

Following revocation it is intended to sell the land at valuation based on the highest and best use.

I commend the bill to the house.

Debate adjourned on motion of Mr CLARK (Box Hill).

Debated adjourned until Wednesday, 22 August.

CONFISCATION AMENDMENT BILL

Statement of compatibility

Mr HULLS (Attorney-General) tabled following statement in accordance with Charter of Human Rights and Responsibilities:

In accordance with section 28 of the Charter of Human Rights and Responsibilities Act 2006, I make this statement of compatibility with respect to the Confiscation Amendment Bill 2007.

In my opinion, the Confiscation Amendment Bill 2007, as introduced to the Legislative Assembly, is compatible with human rights protected by the charter. I base my opinion on the reasons outlined in this statement.

Overview of the bill

The object of the Confiscation Act 1997 ('the act') is to ensure that 'crime does not pay'. It seeks to achieve that object by depriving criminals of their ill-gotten gains, disrupting criminal enterprises and deterring criminal activity.

The act establishes a regime for the restraint of property that may have been used in, or derived from, criminal activity (to prevent its dissipation) and the forfeiture of such property.

The act also allows a person with an interest in property to apply to have that interest excluded from a restraining order (so that the applicant may dispose of or otherwise deal with their interest) or forfeiture (so that it is not transferred to the State). Such applications may relate to property restrained for the purposes of forfeiture or property subject to forfeiture.

The bill amends the act to clarify the scope and operation of its provisions relating to applications for, and the making of, exclusion orders. More specifically, the bill amends the act to:

make clear that exclusion orders can only be made in relation to an applicant's interest in the property, rather than the entire property;

insert a definition of 'derived property' and include that term in provisions relating to the exclusion of property from automatic or civil forfeiture. This set of amendments makes clear the original policy intent that criminally acquired property cannot be excluded from restraint or forfeiture merely because it is not tainted by the specific schedule 2 offence with which the defendant has been charged or is reasonably suspected of having committed;

provide that the 'effective control' test (which is one of the grounds on which a non-defendant applicant must satisfy a court in order to obtain an exclusion order) is to be applied at the time the defendant¹ is charged or his or her property restrained, whichever occurs earlier. This amendment is designed to address arguments that where, for example, a defendant is in custody, he or she no longer has effective control of the property;

make clear that transfer of an interest in property for less than market value is not a sufficient basis on which to have a property interest excluded from restraint or forfeiture; and

ensure the appeal provision of the act covers all decisions concerning exclusion orders to address the Court of Appeal's identification of some 'gaps' in the *Director of Public Prosecutions v. Phan Thi Le.2*

The bill also amends the act:

to clarify that the procedure applying to appeals against sentence are intended to apply to appeals under the act, rather than the principles laid down in *House v The King*³ on the appellate courts' approach to appeals against the exercise of discretion by trial judges; and

to assist in the interpretation and application of provisions concerning 'property', which is defined in s. 3 of the act to include 'any interest in any ... real or personal property'.

Human rights issues

As indicated in the overview above, the principal focus of the bill is on amending provisions relating to applications for, and the making of, exclusion orders from either restraint or forfeiture under the act. Broadly, the ability of any person with an interest in restrained or forfeited property to apply for an exclusion order provides an avenue for such people to assert their right to property.

The bill makes four (sets of) amendments to the exclusion order provisions. Two of these (sets of) amendments may engage human rights under the charter. The following analysis examines each of these amendments and considers whether they engage with any human rights and, if so, whether any limitation to those rights is reasonable.

1. Scope of excluded property: validation

The first series of amendments makes clear that an application for an exclusion order and any exclusion order made under the act relates to the applicant's interest in the property, rather than the whole property. These amendments do not adversely affect an applicant's right to property.

¹ Here, and for ease of reference throughout this Statement, the term 'defendant' is used to include, in the case of civil forfeiture, a person reasonably suspected of having committed a schedule 2 offence (eg: a serious drug or fraud offence).

² [2007] VSCA 18 at paras. 10-11.

³ (1936) 55 CLR 499.

New section 176 of the act inserted by the bill validates those amendments in relation to exclusion orders previously made. New section 177 of the act inserted by the bill requires pending applications for exclusion orders to be determined in accordance with the amended provisions. That is, new sections 176 and 177 provide that the amendments apply to the amended provisions as though they had always been so amended (other than in the case of the parties in *DPP v. Phan Thi Le*). These provisions reflect the manner in which the Courts had construed and applied the amended provisions prior to the Court of Appeal's decision in *Phan Thi Le* and are intended to clarify the original policy intent underlying these provisions.

As the amendments do not create a criminal offence, they do not engage the right against retrospective criminal laws in s. 27 of the charter.

2. *Derived property*

The second set of amendments involves the insertion of a definition of 'derived property' in section 3 of the act. 'Derived property' is defined in the bill as property:

- (a) used in, or in connection with, any unlawful activity⁴ by —
 - (i) the defendant; or
 - (ii) the person who is suspected of having committed a schedule 2 offence; or
 - (iii) the applicant for an exclusion order; or
- (b) derived or realised, or substantially derived or realised, directly or indirectly, from any unlawful activity by —
 - (i) the defendant; or
 - (ii) the person who is suspected of having committed a schedule 2 offence; or
 - (iii) the applicant for an exclusion order; or
- (c) derived or realised, or substantially derived or realised, directly or indirectly, from property of a kind referred to in paragraph (a) or (b).

The 'derived property' amendments relate to the automatic and civil forfeiture regimes. Those regimes in turn relate to schedule 2 offences, that is, to offences at the very serious end of the scale, often involving organised or systemic criminal activity.

These amendments will ensure that the policy objective of targeting the long-term accumulation of wealth through criminal enterprise underlying the automatic and civil forfeiture regimes is not undermined.

The derived property amendments do not expand the type of property that can be included in an application for a restraining order. Rather, once a restraining order is in place, the amendments limit the circumstances in which exclusion orders may be made, by requiring an applicant to satisfy the court that the property is not derived property or the applicant had no knowledge or reason to suspect that the property was derived property.

Given there is a narrowing of the exclusion order provisions, there is a possible impact on charter rights.

2.1 *Right to property (s. 20)*

Section 20 of the charter provides that a person must not be deprived of his or her property other than in accordance with the law.⁴

Section 20 only prohibits a deprivation of property that is carried out unlawfully. As the act is, and the bill if passed will be, a law made by the Victorian Parliament, any deprivation of property that occurs as a result of the 'derived property' amendments would take place under powers conferred by legislation, in accordance with the law. There is an implied limitation on the power to make laws depriving persons of property that the laws must not do so in an arbitrary manner. 'Arbitrary' in this context may mean 'capriciously', 'unpredictably' or 'inconsistently': in other words, lacking in reason or proper policy justification. In this case, the 'derived property' amendments form part of a systematic process of improving the operation of the existing provisions to enable law enforcement authorities to more readily identify and confiscate proceeds of crime, particularly where large amount of profit are generated. The definition of 'derived property' and the powers to deprive a person of such property are confined and structured, formulated in a precise manner and accessible to the public. In this sense, the amendments cannot be said to be arbitrary.

Arguably, the right to property protected by Article 1 of the first protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms casts a more onerous requirement than that laws depriving persons of property not be 'arbitrary'. In Europe, the Courts have held that Article 1 comprises three distinct rules:

- (1) the principle of peaceful enjoyment of property;
- (2) the principle that the deprivation of possession of property must be in the public interest and subject to the conditions provided for by law and by general principles of international law;
- (3) the principle that states are entitled to control the use of property in accordance with the general interest and to secure the payment of taxes or other contributions or penalties.

Principles (2) and (3) have been interpreted to require a 'fair balance' to be struck between the interests of the State and those of the individual. While this may impose a more onerous requirement than that any deprivation must not be arbitrary, the European Court of Human Rights has repeatedly held that confiscation and forfeiture do not breach Art. 1 of the European Convention.

Based on this approach by the European Court, the 'derived property' amendments cannot be said to be incompatible with the right to property under s. 20 of the charter.

3. *Effective control*

⁴ This right is derived from Article 17 of the Universal Declaration of Human Rights.

The third series of amendments clarifies the operation of the 'effective control' test in applications for exclusion of an interest in property from a restraining order or forfeiture by non-defendant applicants. The amendment will require the applicant to satisfy the court that his or her interest in the restrained or forfeited property was not subject to the effective control of the defendant at the time the defendant was charged or his or her property restrained, whichever occurred earlier. These amendments are designed to address arguments that where, for example, a defendant is in custody, he or she no longer has effective control of the property.

The concept of 'effective control' of property is important to the efficacy of the confiscation regime. Section 9(1) of the act provides:

For the purposes of this act, property may be subject to the effective control of a person whether or not the person has an interest in it.

Experience with the legislation that the act replaced⁵ showed that persons could circumvent that regime by divesting themselves of their illegally acquired assets as gifts to family and friends or by making it appear that other people (natural or legal) have control over those assets. Section 9 in the current act is intended to enable the courts to look behind company and trust arrangements to determine who really is in control of the property.

The proposed amendments clarify the application of the 'effective control' test, but make no substantive policy change. They do not engage any of the human rights under the charter.

4. Transfer of property for sufficient consideration

Currently, the act requires that a non-defendant applicant for an exclusion order must prove, among other things, that his or her interest in the property was acquired from the defendant for sufficient consideration. In *Phan Thi Le*, the Court of Appeal held that 'natural love and affection . . . constitute(s) 'sufficient consideration' for the purposes of s. 52(1)(a)(v) of the (Confiscation) Act', i.e.: the relevant provision for the exclusion order in that case. That interpretation also extends to applications for exclusion of the applicant's interest in property from restraint or other forms of forfeiture under the act where sufficient consideration is also required.

The fourth amendment inserts the following definition of 'sufficient consideration' in section 3 of the act:

... in relation to property, means consideration that reflects the market value of the property and does not include —

- (a) consideration arising from the fact of a family relationship between the transferor and transferee;
- (b) if the transferor is the spouse or domestic partner of the transferee, the making of a deed in favour of the transferee;
- (c) a promise by the transferee to become the spouse or domestic partner of the transferor;

- (d) consideration arising from the transferor's love and affection for the transferee;
- (e) transfer by way of gift.

This new definition makes clear that transfer of an interest in property for less than market value is not a sufficient basis on which to have a property interest excluded from a restraining order or forfeiture. It is consistent with the original policy intent indicated in the Second Reading Speech for the Confiscation Bill that the '(t)he bill enables a court to restrain and confiscate tainted property that has been transferred for less than full value.'⁶ (Emphasis added) That requirement is designed to prevent criminals shielding criminally acquired property (including the proceeds of the sale of property for market value) from forfeiture by transferring it to other (often related) parties for less than market value.

The insertion of this new definition and its operation in the act's exclusion order provisions may engage three rights under the charter: the right to privacy (s. 13); protection of families and children (s. 17); and the right to property (s. 20).

4.1 Right to privacy (s. 13)

Section 13(a) requires that a public authority must not unlawfully or arbitrarily interfere with a person's family or home. The insertion of a definition of 'sufficient consideration' engages this right to the extent that where property is the subject of a restraining order or forfeiture, that may at a later stage⁷ lead to the confiscation of a person's home or the eviction of a family from a property where they reside. However, the operation of the forfeiture scheme will ensure that the interference with privacy as a result of the forfeiture of property will occur on a case by case basis in discrete and defined circumstances under powers conferred by statute. Accordingly, the interference with privacy is lawful and not arbitrary, and there is no limitation on the right to privacy in section 13(a) of the act.

4.2 Protection of families and children (s. 17)

Section 17 of the charter provides:

- (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
- (2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

Section 17(1) protects the integrity of the family unit. Section 17(2) accords special protection to children as is needed by reason of being a child. Children are, by reason of being a child, reliant upon their parents to provide the essentials of

⁵ Crimes (Confiscation of Profits) Act 1986.

⁶ The Hon Jan Wade MP, Attorney-General, 'Confiscation Bill: Second reading', Victoria Parliamentary Debates Assembly (13 November 1997), 1146, 1149.

⁷ i.e. once the period for making an exclusion order has passed or an exclusion order application has been refused.

life.⁸ The loss of property has the potential to impact upon the ability to provide those essentials.

The amendments will prevent a family member, who has acquired an interest in property directly or indirectly from a defendant for less than market value, from having that interest excluded from restraint or forfeiture. Such an interest may be in the family home. The purpose of the provisions are to prevent criminals from thwarting the confiscation regime by transferring criminally acquired or derived property to another person including family members. Without this amendment, criminals will be able to use such 'less than market value' transfers to shield their criminally acquired assets from forfeiture.

However, whilst the provisions extend to the family home, the amendments should be considered in the context of the courts' broad powers under the act to ameliorate the impact of restraining orders or forfeiture on any person, including family members and children of a defendant. These powers can be applied to ensure that families and children are not placed in financial hardship by reason of the operation of the confiscation of property.

For example, in relation to restraining orders, a court under section 14(4) of the act may make a restraining order that:

... provide(s) for meeting ... the reasonable living expenses (including the reasonable living expenses of any dependants) ... of any person to whose property the (restraining) order applies if the court ... is satisfied that these expenses cannot be met from unrestrained property or income of the person.

Further, section 26 of the act allows a court to make such further orders in relation to restrained property 'as it considers just', including, but not limited to the type of order envisaged by section 14(4). Affected family members with an interest in the restrained property may apply for such an order. In addition, family members without a legal interest in the property may, with the leave of the court, apply for such an order.

In relation to forfeiture, section 45 of the act permits a court, where it is satisfied that 'hardship may reasonably likely be caused to any person by' the forfeiture of property to:

- (a) ... order that the person is entitled to be paid a specified amount out of the forfeited property, being an amount that the court thinks is necessary to prevent hardship to the person; and
- (b) ... make ancillary orders for the purpose of ensuring the proper application of an amount so paid to a person who is under 18 years of age.

These broad existing powers for the courts to make appropriate orders are consistent with the protection of families and children under section 17 of the charter.

⁸ In relation to the corresponding right in Article 24 of the ICCPR, the United Nations Human Rights Committee has commented that the measures required 'although intended primarily to ensure that children fully enjoy the other rights enunciated in the Covenant, may also be economic, social and cultural': General Comment 17.

The amendments are therefore consistent with the rights in section 17 of the charter.

4.3 Property rights (s. 20)

In light of the Court of Appeal's interpretation of the 'sufficient consideration' requirement in *Phan Thi Le*, the new definition arguably restricts the right to property by increasing the scope of the property that may be subject to restraint and/or forfeiture. That is, any interest in property acquired by a person other than the defendant for less than market value cannot be excluded from restraint or forfeiture. In that sense, the amendments could be regarded as increasing the level of restriction on the right to property of persons with an interest in restrained or forfeited property.

However, the definition of 'sufficient consideration' is formulated precisely to guide those who apply the law. Further, the power to deprive a person of property to which this amendment relates will take place under powers conferred by legislation. The definition of 'sufficient consideration' and its operation in determining exclusion orders sought by non-defendant applicants are confined and structured, formulated in a precise manner and accessible to the public. In this sense, the amendments cannot be said to be arbitrary. For these reasons, any resultant deprivation meets the conditions of a deprivation of property which is 'in accordance with law' and therefore the definition of 'sufficient consideration' and its use in the exclusion provisions does not limit the right to property under section 20 of the charter.⁹

Conclusion

I consider that the bill is compatible with the Charter of Human Rights and Responsibilities because the amendments in the bill either:

- do not raise human rights issues; or
- to the extent that some amendments do raise such issues, these amendments do not limit human rights.

ROB HULLS MP
Attorney-General

Second reading

Mr HULLS (Attorney-General) — I move:

That this bill be now read a second time.

Put simply, the object of the Confiscation Act 1997 ('the act') is to ensure that 'crime does not pay'. It seeks to achieve that object by depriving criminals of their ill-gotten gains, disrupting criminal enterprises and deterring criminal activity.

The act establishes a regime for the restraint of assets that may have been used in or derived from criminal activity (to prevent their dissipation) and for the forfeiture of such assets.

⁹ See also the more detailed discussion of the right to property in section 2.1 above, which is also applicable here.