

# ASSET CONFISCATION UPDATE – 20 August 2013

*Civil Forfeiture;  
Proceeds of Crime Act  
2002*



## **Australian Federal Police**

Since the Commissioner for the Australian Federal Police (**AFP**) took over the prosecution of the *Proceeds of Crime Act 2002 (Cth)* (**POCA**) from the Commonwealth DPP about 18 months ago, there has been a significant increase in enforcement activity under the POCA.

The litigation under the POCA is likely only to increase. Hence, although to date the *Asset Confiscation Updates* have focused almost exclusively on litigation under the *Confiscation Act 1997*, the updates will from now on also report on significant developments under the POCA.

## **Section 19**

This update is intended to provide a brief overview to practitioners of the options available to them when dealing with a s.19 (i.e. civil forfeiture) restraining order under the POCA.

Based on recent experience, there has been a vast increase in these types of restraining orders.

Importantly, these restraining orders can be made without any person having been (or ever being) charged with any criminal offence.

These types of restraining orders are commonly made where large scale money laundering / dealing in proceeds of crime (commonly involving international transactions) is suspected.

The AFP can obtain such restraining orders by satisfying the court that there are reasonable grounds to suspect that certain property is:

- proceeds of an indictable offence; or
- an instrument of a serious offence.

It is the usual practice of the AFP to apply for a forfeiture order shortly after the relevant s.19 restraining order is made.

A court can make a forfeiture order provided that, amongst other things, the relevant restraining order has been in place for six months.

### **What to do?**

There are essentially five avenues available to a person whose property has been restrained under s.19 of the POCA to seek to have the property (or its value)

released or the effects of forfeiture ameliorated. The five types of applications are described below:

**Firstly**, a person with an interest in restrained property can make application for revocation of the restraining order under s.42 of the POCA.

The application must be made within 28 days after the person is notified of the restraining order (or such longer time as the court allows, provided that the application for the extension of time is made within that 28 day period).

**Secondly**, a person with an interest in restrained property can make an application for an exclusion order from the restraining order under s.31 of the POCA, which is then determined under s.29 of the POCA.

**Thirdly**, a person with an interest in restrained property can make application for exclusion order from forfeiture under s.74 of the POCA, which is then determined under s.73 of the POCA.

**Fourthly**, a person with an interest in restrained property can make

an application for a compensation order under s.78 of the POCA, which is then determined under s.77 of the POCA.

**Fifthly**, a person may seek, pursuant to s.72 of the POCA, that a certain sum be paid to any dependents under the age of 18, who would suffer hardship if forfeiture was ordered.

The five types of applications mentioned above are not mutually exclusive and, commonly, several of them are brought concurrently.

Each of the five applications contains a different legal test. In each case, the legal and initial evidentiary onus rests with the person seeking to have the property released.

As always, it is important to draw any affidavit material in support of the applications carefully so as to address each requirement under the relevant statutory test.

## **Further information**

For further information concerning litigation under the *Confiscation Act* 1997, visit [www.confiscation.com.au](http://www.confiscation.com.au).

## **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).

Christian can be contacted on:

T (03) 9640 3216

M 0410 657 177

[cjuebner@melbchambers.com.au](mailto:cjuebner@melbchambers.com.au)

Clerk: Barristers Logistics