

TAKING INSTRUCTIONS – THE FIRST CONFERENCE

Confiscation Act litigation

Key issues to consider

1. **Client** - Determine whether your client is the defendant or a third party claiming an interest in restrained property. Different exclusion test apply and defendants cannot exclude tainted property.
2. **Conflict** - Consider issues of conflict in acting for defendants and third parties.
3. **Property Interest Declarations** - Ensure that the property interest declarations are completed and returned to the Criminal Proceeds Squad within 14 days of service of the restraining order (s.19B of the *Confiscation Act*). At the time of completing the property interest declaration, thought must be given to all potential interest in the property (whether legal or equitable – such as interests under resulting or constructive trusts) so as to avoid inconsistency with later exclusion applications.
4. **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.
5. **Police Affidavit** - Obtain a copy of the affidavit in support of the application for the restraining order and the exhibits from the OPP.
6. **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*.
7. **Legal Aid** - Consider whether it is necessary to make application for Legal Aid under s.143 of the *Confiscation Act*.
8. **Application for Exclusion** - File any application for exclusion within 30 days of the date that the restraining order is made. 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.
9. **Timing of Application** - Consider whether it is preferable to have any exclusion application heard before the criminal charges are determined or whether the application ought to be stayed pending the outcome of the criminal prosecution. Note that, when acting for a defendant, it may not be possible to exclude property until after the criminal charges are determined and it is known whether a pecuniary penalty order or compensation or restitution orders will need to be satisfied.

10. **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.
11. **Sale of Property** - Consider whether restrained property should be sold pending the hearing of the exclusion application. The DPP will generally consent to a sale provided that the net proceeds of sale are held by the Department of Justice pending the finalisation of the proceedings under the *Confiscation Act*. If a sale is contemplated, a variation of the restraining order under s.26 of the *Confiscation Act* is required.
12. **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.

About the author

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

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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