

ASSET CONFISCATION UPDATE – 3 April 2012

Significant amendments to the *Confiscation Act 1997* effective 1 April 2012



With effect from 1 April 2012, significant amendments have come into force under the *Confiscation Act*.

Since it is not possible to detail each of the amendments in this newsletter, please find together with this newsletter a “compare version” of the *Confiscation Act* as it stood on 1 March 2012 which highlights the amendments effective from 1 April 2012.

Property interest declarations

It is now necessary to provide a greater level of disclosure in property interest declarations. Such declarations must be provided to the police within 14 days of service of restraining

orders. The failure to do so is an offence.

A property interest declaration must now set out precisely the nature and extent of each interest in restrained property (legal and equitable), including the amount secured by way of mortgage. (Section 19B and 36O of the *Confiscation Act*).

The practical effect for practitioners is that it is no longer permissible to be vague as to the precise nature of the interest that a person may have in restrained property (i.e. “room to swerve” has been curtailed).

The nature of the interest must be identified with precision at the commencement of the

confiscation litigation process. In order to identify the nature of interests, practitioners must be familiar with the various types of equitable interest, such as express, resulting and constructive trusts, as well as various types of security interest, such as liens, charges and mortgages.

Tainted property substitution declarations – automatic forfeiture

The DPP may now apply for tainted property substitution declarations where property is restrained for automatic forfeiture and an application for exclusion is made in respect of it.

The effect of such an application, if granted, is to deem certain property restrained by a restraining order to be tainted property, whereas such property would otherwise not have been tainted.

By way of example, if a defendant cultivates a commercial quantity of cannabis in a rental property (i.e. a property which the defendant does not own) but is the owner of another property which is not used in or in connection with any drug offence

or derived from it, the DPP can now apply to deem the “clean” property to be “tainted”.

The effect of such an order would be that the defendant could not exclude the property deemed to be tainted since one of the matters which a defendant must establish is that the relevant property sought to be excluded is not tainted property. (Division 3, Part 3, *Confiscation Act*)

Civil forfeiture

An entirely new Part has been created in the *Confiscation Act*, namely Part 4, which now deals exclusively with civil forfeiture.

Applications for exclusion from civil forfeiture restraining orders are now governed by section 36U.

Although provisions dealing with civil forfeiture have been assembled within the new Part 4 of the *Confiscation Act*, most of the principles applicable to civil forfeiture have not changed.

Further information

For further information concerning litigation under the

Confiscation Act 1997, visit
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

Clerk: Barristers Logistics