonable suspicion, that the property was tainted property or derived property; and

> *(D) the applicant's interest in the property was not subject to the effective control of the accused on the earlier of the date that the accused was charged with the Schedule 2 offence or the date that the restraining order was made in relation to the property; and*
>
> *(E) where the applicant acquired the interest from the accused, directly or indirectly, that it was acquired for sufficient consideration; or*
>
> *(ii) if the court is satisfied that the property is not tainted property or derived property and that—*
>
> *(A) the applicant's interest in the property was not subject to the effective control of the accused on the earlier of the date that the accused was charged with the Schedule 2 offence or the date that the restraining order was made in relation to the property; and*
>
> *(B) where the applicant acquired the interest from the accused, directly or indirectly, that it was acquired for sufficient consideration; …*

4.4 Exclusion by defendant and third parties (s.22(a))

Defendants and third parties can apply to exclude restrained property and a Court may[96] make an exclusion order under s.22(a) of the *Confiscation Act* if it is satisfied that the property was lawfully acquired, is not tainted property, is not derived property and will not be required to satisfy a pecuniary penalty order or order for compensation or restitution under the *Sentencing Act*.

[96] 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].

4.5 Lawfully acquired

This focuses on the acquisition itself, as opposed to whether or not the funds used to acquire the property were derived from illegal activities.[97] For example, property which was stolen will not have been lawfully acquired.

4.6 Not tainted property

Refer to paragraph 2.11 above.

4.7 Not derived property[98]

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, Victoria or another State, a Territory or a foreign country punishable by imprisonment.[99]

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

98 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 made (i.e. filed) prior to 26 September 2007.

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*.[100]

4.8 Not required to satisfy Pecuniary Penalty Order or *Sentencing Act* order

It is often difficult (if not impossible) to satisfy this requirement before the conclusion of the criminal proceedings. The DPP may apply for a pecuniary penalty order at any time within six months of conviction and victims may make compensation applications under the *Sentencing Act* 1991 at any time within 12 months of conviction. As for a discussion about the time limits to make applications for compensation applications under the *Sentencing Act* 1991, see *Legal Services Board v Werden*.[101]

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. This difficulty can be overcome by making 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. In practice, this is

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99 *Confiscation Act*, s.3.

100 (1992) 58 A Crim R 310 at 321.

101 [2011] VSC 74.

rarely done since most defendants do not wish to give evidence in confiscation proceedings (and be exposed to cross examination) before the conclusion of the criminal proceeding.[102]

That being so, most applications for exclusion, once filed, are stayed pending the finalisation of the criminal proceedings. The *Confiscation Act* expressly provides for the making of such stay orders in respect of defendants under s.20(7).

4.9 Exclusion by third parties (s.22(b))

In addition to the exclusion test in paragraph 4.3 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 requires the applicant to demonstrate (a) that they were not in any way involved in the offending; (b) that 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; (c) 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 suspicion, that the property was tainted property or derived property; (d) that 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; and (e) that where the applicant acquired the interest from the defendant, directly or indirectly, that it was acquired for sufficient consideration.

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[102] Evidence given during a hearing of an exclusion application cannot be used in the criminal trial. See Confiscation *Act*, s.20(4). Despite that 'protection', there are many good reasons why a defendant should not be exposed to cross examination before the criminal process has run its course.

4.10 Not in any way involved

The fact that an applicant is not charged with the relevant 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*,[103] the Court of Appeal examined the expression 'in any way involved in the commission of' the relevant offence. In that case the wife of an offender had lived in the house in which the cannabis had been hydroponically grown in some bedrooms. 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.*

The wife's evidence was rejected as untruthful. That being so, she was unable to satisfy the Court that she had a belief that the quantity of cannabis cultivated was less than a commercial quantity.

In *Grillo v DPP*,[104] Kyrou J applied the decision of *Hong Yen Le v DPP.* In that case, the parents of the offender were seeking exclusion of their family home, which had been used to cultivate a commercial quantity of cannabis. Kyrou J summarised the hurdle that the parents needed to meet as follows (at [69]):

> *In accordance with Le, the parents' application will succeed if they*

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103 [2007] VSCA 72.

104 [2011] VSC 575.

establish, on the balance of probabilities, that in the period from 8 November 2006 until 8 April 2007:

(a) they did not know of, and were not wilfully blind:

(i) to the cultivation of the cannabis at the Johnson Street Property; or

(ii) as to there being a significant or real chance that the cannabis was a commercial quantity; or

(iii) as to there being a significant or real chance that the cannabis was being cultivated for sale; or

(b) if no part of (a) applies, they were nevertheless not involved in the commission of Dominic's trafficking offence.

The parents will not satisfy (b) if they fail to establish that they did not solicit, condone, acquiesce in, facilitate or permit the commission of the offence.

Interestingly, the offender's father had been diagnosed with dementia. Kyrou J found that the father did not have the ability to perceive the fact that cannabis had been cultivated on his property and, hence, his application for exclusion succeeded. By contrast, the offender's mother was disbelieved about her alleged lack of knowledge of the cultivation of cannabis and her application was dismissed. As a result, only half of the property was automatically forfeited.

4.11 Before commission; did not know that the defendant would use property

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.

4.12 <u>During or after commission; acquired interest without knowing, and in circumstances such as not to arouse a suspicion, that the property was tainted property or derived property</u>

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 a lavish family home, the wife may find it difficult to satisfy the Court that she acquired her interest in the home in circumstances such as not to arouse a reasonable suspicion that the home was tainted property.

In *DPP v Phan Thi Le*[105] 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*[106], an exclusion application was dismissed on the basis that the Court was not satisfied that Mrs McMunn did not suspect, and alternatively that a reasonable person in her position would not have suspected, that the family home was purchased with stolen funds and was, therefore, tainted property. In dismissing Mrs McMunn's appeal, Maxwell P (with whom Weinberg

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105 [2007] VSCA 18.

106 [2010] VSCA 330.

and Mandy JJA agreed) referred to the trial judge's reasons and observed (from [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.*
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> …
>
> *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.*

4.13 Effective control

The concept of effective control is not defined in the *Confiscation Act*. In *DPP v Twenty Fourth Tengganu Pty Ltd*[107] Hargrave AJA (with whom Nettle and Mandie JJA agreed) stated (at [24]):

> *Further, it was common ground that the concept of 'effective control' was correctly summarised by Kaye J, who was also the trial judge on the company's application, in DPP v Ferguson, where his Honour stated:*
>
> > *The whole scheme of the Act is to treat as the owner of property those who, in reality, exercise a fundamental incident of ownership, namely, the practical control of property. Accordingly, the question whether the defendant has the effective control of property involves an examination of the actual practical exercise, or capacity to exercise, by the defendant of rights over the property in question, such as the right to possess, use, sell, mortgage, make fundamental improvements to, and exclude others from possession of, the items of property in question.*

See also *DPP v Tat Sang Loo*[108] and *DPP v Ferguson.*[109]

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107 [2011] VSCA 92.

In analysing the question of effective control, it is first necessary to identify the precise interest which the applicant seeks to exclude. It is that interest (and not necessarily the physical property) which the applicant must demonstrate not to be under the offenders effective control. This issue was the subject of detailed consideration in *DPP v Twenty Fourth Tengganu Pty Ltd.*[110] In that case, the Court held:

- at first instance,[111] that the interest of a chargee of land was not under the effective control of the offender despite the fact that the offender resided in the property; and

- at first instance and on appeal,[112] that a motor vehicle owned by and registered to a third party but used almost exclusively by the defendant was not under the defendant's effective control.

4.14 Sufficient consideration[113]

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

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108 [2002] VSC 231.

109 [2006] VSC 484.

110 [2011] VSCA 92.

111 *Rizzo & Anor v DPP* [2009] VSC 525 (Kaye J).

112 The issue of the charge over real estate was not the subject of the appeal.

113 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* [2007] VSCA 18, subsequently upheld on this point by the High Court in *DPP v Le* [2007] HCA 52.

partner of the transferor; consideration arising from love and affection; transfer by way of gift.[114]

The definition of "sufficient consideration" and its application in the exclusion test poses significant difficulties. It is not clear whether a person who derives an equitable interest in property from, say, a domestic relationship (as was found in *Baumgartner v Baumgartner*[115]) can meet the exclusion test. It is unlikely that Parliament could have intended to deprive such person of their proprietary rights. Further, the legislative history would suggest that an equitable interest holder should not be precluded by the test. In the author's view, the definition of "sufficient consideration" only applies to transfers of interests at less than commercial value (such as a transfer for natural love and affection, as in *DPP v Phan Thi Le*).

4.15 Exclusion under s.22(b)(ii)

Further, under s.22(b)(ii) of the *Confiscation Act*, a third party may seek to exclude property which is not tainted property if it can be established that (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 and (b) that where the applicant acquired the interest from the defendant, directly or indirectly, that it was acquired for sufficient consideration. Refer to commentary at paragraphs 4.13 and 4.14 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

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114 *Confiscation Act*, s.3. Further, note that the expression 'gift' is also defined in *Confiscation Act*, s.3.

115 1988 ALR 75.

Attorney General of Victoria) 60 days after the date of conviction of the Schedule 2 (automatic forfeiture) offence unless:

(1) an exclusion application has been made in respect of the property prior to the expiry of those 60 days; or

(2) an exclusion order has been made in respect of the property.

In *DPP v Nguyen* and *DPP v Duncan*[116], the Court of Appeal recently affirmed that conviction occurs at the time a person pleads guilty and is arraigned. See also *DPP v McCoid*.[117]

6. Procedure

Despite the fact that proceedings under the *Confiscation Act* are civil proceedings, the rules regulating civil proceedings do not apply.[118] Where the confiscation proceedings are conducted in the Supreme Court, the procedure is governed by Order 6 of the *Supreme Court (Criminal Procedure) Rules* 2008.

Evidence in support of an application for a restraining order must be by affidavit unless the application is brought on for hearing during or at the conclusion of the trial of the defendant. Evidence in support of an application for an exclusion order must also be by affidavit.[119] There is no express requirement that evidence in respect of a forfeiture application must be by affidavit, but the Court may, in accordance with Rule 6.11(4), direct that it be by affidavit.

It is the usual practice that the parties to confiscation proceedings are directed to prepare affidavits and are then, at the hearing, confined insofar as the

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116 [2009] VSCA 147.
117 [1988] VR 982.
118 *Confiscation Act*, s.133(2).
119 Rule 6.11.

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. Those ruses are substantially similar to the rules in the Supreme Court.

The County Court has a specialist confiscation list, which sits every Tuesday at 9.30am. The purpose of the list is to make directions for the case management of confiscation matters. The County Court also 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 presently exists in the Supreme Court.

7. Evidentiary onus

Although the rules of civil procedure don't apply to proceedings under the *Confiscation Act*, the rules of evidence continue to apply.[120] Facts required to be proven must be proven on the balance of probabilities.[121] The affidavit material to be relied on by applicants for exclusion orders or opponents of forfeiture orders must be very carefully prepared. It is critical to:

(1) direct the evidence to the relevant exclusion test; and

(2) put forward sufficient relevant evidence (including supporting material);

(3) prepare affidavits in admissible form; and

(4) avoid inconsistencies between affidavits.

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120 *DPP v Dan* [2000] VSC 490 at [9].

121 *DPP v Delaney* (1998) 99 A Crim R 574; *Confiscation Act*, s 132.

Many affidavits are poorly prepared and do not give applicants for exclusion the best chance of success. Affidavits often contain inadmissible, irrelevant and in accurate material. Since the onus of proof rests with an applicant for exclusion and the evidence in chief must be on affidavit, affidavits play a critical role in obtaining an exclusion order. Where affidavits contain inaccurate statements or generalities (e.g. always, never etc), the deponent faces significant exposure in cross-examination. Once the credit of an applicant is diminished, the application is likely to fail. Hence, 'credit is everything'. If credit is in issue, then it is necessary to obtain corroborating material (such as source documents; bank statements, contracts of sale etc.).

The difficulties associated with satisfying the exclusion test[122] were recognised by Hunt CJ at CL in *DPP v Jeffery*.[123] 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 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*

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

123 (1992) 58 A Crim R 310

> *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 made clear that there was 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.

8. Relationship with sentencing

Confiscation has an obvious penal effect. Hence, the Courts try to take into account, where permissible, the extent of any loss of property in passing sentence.

In *R v McLeod*[124], 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*.[125] The fact of that case

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[124] [2007] VSCA 183.

[125] [2010] VSC 503.

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 and 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 order[126]) 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.

10. Costs

Section 133A of the *Confiscation Act* places some limitations on the award of costs against the DPP. In summary, the position concerning costs is as follows:

(1) a person who succeeds with an exclusion order or who opposes forfeiture or the making of a restraining order is entitled to a costs order against the DPP provided that they can demonstrate that they were not in any way involved in the offending. It follows that a defendant cannot get costs against the DPP in those circumstances.

(2) There are no restrictions on the award of costs in any other applications. Hence, since the proceedings are civil in nature, the usual

civil rules governing the award of costs apply. Usually, costs follow the event.

(3) The court can award costs on a party / party or more generous basis.

For a discussion of the issues concerning costs, see *DPP v Ali*[127] and *Bow Ye Investments Pty Ltd (in liq) v DPP* (No. 2),[128] (where the Court of Appeal did not follow *DPP v* Loo[129] and *DPP v* McMunn (No 2)[130]).

It is unlikely that a court will award costs in favour of one party or the other when the proceeding is settled and the respective cases are not tested at a hearing. See *Australian Agriculture and Property Development Corporation v DPP (Cth)*.[131]

11. Practical considerations in taking instructions

When taking instructions from a client in a proceeding under the *Confiscation Act*, practitioners might 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

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126 Section 38(2) of the *Confiscation Act*.
127 [2009] VCSA 243
128 [2009] VSCA 278
129 [2007] VSC 437.
130 [2009] VSC 379.
131 [2006] VSC 297.

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 same 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 orders 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 before 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.