

# ASSET CONFISCATION UPDATE – 9 August 2010

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## ***Purposes of Restraining Orders***

I write this time with a view to creating awareness in relation to problems that I commonly encounter with the form of restraining orders.

### **The purposes**

A restraining order must set out the purposes for which property is restrained.

The purposes are those specified in s.15 of the *Confiscation Act (Act)*.

### Discretionary Forfeiture

Almost all restraining orders include the purpose of a “*forfeiture order that may be made under Division 1 of Part 3*” of the Act.

That is so despite the fact that the supporting affidavits presented to the Court (usually *ex parte*) in most cases do not make any allegation that the property sought to be restrained is “*tainted property*”.

Critically, there can be no discretionary forfeiture of property under s.32 of the Act unless such property is tainted property.

Most property is restrained solely on the basis that the accused is alleged to have an “interest” in the restrained property, as opposed to it being “tainted property”.

Unless an allegation is made in the supporting affidavit that property is tainted property, it ought not be restrained for discretionary forfeiture.

### Pecuniary Penalty Order

Many restraining orders restrain property to satisfy pecuniary penalty orders.

In some cases, property restrained to satisfy a pecuniary penalty order is a third party’s property.

If that is so, then it ought only be restrained to satisfy a pecuniary penalty order if there is evidence in the supporting affidavit that, in accordance with s.70 of the Act,

the accused has effective control of the property.

Otherwise, the Court is asked to restrain property of a third party to potentially pay for a pecuniary penalty order made against the accused in circumstances where such property could never be applied for that purpose.

### **Undertaking as to damages**

Commonly, the undertaking as to damages in restraining orders is too narrow and confined solely to the “respondent”.

There is no “respondent” to an application for a restraining order. A restraining order is an order against property (i.e. *in rem*).

The undertaking ought to be expressed to extend to any person who may suffer a detriment arising from the restraining order.

Practitioners should carefully scrutinize restraining orders to ascertain whether they were made for permissible purposes and whether the undertaking as to damages given by the State of Victoria is sufficiently broad.

### **About the author**

Christian Juebner is a barrister at the Victorian Bar. Christian practices in

commercial law and confiscation litigation.

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

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