

ASSET CONFISCATION UPDATE – 5 March 2012

Undertaking as to damages



The form of words used in an undertaking as to damages in a restraining order is critical.

If a person suffers loss and damage as a result of a restraining order, the only avenue available to such person to seek compensation from the State of Victoria is pursuant to the terms of the undertaking. If the undertaking is too restrictive, no damages can be recovered. See *Re Cannon* [1999] 1 Qd R 247; *McCleary & Ors v Director of Public Prosecutions (Cth)* (1998) 157 ALR 301.

As practitioners may have noticed, more recently the DPP has proffered an undertaking as to damages in *ex parte* applications for restraining orders which is more limited than that which had previously been offered. The form of undertaking recently offered by the DPP is in the following form:

The Applicant, by his Counsel and on behalf of the State, undertakes pursuant to section 14(7) of the

Confiscation Act 1997 to abide by any order of the court as to damages sustained by any relevant person who has an interest in the subject property and who is not in any way involved in the alleged offending if the court should determine that the said damages have been sustained by reason of this order and which the State ought pay.

[Underlining added]

By inserting the words “*who is not in any way involved in the alleged offending*” the DPP limits the exposure which the State of Victoria has in respect of the undertaking. That limitation is, in the author’s view, unreasonable.

This form of undertaking was challenged before Whelan J last week. His Honour proposed a revised form of undertaking in the following terms:

A. *The Applicant, by his Counsel and on behalf of the State, undertakes pursuant to section 14(7) of the Confiscation Act 1997 to abide by any order of the Court as to damages sustained by any relevant person who has an interest in the subject property if the Court should determine that the said damages have been sustained by reason of this order and which the State ought to pay, provided that in determining whether **[the alleged offender]** is entitled to damages, the Court may take into account evidence of **[his / her]** alleged criminal offending, notwithstanding any acquittal on or discontinuance or withdrawal of the charges.*

B. *The proviso contained in paragraph A of this order is intended to overcome any suggestion based on the reasoning enunciated in *McCleary & Ors v Director of Public Prosecutions (Cth) (WA) (1998) 157 ALR 301*, that the DPP may not seek to lead evidence at any hearing to determine whether **[the alleged offender]** is entitled to damages that **[he / she]** did offend in accordance with the criminal charges against him.*

The revised form of undertaking immediately above is far more satisfactory in that it does not disentitle any person from making an application as to damages at the commencement of

the confiscation process, but leaves that matter for determination at the time that an application is made seeking damages.

It may be, for example, that a defendant is convicted of the offence which gave rise to the making of the restraining order, but is wholly successful in excluding all of their assets from the restraining order. Rhetorically, one may ask: *If such defendant can prove that they have suffered loss and damage as a result of the restraining order, why should they be precluded from making an application seeking to recover such loss and damage from the State?*

What this means for practitioners is that, when first obtaining instructions in respect of a restraining order, practitioners should carefully look at the undertaking and, if it is in an unsatisfactory form, require the DPP to consent to a variation of it, failing which you should seek instructions whether to make an application to the court for an *inter partes* rehearing of the application for the restraining order, at which time it can be contended that the restraining order should be revoked unless an appropriate (i.e. less qualified) undertaking is proffered.

Further information

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

About the author

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