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Claims on the rise for Criminal Lawyers

- 6 month time limit being missed



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In the past, Law Claims' experience was that there were fewer claims in the area of criminal law than other areas of law. This is not so the case in recent times.

Law Claims is extremely concerned given a significant number of notifications / claims that have arisen from the rigid 6 month time limit for the bringing of applications pursuant to the *Criminal Assets Confiscation Act* (Act) to exclude property from forfeiture orders.

It is essential that lawyers who practice in criminal law are aware of the "time limit" to bring an exclusion application under the Act. The "relevant period" for an application is "not later than 6 months after the start of the day of the relevant conviction".

Practitioners also need to be mindful of the many other time limits set out in the Act. For example, see s 35(1), s 43, s 60, s 62, s 95 and s 97.

A couple of Law Claims case examples are as follows:

Case 1

A claim was brought against the solicitor in relation to the deemed automatic forfeiture of the claimant's property pursuant to Section 74 of the Act.

It was alleged that the practitioner failed to advise the claimant to make application to exclude that property from automatic forfeiture within the applicable time limit. The claimant sought the full amount of the forfeited property (being the sale proceeds of a house property) plus interest and costs. In this matter the insured ought to have advised the claimant before the expiration of the **6 month time limit** in which to bring an application to either exclude the property (or sale proceeds) from the operation of the restraining order or to apply to exclude the property (or sale proceeds) from forfeiture.



In this case the practitioner overlooked or gave no consideration to the relevant provisions of the Act until after the expiry of the **6 month limitation period**. Accordingly, liability was certain against the practitioner.

Case 2

Allegation against the practitioner in failing to protect the client's property from a restraining order by filing appropriate documentation within time. The application made to extend time was made but the application failed.

This case involved criminal and confiscation of profits matters. The criminal matters were extremely complex and involved multiple major indictable information laid in various Magistrate Courts over a period of time and then finalised in the District Court over an extended period of time. There were also numerous other summary and minor indictable criminal charges proceeding in multiple Magistrates Courts.

The practitioner failed to apply to the Civil Jurisdiction of the District Court to extend the time for automatic forfeiture or to exclude property from the restraining order.

The applications filed by the practitioner had in fact been filed within time of the most recent conviction. It had transpired however that there had been a conviction in the District Court in relevant matters very early in the piece and, as a result of this conviction, the time for automatic forfeiture had passed and the matter was out of time.

In all of the claims that have been notified where the practitioners have not filed the relevant application within **6 months of the date of conviction** the common theme seems to be the same, namely, the claimants have multiple charges and different conviction dates and, they are sentenced at a date considerably later.

FORFEITURE

The practitioners have become embroiled in the criminal charges and sentencing issues and they overlook the filing of the relevant application within **6 months of the date of conviction**.

There have been various court decisions indicating that there is no prospect of obtaining an extension of time beyond the 6 month period.

Consideration ought to be given to the judgment of Tilmouth J, delivered on 18 July 2014 in the matter of Director of Public Prosecutions v Hall [2014] SADC 156.

The principal issue for resolution in that case was whether an extension of time could be granted in which to bring an application for the exclusion of property from the ambit of forfeiture, after forfeiture to the Crown had taken place under s 74(1) of the Act. His Honour held that no extension of time could be granted. Although ss 47 and 48 of the *Limitation of Actions Act* is capable of application to the 6 month time limit under the Act, as that period is 'essential' to the nature and purpose of the forfeiture mechanism under the Act regime, s 47 does not apply and there is no resort to s 48.

These recent cases highlight the same underlying causes of claims faced by non-criminal practitioners – namely, limitation periods and missing a deadline. Perhaps another reminder to ask yourself how well you know your critical dates and deadlines and, ask yourself how you might improve how you go about making sure you know the critical dates relevant to your practice area?



For any queries about this or other Risk Management Services offered by Law Claims, please contact the PII Risk Manager, Gianna Di Stefano on 8410 7677.
