



Amendments to Confiscation Act 1997 (Vic)

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Critical amendments to the Confiscation Act 1997, including the inclusion of further automatic forfeiture provisions

by Christian Juebner

The Victorian Parliament is about to pass *the Criminal Organisations Control and Other Acts Amendment Bill 2014 (Vic) (Bill)*.

Part 2 of the Bill proposes critical amendments to the *Confiscation Act 1997*. Of greatest concern is that the Bill introduces a regime for the automatic forfeiture of **all** property owned or controlled by a person convicted of a “serious drug offence”. Similar provisions have operated in Western Australia for some time.

Pursuant to the new provisions, if a person is convicted of a serious drug offence, all of their property will be automatically forfeited to the State of Victoria without the opportunity to make an application for exclusion, but preserving for forfeiture a very modest amount of property, similar to that of a person made bankrupt.

A “serious drug offence” is any one of the following:

- trafficking in a drug of dependence - large commercial quantity;¹
- cultivation of narcotic plants - large commercial quantity;²
- conspiracy to commit either of the above offences;³
- aiding and abetting in the commission of either of the above offences.⁴

Only a third party, not being the accused, can make application for exclusion of their interest in respect of property that is restrained for the purpose of a serious drug offence.

Such third party must show that they were not in any way involved in the commission of the serious drug offence, that their interest was not subject to the effective control of the accused and that their interest was acquired for sufficient consideration where it was acquired from the accused.

Property that is protected from automatic forfeiture arising from a serious drug offence is the following:

- property used by the accused or a dependant of the accused primarily as a means of transport;
- any item of necessary clothing of the accused or a dependant of the accused;
- any item of ordinary household property of the accused or a dependant of the accused;
- any tools of trade required by the accused or a dependant of the accused in earning income.

However, the regulations will prescribe a maximum value (currently unknown) in respect of such items and, insofar as any of the affected

items exceed that value, they are liable to forfeiture.

Further, if any of the protected property is “tainted property”, then it is automatically forfeited notwithstanding the protective provisions. For example, tools of trade used to prepare a room for hydroponic cultivation of cannabis would not be excluded through the protective provisions.

In order for automatic forfeiture to occur, a declaration is required to be made under the *Sentencing Act* 1991 that the accused is a “serious drug offender”. It is likely that such declarations will be made upon the conviction of the predicate offences.

Important protections have been included for dependants of persons declared to be serious drug offenders. If the residence of a serious drug offender is forfeited, an application may be made by dependants for relief from forfeiture in respect of the residence. In short, such dependants can seek the payment of an amount of money enabling them to obtain alternative accommodation.

Apart from the new automatic forfeiture provisions relating to serious drug offences, amendments are also proposed be made by the Bill in relation to the hardship provisions. In short, the DPP has failed in many attempts to obtain forfeiture orders on a discretionary basis over real estate.

Under the proposed amendments, a court will not be entitled to have regard to the sentence imposed in determining whether hardship is made out. Further, the concept of hardship is replaced with a concept of “undue hardship”, further

¹ Section 71, *Drugs, Poisons and Controlled Substances Act* 1981 (*Drugs Act*).

² Section 72, *Drugs Act*.

³ Section 79(1) or 80(3)(a) *Drugs Act*.

⁴ Section 80(1) or 80(3)(b), *Drugs Act*.

indicating that something more than ordinary hardship resulting from forfeiture is required to obtain hardship relief.

Having regard to the fact that courts will no longer be able to have regard to the criminal sentence imposed, issues of proportionality between sentencing and forfeiture will no longer be relevant. As a result, it will be more difficult in many cases to demonstrate the necessary hardship to obtain relief, in whole or part, from the forfeiture provisions.

Importantly, questions of hardship are only relevant with respect to civil forfeiture and discretionary forfeiture (i.e. solely Schedule 1 offences). Hardship is irrelevant, and cannot be relied upon, to avoid forfeiture arising from the automatic forfeiture provisions, including the new proposed serious drug offence provisions.

About the author

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