

ASSET CONFISCATION UPDATE – 26 June 2009

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DPP v Nguyen
DPP v Duncan
Court of Appeal decision
concerning date of conviction

On 25 June 2009, the Court of Appeal (Maxwell P, Weinberg JA and Kyrou AJA) handed down its decision in *DPP v Nguyen* and *DPP v Duncan* [2009] VSCA 147.

The decision of the Court of Appeal is critical to all practitioners practicing in litigation under the *Confiscation Act*.

By its decision, the Court of Appeal has 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.

The critical issue to appreciate, when acting on behalf of persons who have had property restrained for the purpose of automatic forfeiture, is that the 60 day period after which automatic forfeiture occurs (absent an application for

an exclusion order having been made) commences from the date of “conviction”. Hence, it is critical that exclusion applications are filed promptly and, in any event, within the 60 day period.

In many cases, a defendant will be “convicted” for the purposes of the *Confiscation Act* long before a plea in mitigation is heard and the defendant is sentenced.

There have now been numerous occasions on which practitioners have, erroneously, proceeded on the assumption that a conviction does not occur for the purposes of the *Confiscation Act* until the plea in mitigation is heard or sentence is pronounced. Based on that erroneous assumptions, exclusion applications have at times been filed after automatic forfeiture has already occurred.

There is no provision within the *Confiscation Act* which permits a defendant to apply for exclusion of property which is automatically forfeited. Further, there is no provision in the *Confiscation Act* which enables a defendant to seek

an extension of time within which to file an application for exclusion after automatic forfeiture has occurred. A third party stands in a different position and may make application for exclusion after automatic forfeiture under s.51 of the *Confiscation Act*.

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 significant risk that the legal practitioner will face a claim for professional negligence.

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.

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