

ASSET CONFISCATION UPDATE – 11 October 2013

*Civil Forfeiture under the
Proceeds of Crime Act
2002 – AFP Application
[2013] NSWSC 1444*



Applications for civil forfeiture

In my *Asset Confiscation Update* dated 20 August 2013, I provided some guidance about how to deal with civil forfeiture restraining orders made under the *Proceeds of Crime Act 2002 (Cth) (POCA)*.

These are restraining orders made under section 19 of the POCA, where police suspect on reasonable grounds that certain property is either proceeds or an instrument of a specified offence. They are restraining orders made without the need for any concurrent criminal proceedings.

Although most practitioners regard the civil forfeiture regime as quite distinct from the

automatic forfeiture regime, such a view is erroneous and could lead to devastating outcomes.

Recent experience shows that the AFP generally make application for forfeiture under section 49 of the POCA shortly after obtaining a section 19 restraining order. The application for forfeiture is generally made returnable on a date which is 6 months after the date of the making of the restraining order. That is so because no forfeiture order can be made prior to the expiration of 6 months from the making of the restraining order.¹

Critically, unless an application for exclusion is made under section

¹ Section 49(1)(b).

31 of the POCA,² on the return of the forfeiture application the court “must” make the forfeiture order provided that it is satisfied of 3 uncontentious matters, namely that the forfeiture order has been applied for, that the restraining order has been in place for a period of 6 months and that reasonable steps have been taken to identify and notify persons with an interest in the restrained property.

The requirement that, on the return of an application for forfeiture, the court must also be satisfied that the property is proceeds or an instrument³ before making any forfeiture order does **not** apply where no application for exclusion has been made under section 31 of the POCA. In other words, unless an application for exclusion is made the application to forfeiture is akin to the occurrence of automatic forfeiture.

Hence, it is critical that, when acting for a client whose property has been restrained under a section 19 restraining order, an application for exclusion is promptly made under section 31

of the POCA so as to avoid, what is effectively, automatic forfeiture arising in a civil forfeiture context.

The risk of pseudo automatic forfeiture occurring in a civil forfeiture context is highlighted by the recent decision of Davies J in *Application by the Commissioner of the Australian Federal Police re Matter 2012/249599 [2013] NSWSC 1444*, where Davies J made a forfeiture order over restrained property without considering the question of whether the property was either proceeds or an instrument.

Further information

For further information concerning litigation under the *Confiscation Act 1997*, visit www.confiscation.com.au.

About the author

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² Section 49(3).

³ As relevantly defined.