

ASSET CONFISCATION UPDATE – 11 August 2008

by Christian Juebner
Barrister, Victorian Bar
Foley's List

DPP v Nguyen
DPP v Duncan

make application for exclusion of
property.

On 7 August 2008, Justice Smith
handed down his decision in *DPP*
v Nguyen & DPP v Duncan [2008]
VSC 292.

Held

Justice Smith made the following
observation in considering whether
convictions had occurred:

The judgment concerns the DPP's
applications for judicial review of
decisions made by Judge
McInerney refusing to strike out
certain exclusion applications
made under s.20 of the
Confiscation Act.

*The test in all cases is whether the
conduct relied upon, considered in all
the circumstances, indicates
unequivocally that the accused has been
found guilty and it is conceivable that
there may be cases where a "remand"
order is made where that may not be so
– for example, the term might be used
inappropriately. For present purposes,
however, I will assume that, as a matter
of law, where a person has pleaded
guilty and the person has been remanded
for plea and sentence or sentence, that
act provides an unequivocal indication
that the accused has been found guilty.*

Facts

In each case in the Court below
Judge McInerney had found that
the relevant defendant was not
convicted for the purposes of the
Confiscation Act on the date on
which the defendant was
arraigned, the allocutus was put
and the plea date was fixed.

[Underlining added]

The date of conviction in each case
was critical since, under s.35 of the
Confiscation Act, automatic
forfeiture takes place on the 60th
day after conviction and,
thereafter, a defendant cannot

However, in finding against the
DPP, Justice Smith stated that, on
the facts of *Nguyen & Duncan*, the
conduct of arraigning, the putting
of the allocutus and the fixing of
the pleas, were not unequivocal
acts consistent only with a
conviction because:

- Those acts occurred on a listing day in the Criminal List and not before the trial judge;
- The putting of the allocutus in that context can be seen as a procedural step taken before moving on to explore the management of the trial process;
- No remand order was made.

Therefore, when attempting to ascertain whether a defendant has been convicted, it is critical to consider the factual matrix to see whether there has been an unequivocal indication that an accused has been found guilty.

Despite the observations of Justice Smith, it is prudent and good practice to file applications for exclusion as early as possible. In any event, s.20(1A) of the *Confiscation Act* requires that exclusion applications are filed within 30 days of the date on which restraining orders are made.

About the author

Christian Juebner is a barrister at the Victorian Bar. Christian practices predominantly in confiscations and proceeds of crime.

Before coming to the Bar, Christian was a partner with Deacons. 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.

Christian can be contacted on:
T (03) 9640 3216
M 0410 657 177
cjuebner@melbchambers.com.au

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