DIRECTOR OF PUBLIC PROSECUTIONS v NGUYEN and Another
DIRECTOR OF PUBLIC PROSECUTIONS v DUNCAN and Another

COURT OF APPEAL

MAXWELL P, WEINBERG JA and KYROU AJA

12 May, 25 June 2009
[2009] VSCA 147

Criminal law — Confiscation of property — Restraining order — Automatic forfeiture — Application for exclusion — DPP contending application out of time — Whether application made within 60 days of conviction — When conviction occurs — Arraignment, plea of guilty, allocutus — Plea taken at listing hearing — Matter adjourned for plea and sentence — Whether unequivocal acceptance of plea — "Conviction" — Confiscation Act 1997 (No 108) ss 4, 22, 35.

Appeal — Appeal to Court of Appeal — Final decision — Leave not required — Refusal to grant prerogative writ.

Section 22 of the Confiscation Act 1997 ("the Act") provided that in a case where property subject to a restraining order became automatically forfeited under s 35 of the Act, the application for an exclusion order had to be made within 60 days of the date on which the accused was convicted of the offence giving rise to the automatic forfeiture.

N and D pleaded guilty, in unrelated proceedings and on separate dates, to offences resulting in automatic forfeiture under s 35. In the case of each of N and D, following arraignment and the plea of guilty, the judge adjourned the case for the hearing of the plea and extended bail. N and D each sought to avoid that consequence by applying for an exclusion order. The question arose: when was the accused convicted? If the date of conviction was the date on which an accused was arraigned and the allocutus administered, each accused was out of time in seeking an exclusion order. If the date of conviction was the date on which the plea of the accused was heard and unequivocally accepted, there would be no automatic forfeiture. In each case, the judge of the County Court had dismissed applications by the director to strike out the exclusion applications, and those decisions were upheld by a judge of the Trial Division. On appeal by the director.

Held, allowing the appeal: (1) The judge's refusal to grant an order in the nature of certiorari finally determined the rights of the parties in a principal proceeding. Accordingly, the order dismissing the proceeding was final and not interlocutory. There was an appeal as of right and no leave was required. [5].

(2) The test for determining whether, in any relevant sense, there had been a conviction, was whether, viewed objectively and on the facts as established, there was at the relevant time an unequivocal acceptance by the court of the guilty plea or, to put the matter another way, a judicial determination of guilt. A person who pleaded guilty at arraignment, and whose plea was adjourned to another day, was to be regarded as having been "convicted" when arraigned. There was no meaningful distinction for this purpose between the *adjournment* of a case for plea and sentence, and the *remand* of an accused on bail pending plea and sentence. It followed that each accused was convicted then and there. [10], [51]–[93].

Director of Public Prosecutions v McCoid [1988] VR 982 considered and followed.

Griffiths v R (1977) 137 CLR 293; *Della Patrona v Director of Public Prosecutions (Cth) (No 2)* (1995) 38 NSWLR 257; *Maxwell v R* (1996) 184 CLR 501; *Director of Public Prosecutions v Helou* (2003) 58 NSWLR 574 considered.

R v Celep [1998] 4 VR 811; *R v Drew* [1985] 1 WLR 914; *Hellenic Republic v Tzatzimakis* (2003) 127 FCR 130 referred to.

(3) The administration of the allocutus was itself sufficient to demonstrate that a plea of guilty had been accepted, and that there had therefore been a judicial determination of guilt. [94], [110]–[112].

R v Rear [1965] 2 QB 290; *R v Shillingsworth* [1985] 1 Qd R 537; *Tihanyi v R* (1999) 21 WAR 377; *Director of Public Prosecutions (Vic) v Ferguson* (2004) 148 A Crim R 244 considered.

Per curiam. The ancient process of administering the allocutus did not seem to serve any useful purpose today. It should be abolished and replaced by some modern process simple and comprehensible to all and by which the conviction of the accused person can be marked. [98], [112], [121].

Decisions of Smith J (2008) 19 VR 662 reversed.

Appeal against orders

This was an appeal by the Director of Public Prosecutions against a decision of Smith J (2008) 19 VR 662 dismissing an application by the director in each of two cases in which a County Court judge had dismissed applications by the director to strike out exclusion applications arising out of restraining orders made under the Confiscation Act 1997. The facts are stated in the judgment.

S G O'Bryan SC and *L G De Ferrari* for the appellant.

M J Croucher for the first respondent in each appeal.

No appearance for the second respondent in each proceeding.

Cur adv vult.

1 **Maxwell P, Weinberg JA and Kyrou AJA.** This is an appeal by the Director of Public Prosecutions ("DPP") against a judgment and orders made by a judge of the Trial Division on 7 August 2008. Those orders arose out of proceedings by way of judicial review brought by the DPP in relation to two separate decisions of his Honour Judge McInerney in the County Court. By those decisions, Judge McInerney dismissed applications by the DPP to strike out what may be termed "exclusion applications" arising out of certain restraining orders made under the Confiscation Act 1997 ("the Act") in anticipation of automatic forfeiture of property. The respondents are Hai Minh Nguyen and Adrian Michael Duncan.

2 In each matter, Judge McInerney was concerned with property belonging to persons who had pleaded guilty, in unrelated proceedings and on separate dates, to what are known under the Act as "Schedule 2 offences". Property of each respondent, being subject to a restraining order, faced automatic forfeiture under the Act. Each sought to avoid that consequence by making application for exclusion pursuant to s 22. The DPP contended, in each case, that the application should be struck out because it was out of time. The judge below, who

determined the application for judicial review, heard the two cases together because they raised essentially the same legal issue.[1]

3 In each case, the application for exclusion had to be made within 60 days of the date on which the applicant was convicted of the offence giving rise to the automatic forfeiture.[2] The critical question in each case therefore is: when was the applicant convicted?

Is leave to appeal required?

4 There is a preliminary point to be resolved. The DPP contends that the order dismissing his originating motion, in which he sought, among other things, certiorari to quash the decisions of Judge McInerney, was final and not interlocutory. The respondents contend that the order was a "judgment or order in an interlocutory application", within the meaning of s 17A(4)(b) of the Supreme Court Act 1986, and that leave to appeal is required.

5 In our view, the judge's refusal to grant an order in the nature of certiorari finally determined the rights of the parties in a principal proceeding. Accordingly, the order dismissing the proceeding was final and not interlocutory.[3] The appeal lies as of right, and no leave is required.

The central issue in this appeal

6 The question to be determined in this appeal is whether the date of conviction is the date on which an accused is arraigned and has the allocutus administered, or the date upon which his or her plea is heard and unequivocally accepted. If the former position is correct, as the DPP contends, each respondent to this appeal was out of time in seeking an exclusion order. If, however, the latter position represents the law, as the respondents contend, there would be no automatic forfeiture.

7 It is necessary, therefore, to focus upon the meaning to be given to the term "conviction" as it appears in s 35 of the Act. That term has troubled courts in the past. In *R v Celep*,[4] Winneke P observed that the word "conviction" was used in a variety of senses and, generally, had to take its meaning from the statutory context in which it appeared.[5] As will be seen, its primary meaning denotes the judicial determination of a case, a finding of guilt, or the acceptance of a plea of guilty followed by sentence. However, it has also been used in a secondary sense to refer to a verdict of guilty, before the adjudication which was completed only when sentence was imposed.[6]

8 The ambiguity associated with the term "conviction" was recognised as far back as 1844 when Tindal CJ said:[7]

> The word "conviction" is undoubtedly verbum aequivocum. It is sometimes used as meaning the verdict of a jury, and at other times, in its more strictly legal sense, for the sentence of the court.

---

1. *Director of Public Prosecutions v Nguyen; Director of Public Prosecutions v Duncan* (2008) 19 VR 662.
2. Section 35 of the Confiscation Act 1997.
3. See *Applicants A1 and A2 v Brouwer* (2007) 16 VR 612 at 633–5. The same is true in the Federal Court: *Applicants S61 of 2002 v Refugee Review Tribunal* (2004) 136 FCR 122.
4. [1998] 4 VR 811.
5. At 814.
6. *S (an infant) v Manchester City Recorder* [1971] AC 481 at 506 per Lord Upjohn.
7. *Burgess v Boetefeur* [1844] ER 567.

9 In *R v Drew*, Lord Lane CJ expressed similar views. He observed that the term "conviction" was capable of more than one meaning, sometimes being used to refer to the verdict of the jury and, at other times, used in a more strictly legal sense, as the sentence of the court.[8] Lord Reid had earlier said that the term was often used to mean final disposal of a case, but noted that it was not uncommon for it to be used as meaning a finding of guilt.[9]

10 In this country, it is generally understood that a plea of guilty does not, of itself, amount to a conviction.[10] It is no more than an acknowledgment that all the ingredients of the offence charged have been made out. A conviction, on the other hand, is a judicial determination of guilt. There can be no conviction on a count to which an accused pleads guilty until, by some act on the part of the court, it indicates that there has been such a determination.

Statutory framework

11 The statutory context in which the meaning of the term "conviction" is to be ascertained is as follows. Section 35 of the Act provides for what is described as "automatic forfeiture" of restrained property[11] on conviction of certain offences. Under s 35(1), if a person is convicted of a "Schedule 2 offence", and the restrained property is not the subject of an exclusion order under s 22, it is forfeited on the expiry of 60 days after the making of the restraining order, or the conviction, whichever is the later. If, however, an application has been made within that 60 day period for an exclusion order under s 22, then the property is forfeited only if that application fails or is abandoned.[12] Any person claiming an interest in the property (including the person convicted of the relevant offence) may apply under s 22 for an order excluding the person's interest in the property from the operation of the restraining order.

12 Everything turns upon whether or not the application for an exclusion order is made within the 60 day period. If it is, automatic forfeiture will be avoided and the case will proceed to a hearing on the merits. If it is not, there is no provision for time to be extended.[13] Automatic forfeiture occurs on the expiry of the 60 days, by operation of s 35(1). That is so irrespective of the merits of the case and irrespective of whether there is an acceptable explanation for the failure to lodge the application within time.

The facts concerning Hai Minh Nguyen

13 Mr Nguyen was charged with trafficking in a large commercial quantity of heroin, a Sch 2 offence within the meaning of the Act. On 7 October 2003, a judge of the County Court granted a restraining order against his property, ex parte. The purposes of the order were stated to be those of forfeiture, automatic forfeiture and pecuniary penalty.

14 On 14 September 2006, after two case conferences, each conducted pursuant to the Crimes (Criminal Trials) Act 1999, Mr Nguyen's matter was listed for a first directions hearing. However, it having been intimated that he was prepared

8. [1985] 1 WLR 914 at 917.
9. *S (an infant) v Manchester City Recorder* [1971] AC 481 at 489. See also *Dixon v McCarthy* [1975] 1 NSWLR 617 at 624.
10. *R v Tonks* [1963] VR 121 at 127–8.
11. That is, property in respect of which a restraining order was made under Pt 2 of the Act, for the purposes of automatic forfeiture: s 35(1)(b).
12. Section 35(2).
13. See further [116]–[118] below.

to plead guilty, the matter proceeded before Judge Nicholson, who happened to be the list judge on that day, as an arraignment.

15 Mr Nguyen pleaded guilty to one count of trafficking in heroin. There was then the administration of the allocutus, the nature and effect of which will be discussed in detail later in this judgment. However, Mr Nguyen was not asked to admit any prior convictions. The hearing of his plea was fixed for 19 March 2007, and his bail was extended to that date. On 16 March 2007 the Chief Judge vacated the date fixed for the plea, and adjourned the matter to 30 July 2007. On that day, the plea was further adjourned to 3 September 2007.

16 The plea was eventually heard by Judge Hart. Mr Nguyen was not arraigned again, but he was asked to admit prior convictions, and did so. The allocutus was again administered. Over the next few days, his plea, and those of five co-accused, proceeded. It was only after all pleas had been heard that he was, for the first time, on 7 September 2007, remanded in custody to await sentence.

17 On 24 September 2007, Mr Nguyen was sentenced to a term of eight years' imprisonment with a non-parole period of five years. Some four days later, on 28 September 2007, he applied, pursuant to s 20 of the Act, for an exclusion order under s 22.

18 On 4 December 2007, the DPP moved to strike out Mr Nguyen's application for an exclusion order as having been brought out of time. It was submitted that by the time the application was made, the property the subject of the restraining order had already been automatically forfeited. There was therefore nothing left to exclude.

19 The debate between the parties centred around whether the conviction dated from 14 September 2006, the date on which Mr Nguyen was arraigned, and the allocutus was put, or whether it dated from 7 September 2007, the date of his remand for sentence.

20 On 1 April 2008, Judge McInerney found in favour of Mr Nguyen. He ordered that the DPP's strike-out application be dismissed because there had been no conviction for the purposes of s 35(1) until 7 September 2007.

The facts concerning Adrian Michael Duncan

21 Mr Duncan was charged with trafficking in a large commercial quantity of MDMA, also a "Schedule 2 offence" within the meaning of the Act. On 6 February 2003, a restraining order was made over property in which he had an interest. One of the purposes stipulated in that restraining order was that of automatic forfeiture.

22 On 30 March 2005, Mr Duncan's matter came before the Chief Judge of the County Court, acting as list judge on that day. It appears that the proceeding had originally been intended as a first directions hearing, but once it was clear that there was to be a plea of guilty, it was designated as an arraignment hearing.

23 On that day, Mr Duncan, appearing with 10 co-accused, pleaded guilty to two counts of trafficking and one count of possession of a drug of dependence. Although the transcript does not record the allocutus as having been administered, it was common ground on the appeal that, in accordance with the usual practice, this was done.

24 As in the case of Mr Nguyen, Mr Duncan's matter was adjourned to a date to be fixed for plea and sentence. His bail was extended.

25 On 18 May 2005 (still within the 60 day period specified in s 35(1)), Mr Duncan filed with the County Court an application, pursuant to s 20, for the exclusion of property from the restraining order. That application was not heard until 2 June 2005, several days after the expiration of that period.

26 Under the County Court Miscellaneous Rules 1999, as they then stood,[14] an application to that court was taken to be made "when the application is first brought on before a Judge for hearing or for directions". Accordingly, the application would be treated as having been made on 2 June 2005 despite the fact that it was filed some weeks earlier.

27 Mr Duncan's plea was eventually heard by Judge Hogan on 10 August 2005. He was remanded in custody and sentenced on 14 October 2005.

28 On 12 September 2006, the DPP moved, before Judge McInerney, to have Mr Duncan's exclusion application struck out. The hearing of that application was adjourned until 5 December 2006. On that day, it was submitted that Mr Duncan had been convicted on 30 March 2005, the date of his arraignment before the Chief Judge. It was argued that, as a result, his application was out of time, the property having already been automatically forfeited.

29 On 9 August 2007, Judge McInerney dismissed the DPP's strike-out application, having held that Mr Duncan had not been convicted until his plea had been accepted by Judge Hogan on 14 October 2005.

Judge McInerney's findings of fact

30 In relation to Mr Nguyen, Judge McInerney first explained the context in which his actions in pleading guilty before Judge Nicholson should be viewed. His Honour said:[15]

> It is important, in understanding the administrative procedure of listing of criminal trials that takes place in the County Court, to comprehend that the listing for arraignment was to take place before a Judge in control of criminal listing, who turned out to be Judge Nicholson. On the 14th September 2006, Judge Nicholson heard twenty-five matters as criminal listing Judge between the hours of 9.15 am and 11.00 am, when she thereafter commenced the role of a trial Judge in the sense earlier referred to by Aickin J[16] when she heard a plea.

31 It seems that Judge McInerney had conducted his own inquiries into what had taken place at the arraignment before Judge Nicholson on 14 September 2006. He did so for the stated purpose of determining whether there had been an "unequivocal indication" by her Honour, on that day, that she had accepted Mr Nguyen's plea of guilty, such as to amount to a judicial determination of his guilt.

32 Judge McInerney understood that the allocutus had been administered at the arraignment. He noted, however, that in the formal record of the court kept pursuant to its case list management system, there was no indication of any plea having been taken on that day. In fact, a plea of guilty was not recorded on that system as having taken place until 30 July 2007, the date on which the matter had

14. Rule 10.03. That rule has since been amended. Under the current r 10.03, the position in the County Court is now the same as that which applies in the Supreme Court. An application is taken to have been made on the date on which it is filed, and not the date on which it is heard.
15. *Nguyen v Director of Public Prosecutions* (unreported, County Court of Victoria, Judge McInerney, 1 April 2008) at [11].
16. In *Griffiths v R* (1977) 137 CLR 293 at 336.

first come before Judge Hart, and adjourned. It was not until the matter came before Judge Hart again, on 24 September 2007, that there was any formal note in any of the court's records that Mr Nguyen had been "convicted".[17]

33 Judge McInerney observed that the problem with which he was confronted appeared to be a novel one. In order to resolve that problem, he focused heavily upon the role played by Judge Nicholson, at arraignment, as a judge in control of criminal listing. He said that she had in no sense performed the role of a "trial judge", but had instead acted purely as a "case manager". He added:[18]

> In accordance with the practice at the County Court, Judge Nicholson was never to be, or at the very least unlikely to be, the trial Judge or the Judge who would hear the plea and/or remand Mr Nguyen for sentence. Hence the circumstances are quite different from the proposition expounded in *McCoid* … or in *Griffiths* …

It was in the light of these special circumstances that his Honour concluded that Mr Nguyen had not been convicted until he was finally remanded in custody for sentence.

34 In dealing with Mr Duncan, Judge McInerney noted that although his matter had been listed for a committal in the Magistrates' Court on 23 February 2005, that entire process had been bypassed, there having been an early intimation that he would plead guilty. As previously indicated, the matter had come before the Chief Judge on 30 March 2005 for arraignment. Judge McInerney's description of what took place before the Chief Judge was as follows:[19]

> On 30 March 2005 Mr Duncan appeared and was one of the ten co-accused before the Court, he pleaded guilty and the date for the plea to be heard was then re-fixed for the fourth day of July 04. The listing Judge, in this case, Chief Judge Rozenes, hears a number of cases. He effects pleas if possible and refers them off for hearing before other Judges. *Albeit that on 30 March 05 a plea was effected, the prime purpose of such plea was administrative and list management.*

35 Judge McInerney said that he had inspected the court file and read the transcript of the proceedings. He noted that there was nothing to indicate that the allocutus had been put, but said that he would proceed upon the assumption that this was done. He drew attention to the significance ordinarily attached to that fact. He said that where, in response to a plea of guilty, the allocutus was put, and answered, that would generally be regarded as an acceptance by the court of the guilty plea.[20]

36 However, his Honour distinguished those cases which treated the putting of the allocutus as manifesting acceptance of a plea, on the basis that they had mainly been decided prior to the County Court introducing the modern practice of multiple arraignments for case management purposes. This change meant, in his Honour's view, that decisions such as *Director of Public Prosecutions v McCoid* ("*McCoid*")[21] (which held that a person is to be regarded as having been "convicted" for the purposes of confiscation proceedings when remanded for plea

17. In accordance with the practice of the court, his Honour's associate completed a "A Return of Prisoners Convicted" form, which was subsequently filed with the Registry, thereby incorporating into the records of the court the fact of the conviction.
18. *Nguyen v Director of Public Prosecutions* (unreported, County Court of Victoria, Judge McInerney, 1 April 2008) at [25].
19. At [23] (emphasis added).
20. *R v Shillingsworth* [1985] 1 Qd R 537.
21. [1988] VR 982 (discussed below).

and sentence at arraignment, and not at some later stage when finally sentenced) no longer had any application. His Honour added that the Chief Judge, before whom Mr Duncan had been arraigned, had been acting "in his capacity as a listing judge", and not "as a trial judge". Indeed, the record showed that, on the day of Mr Duncan's arraignment, the Chief Judge had sat from 9 am to 11 am, and had heard 23 other matters in that time.

37 Judge McInerney said that it had been at all times apparent, given the practice of the court, that the Chief Judge would not hear a plea, or impose sentence, when he acted in effect as list judge. That fact must have been known to all of the parties. Indeed, the transcript showed that Mr Duncan was not represented by counsel at arraignment, but rather only by his solicitor. Finally, his Honour noted, the Chief Judge had not remanded Mr Duncan in custody, but had simply adjourned his case to another date for the hearing of his plea.

38 Having considered the authorities, Judge McInerney concluded, as we have earlier indicated, that Mr Duncan had not been "convicted" on 30 March 2005, the date of his arraignment. That was so despite his having pleaded guilty, his plea having been noted on the presentment, and the allocutus having been put. He added that, based upon his own knowledge of the court's procedures, it was unlikely that the Chief Judge would have known very much about the circumstances surrounding Mr Duncan's case, or indeed any of the other cases in which there were arraignments on the day in question. According to Judge McInerney, it followed that nothing that occurred on that day could be regarded as amounting to an unequivocal acceptance of the plea, still less a judicial determination of guilt.

39 It is perhaps worth noting that his Honour also expressed disquiet at the DPP's conduct in having sought to use the proceedings before the Chief Judge as a bar to Mr Duncan making application for an exclusion order.

Decision dismissing the application for judicial review

40 Smith J, before whom the application for judicial review was heard, observed that it was clear that Judge McInerney had considered all relevant authorities.[22] Indeed, it was also clear that his Honour had applied the correct legal test in determining whether each plea of guilty gave rise, on the day of arraignment, to a conviction.[23]

41 Smith J formulated that test as being whether, viewed objectively, there had been an unequivocal acceptance of each plea such that what took place should be regarded as a conviction.[24] He observed:[25]

> … For present purposes, however, I will assume that, as a matter of law, where a person has pleaded guilty and the person has been remanded for plea and sentence or sentence, that act provides an unequivocal indication that the accused has been found guilty.
>
> This, however, does not assist the DPP. The difficulty facing the DPP is that the defendants were not remanded for sentence at the critical time. Thus the alleged proposition of law applying in the remand situation is not directly applicable, unless, as the DPP has argued, what occurred when the proceedings were adjourned was the

22. *Director of Public Prosecutions v Nguyen; Director of Public Prosecutions v Duncan* (2008) 19 VR 662 at 670, [21].
23. At 670, [21].
24. At 671, [25].
25. At 671, [25]–[26].

> equivalent of a remand for sentence. The alleged error of law can only be made out if it be accepted that the act of adjourning the proceedings and extending bail was the equivalent of remanding each defendant for sentence. In my view, however, the actions are different legally and the two situations cannot be equated.

42 It should be noted that in approaching the matter in that way, his Honour was responding directly to a submission by the DPP that there was no distinction to be drawn between an order remanding an accused for sentence and an order adjourning the proceedings and extending bail. That was an alternative to the DPP's primary submission that, once there had been a plea of guilty and the allocutus put, it followed, as a matter of law, that there had been a conviction.

43 Smith J noted and dealt with several other submissions advanced by the DPP. These were, first, that Judge McInerney had erred in distinguishing between the role of a listing judge and that of a trial judge. This distinction was said by the DPP to be irrelevant. The second was that Judge McInerney had erred in distinguishing *McCoid* by following what was said to be a "stricter approach" to the meaning of the term "conviction" that had been favoured by the High Court in *Maxwell v R* ("*Maxwell*").[26] The latter was a case of autrefois convict which, the DPP submitted, necessarily involved different considerations.

44 After carefully examining the authorities, Smith J rejected each of the DPP's submissions. In his Honour's view, Judge McInerney was "plainly correct" in concluding that the act of adjourning the proceedings, and extending bail, could not be equated, in legal terms, with remanding a defendant for sentence. As his Honour put it:[27]

> I do not accept the argument that to remand someone for sentence is to do no more than adjourn for sentence. As the definitions in the dictionaries demonstrate, the term is used to cover the situation where a person will, unless admitted to bail, be taken into custody on the basis that the person is convicted. As Aickin J said this can only be done where a person has been convicted.

Smith J accepted that "in the ordinary course", the administration of the allocutus would indicate that the court had found the defendant guilty.[28] However, he added that "whether it does in a particular case will depend on all the circumstances".[29]

45 Smith J next said that the DPP could not escape the problem that what he sought to challenge was a finding of fact by a judge. The only question of law that arose in that situation was "whether the conduct relied upon by the DPP was an unequivocal indication that the judge had found the accused guilty".[30] The facts found by Judge McInerney were of central importance to the determination of that issue. They led to the conclusion that it was highly improbable that the listing judge could, in any particular case in the list, apply his or her mind to the material or, in any realistic sense, exercise any power to accept the plea or reject it. All that

---

26. (1996) 184 CLR 501.
27. *Director of Public Prosecutions v Nguyen; Director of Public Prosecutions v Duncan* (2008) 19 VR 662 at 671, [27].
28. At 672, [28], citing *R v Collins* [1996] 1 Qd R 631 at 635.
29. At 672, [28].
30. At 672, [29].

the judge could do would be to note it. It was therefore unlikely that, in receiving the plea, the judge was accepting it and making a finding of guilt.[31]

46 As regards the putting of the allocutus, his Honour repeated that in some circumstances this could constitute evidence that the plea had been unequivocally accepted, and that guilt had been determined. However, Judge McInerney had explained why, in the particular circumstances that prevailed in each of these two cases, that conclusion should not be drawn.[32] Smith J said that, for one thing, the allocutus had long since ceased to serve its original function. And in being administered in these particular cases, it had served no rational function whatsoever. It could only have been put as a prelude to exploring matters of case management.[33]

47 Finally, his Honour noted, even if — contrary to his primary conclusion — the adjournment of a proceeding could be regarded as equivalent to an order remanding an accused for sentence, that course had not been taken in either of these cases after a consideration of the plea. Nor had there even been any consideration of the material in support of the charges laid. In those circumstances, it had been open to Judge McInerney to find that, viewed objectively, neither Judge Nicholson nor the Chief Judge had in any meaningful sense determined guilt on the part of either accused. At its highest, the matter was equivocal — but the test required more.[34]

48 Smith J said that it was "important for all concerned" that there be certainty in this area of the law. "That is presumably why the law requires an unequivocal indication of a finding of guilt."[35] In his Honour's view, there was certainty as to the test to be applied. Any lack of certainty arose only because "the issue is one of fact and concerns the time at which it becomes clear that the court has found the accused guilty".[36] That moment would always become clear at some point, his Honour said, even if only when the defendant was sentenced.

49 In his Honour's view, the DPP's argument gave "preference to form over substance and [would] introduce uncertainty and arbitrary outcomes".[37] What the DPP was seeking was not certainty as such, but certainty at the earliest time possible. The only disadvantage to the DPP from the alleged "uncertainty" was that he would have to argue the application for exclusion on its merits. That was a matter that ought not to be of great concern.[38]

50 Finally, in relation to the DPP's submission that Judge McInerney had misunderstood or misapplied *Maxwell*, Smith J observed:[39]

> As I read his Honour's reasons in both matters, his Honour referred to this decision as a matter of support and comfort … A reading of the test he applied and his decision as to when the unequivocal indication emerged, indicates that he did not take the stricter approach indicated in some of the passages in *Maxwell* which suggest that disposal of the matter may be required before there can be said to be a conviction. Rather, his Honour applied the other authorities to which I have already referred and in both

31. At 672–3, [30].
32. At 672–3, [30].
33. At 672–3, [30].
34. At 672–3, [30]–[31].
35. *Nguyen v DPP* (unreported, County Court of Victoria, Judge McInerney, 1 April 2008) at [33].
36. At [33].
37. At [34].
38. At [34].
39. At [37]–[38].

matters, came to the conclusion that the unequivocal indication was provided when each defendant was remanded for sentence after hearing the evidence on the plea and prior to sentence, but not before.

Appeal to this court

51 The submissions on the appeal followed closely those advanced both before Judge McInerney, and before Smith J. There is no need to rehearse them.

52 The starting point, as with any question of statutory construction, must be with the structure and text of the Act. We are concerned not with the meaning of the word "conviction" at large, but rather with the specific use of that term in s 35(1).

53 As we have previously noted, the word "conviction" is protean in nature and can have different meanings in different contexts. So much has been stated repeatedly.[40] Certainly, the definition of that term in s 4 of the Act is of no assistance. Remarkably, s 4(1)(a) provides that a person is deemed to have been convicted of an offence if "the person has been convicted of the offence". The extended definition of the term in s 4(1)(b), (c) and (d) adds nothing of any consequence so far as this appeal is concerned.

54 Little is to be gained from dictionary definitions. They simply affirm that the meaning of the word "conviction" has a legal connotation that is dependent upon the context in which that term is used.

55 Given the way in which this appeal was conducted, it is unnecessary to attempt an exhaustive definition of the term, or even one generally applicable, for the purposes of the Act. It is accepted that the test for determining whether, in any relevant sense, there has been a conviction, is whether, viewed objectively and on the facts as established, there was at the relevant time an "unequivocal acceptance" by the court of the guilty plea or, to put the matter another way, a judicial determination of guilt.

56 Of course, the clearest possible indication of such a determination would be an express statement by the court to that effect. In other parts of Australia, it is the practice of courts to order, after a plea of guilty entered or a verdict of guilty delivered, that a conviction be formally recorded. That practice, as we understand the position, is not generally followed in this State.

57 Of course, it is not necessary for a judge to state formally that a plea of guilty has been accepted or that a conviction has been recorded, in order to make it unequivocally clear that the court has made a finding of guilt. Many cases support that proposition, as will be shortly seen.

The law regarding acceptance of guilt

58 As we have previously indicated, a plea of guilty, standing alone, does not amount to a conviction.[41] It is nothing more than an admission on the part of the accused that all of the ingredients of the offence charged have been proved.[42] A conviction, on the other hand, is a determination of guilt by a court. There can be no conviction on a count to which an accused pleads guilty unless, by some act on its part, the court has indicated a determination of the question of guilt.

40. *R v Celep* [1998] 4 VR 811 at 814 per Winneke P.
41. *R v Tonks* [1963] VR 121 at 127–8. Cited with approval in *R v Jerome* [1964] Qd R 595 at 604 per Gibbs J and in *Maxwell v R* (1996) 184 CLR 501 at 508 per Dawson and McHugh JJ.
42. *R v Celep* [1998] 4 VR 811 at 813 per Winneke P.

59 The law is that in order to amount to a conviction, a plea of guilty must be acted upon in such a way that the court finally, and unequivocally, determines the guilt of the accused.[43] That view was implicitly (and explicitly in the case of Aickin J) accepted by the High Court in *Griffiths v R*.[44]

60 However, that test is not applied universally and for all purposes. For example, in *Maxwell,* it was held, in the context of autrefois convict, that although the determination of guilt forms part of the judgment of the court, it can occur otherwise than by the formal entry of the plea upon the record of the court.[45] That formal entry may afford evidence of a determination of the court, but a determination may otherwise occur when the court acts so as to indicate unequivocally its acceptance of the plea.[46]

61 Of course, a court may deal with an offender who has been found guilty — whether as a result of a plea or by verdict — without proceeding to conviction.[47] Release on adjournment without conviction, and dismissal of a charge on being satisfied that a person is guilty of an offence, are but two examples.[48] The same is true where a jury has brought in a verdict of guilty, but the judge has exercised his or her discretion not to record a conviction.[49]

62 One reason why a plea of guilty does not of itself determine whether there has been a conviction is that a determination of guilt on the part of the court must be unequivocal. A court will reject such a plea if it is made in circumstances suggesting that it is not a true admission of guilt. In *Maxwell,* Dawson and McHugh JJ, in a joint judgment, said:[50]

> … If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered.

Their Honours said that they had in mind circumstances where ignorance, fear, duress, mistake, or even the desire to gain a technical advantage, suggested that the plea of guilty was not a true admission of guilt.

63 On the other hand, an accused is entitled to plead guilty to any offence with which he or she is charged.[51] The one qualification to that proposition is, as stated by Dawson and McHugh JJ, as follows:[52]

> … Of course, if the trial judge forms the view that the evidence does not support the charge or that for any other reason the charge is not supportable, he should advise the accused to withdraw his plea and plead not guilty. But he cannot compel an accused to do so and if the accused refuses, the plea must be considered final, subject only to the

43. *R v Hodgkinson* [1954] VLR 140 at 146 and *R v De Marchi* [1983] 1 VR 619 at 621.
44. (1977) 137 CLR 293 at 335 per Aickin J.
45. (1996) 184 CLR 501 at 508–9.
46. At 508–9.
47. Section 8 of the Sentencing Act 1991 expressly provides for a finding of guilt to be made without the recording of a conviction. In such circumstances, the finding of guilt has the same effect as if a conviction had been recorded at least for the purpose of appeals against sentence, proceedings against the offender for a subsequent offence, or subsequent proceedings against the offender for the same offence.
48. See Sentencing Act 1991, ss 75 and 76. See also Crimes Act 1914 (Cth), s 19B. See generally *R v Ingrassia* (1997) 41 NSWLR 447 at 449 per Gleeson CJ.
49. *R v Abedsamad* [1987] VR 881 and *R v Celep* [1998] 4 VR 811.
50. *Maxwell v R* (1996) 184 CLR 501 at 511.
51. At 510.
52. At 510–11.

discretion of the judge to grant leave to change the plea to one of not guilty at any time before the matter is disposed of by sentence or otherwise.

64 The cases provide many instances of pleas of guilty which, it has later been held, should not have been accepted.[53] To take but one example, there may have been a complete defence in law to the charge as laid, with the plea being proffered in ignorance of that fact. A plea of guilty entered in such circumstances would have to be rejected.

65 Enough has been said to indicate that the decision to accept a plea of guilty is no mere formality. At any time up until the point of sentence, a judge has a discretion to allow such a plea to be withdrawn.[54] It is a broad discretion, though one which must be exercised judicially. The overriding concern must be to avoid a miscarriage of justice.

66 That takes us back to the central issue in this appeal. Applying the relevant test, was there on the part of the court an unequivocal determination of guilt when Messrs Nguyen and Duncan each pleaded guilty?

The applicable authorities on "conviction"

67 The starting point in resolving that question must be the decision of the Full Court in *McCoid*.[55] That was an appeal by the DPP against the refusal of a judge of the County Court to make a confiscation order under the Crimes (Confiscation of Profits) Act 1986 ("Confiscation of Profits Act"), the legislative precursor to the present Act.

68 In *McCoid*, the respondents, together with several others, had been charged with having trafficked in heroin. They were arraigned on 17 February 1987 and, upon arraignment, pleaded guilty. They were then remanded for plea and sentence.

69 Some 10 days later, on 27 February 1987, the DPP filed an application in the County Court for a pecuniary penalty pursuant to the provisions (as they then were) of the Drugs, Poisons and Controlled Substances Act 1981. On 6 March 1987, the judge before whom the respondents had been arraigned, began hearing pleas for leniency. At the conclusion of those pleas, he remanded one of the respondents in custody and the other on bail. On 18 March 1987, he sentenced them to terms of imprisonment.

70 After his Honour had pronounced sentence, applications for pecuniary penalties and forfeiture pursuant to ss 85 and 86 of the Drugs, Poisons and Controlled Substances Act were made. Those applications were adjourned.

71 In the meantime, on 1 August 1987, the Confiscation of Profits Act came into operation. By notice dated 31 August 1987, the DPP purported to give notice that, on 4 November 1987, he would apply for confiscation orders pursuant to that Act.

72 As the law then stood, the process under the Confiscation of Profits Act was founded upon a person having been convicted of a serious offence. An application under s 5 of that Act had to be made within six months after

53. *Joshua v Thomson* (1994) 119 FLR 296; *R v Bennett* (1988) 79 ACTR 1; *Salmon v Chute* (1994) 4 NTLR 149 and *Lim v Bateman* (2001) 125 A Crim R 101; 165 FLR 268.
54. *R v Broadbent* [1964] VR 733 at 735; *R v Middap* (1989) 43 A Crim R 362; *Meissner v R* (1995) 184 CLR 132 at 157; *R v Moxham* (2000) 112 A Crim R 142 at 143 and *R v Douglass* (2004) 9 VR 355.
55. [1988] VR 982.

conviction, as defined in the Act. The judge held that the respondents had been convicted on 18 March 1987, the date upon which they were sentenced. The DPP's application, having been made on 23 September 1987 when it was first mentioned before the judge, fell outside that period. Accordingly, the six month period had expired on 18 September 1987.

73 The DPP appealed, contending that the notice of application given on 31 August 1987 was the relevant "application" for the purposes of s 5 of the Act. The Full Court rejected that submission and dismissed the appeal. Young CJ, who delivered the main judgment, provided a different justification for rejecting the DPP's contention.[56] His Honour, after referring to the definition of "conviction" in s 3 (which was in essentially the same terms as that contained in s 4 of the present Act), stated that the ordinary meaning of the word "convicted" could be obtained from a consideration of the judgments of the High Court in *Griffiths v R* ("*Griffiths*").[57]

74 He went on to read a passage from the judgment of Aickin J in that case, which established that it was not correct to say that there could be no conviction until judgment was entered. Aickin J, having noted that the judge in *Griffiths* had remanded the accused for sentence, stated that this was "an unequivocal indication that he had found the accused guilty, ie convicted him of the offences". That was because "the step of remanding for sentence could not be taken by any court without there having been a conviction".[58]

75 Chief Justice Young went on to say of the test laid down by Aickin J:[59]

> What needs to be emphasised in that passage is that the remanding of an accused person for sentence, whether in custody or on bail, is an unequivocal indication that the accused has been found guilty. Reference may also be made to the judgment of Jacobs J, particularly (137 CLR), at p 316; (15 ALR), at p 22.
>
> Put in another way, the point is that there must be some act or determination by the Court before it can be said that a person has been convicted: see *R v Tonks and Goss* [1963] VR 121, at pp 127–8.

76 His Honour then returned to the facts of the particular case in *McCoid.* He said:[60]

> The learned Judge appears to have been influenced by the provisions of the Penalties and Sentences Act which enable a sentencing Judge to adjourn a matter in an appropriate case without recording a conviction. No doubt his Honour is correct in that. But that does not mean that there is no conviction when a plea of guilty is accepted by some act or determination of the Court: rather it means that having accepted it, say by remanding the accused for plea and sentence, a judge can later indicate that in the particular circumstances he does not, on reflection, accept the plea as justifying a conviction, or if the plea for leniency is heard on the same day as the arraignment, simply adjourn without conviction in accordance with the provisions of the Act. In other words, the situation is closely analogous to the situation envisaged by Aickin J in the passage I have read from his Honour's judgment in *Griffiths' Case* where an accused is allowed to change his plea.
>
> What I have already said indicates that the ordinary meaning of the word "conviction" requires the conclusion that in the present case the respondents were

56. At 987.
57. (1977) 137 CLR 293.
58. *McCoid* [1988] VR 982 at 987, citing *Griffiths* (1977) 137 CLR 293 at 336.
59. At 987.
60. At 988.

> convicted on 17 and 18 February 1987, respectively. But it is necessary to consider whether the word is to be given any different meaning when it is used in the Crimes (Confiscation of Profits) Act and in those parts of that Act which I have read and which are concerned with the time for making an application under it.
>
> So far from finding any indication that the word is used in those provisions in a different sense, I think that s 5(3) indicates that Parliament intended to use it in its ordinary sense.

77 The facts in *McCoid,* as summarised by the Chief Justice, do not indicate whether the allocutus was put when the accused were arraigned. None the less, it would be reasonable to assume that, in accordance with ordinary practice, this was done. In any event, without any reference to that question, his Honour was satisfied that by "remanding the accused for plea and sentence", the court would ordinarily be regarded as having accepted the plea "by some act or determination".[61] O'Bryan and Tadgell JJ both agreed.

78 *McCoid* seems to us to establish, first, that the term "conviction" in the Act is to be given its "ordinary meaning"; and, secondly, that the test to be applied in determining whether there has been a conviction is that formulated by Aickin J in *Griffiths*. It should be noted, however, that whereas Aickin J spoke of "remanding an accused for sentence" as the touchstone of unequivocal acceptance of a plea, Young CJ chose different language, referring instead to "remanding an accused for plea and sentence".[62]

79 It was said on behalf of the respondents that Young CJ's reference to remand "for plea and sentence" was an unintended — or, if intended, impermissible — extension of the dictum of Aickin J in *Griffiths*. We disagree. We have little doubt that Young CJ meant exactly what he said. His Honour was always most careful in his choice of words. Nor was the reference to "plea and sentence" impermissible. It was consistent with Aickin J's analysis for the court in *McCoid* to view "remand for plea and sentence" as an "act or determination" by the court signifying its acceptance of the plea of guilty. It follows that we also reject the alternative submission on behalf of the respondent that *McCoid* was wrongly decided and should not be followed.

80 We are fortified in this conclusion that by the fact that *McCoid* was followed by the New South Wales Court of Appeal in *Della Patrona v Director of Public Prosecutions (Cth) (No 2)* ("*Della Patrona*").[63] In that case, the appellant contested an order of a judge in the criminal division of the Supreme Court, dismissing a motion for declaratory relief and other orders in respect of certain property affected by the Proceeds of Crime Act 1987 (Cth). One of the issues on the appeal concerned the meaning of the word "conviction" in s 30 of that Act, and the judge's determination that the appellant had been "convicted" on the day on which a jury returned a verdict of guilty against her.

81 Kirby P (with whom Priestley and Meagher JJA both relevantly agreed) observed that when the jury returned with its verdict of guilty, the transcript disclosed no formal pronouncement by the trial judge of the conviction. The

61. At 987.
62. At 988.
63. (1995) 38 NSWLR 257.

judge simply remanded her in custody until the following week. No formal words of conviction were uttered on that day or indeed on any later date.[64]

82 The issue to be resolved was whether the day of conviction was the day of the jury's verdict, as the DPP asserted, or whether it was the day on which the appellant was finally sentenced, which was the appellant's case. If the DPP's submission were accepted, her application under the Act was out of time. If the appellant's submission were accepted, she was within time.

83 Kirby P emphasised that in construing the word "conviction", context was all-important. That term had to be construed purposively, bearing in mind the need for the "efficient operation" of the Act. Legal history, fascinating as it might be, could not govern what was, in the end, a matter of construction, bearing in mind the structure, text, and language of the statute.[65]

84 Kirby P considered the authorities in some detail, and the submission advanced on behalf of the appellant that a "Draconian" statute, such as the Proceeds of Crime Act, should be construed narrowly, and in a way favourable to the rights of the citizen. His Honour concluded, however, that the DPP's submission should be preferred. He said:[66]

> The starting point for an understanding of Australian jurisprudence on the meaning of "convicted", in its ordinary denotation, is the reasoning of the judges in *Griffiths.* Different and even conflicting views were expressed. In relation to non-jury trials and the meaning of "convicted" following a plea of guilty other views have been stated. But in the case of a person who is tried by jury, the reasons of Barwick CJ in *Griffith*s clearly support the proposition that the prisoner is convicted at the moment when, by express words or by necessary implication, the trial judge accepts the jury's verdict of guilty.
>
> Jacobs J, in *Griffiths* (at 313f), accepted the conceptual distinction between the act of the jury in finding the guilt of the accused and the act of the judge in convicting and sentencing the prisoner, once found guilty. But his Honour appears to have considered that a "conviction" did not occur until it was formally recorded. The necessity for this procedural refinement, which is unevenly observed in practice, is impliedly rejected by the reasoning of Barwick CJ. It did not find favour in the decision of the Court of Criminal Appeal of this State in *R v Reinsch*. It was expressly rejected by this Court in *Frodsham v O'Gorman* [1979] 1 NSWLR 683 at 688 and 690. It was also rejected by the Victorian Full Court in *Director of Public Prosecutions (Vic) v McCoid* [1988] VR 982.
>
> The last-mentioned decision is important because, in it, a question arose whether the DPP for Victoria had applied for forfeiture and a pecuniary penalty under the Victorian confiscation legislation within the time laid down by the Act for the making of such an application. It was therefore critical to the Court's decision that it should determine the time from which the person's "conviction" began to run. Young CJ (with whom O'Bryan J and Tadgell J agreed) found (at 987): "The ordinary meaning of the word "convicted" may be obtained from a consideration of the judgments of the High Court in the case of *Griffiths v R* (1977) 137 CLR 293".
>
> Young CJ rejected the notion that it was to be decided at a later time when the prisoner, having pleaded guilty or been found guilty, was sentenced. He said (at 988):

64. At 262.
65. At 263.
66. At 265–6.

> "But it is necessary to consider whether the word is to be given any different meaning when it is used in the Crimes (Confiscation of Profits) Act and in those parts of the Act which I have read and which are concerned with the time for making an application under it …
>
> So far from finding any indication that the word is used in those provisions in a different sense, I think that s 5(3) indicates that Parliament intended to use it in its ordinary sense."

The provision in the Act parallels that in the Victorian legislation. The two Acts were based upon the draft model Bill agreed to by the Standing Committee of Attorneys-General of the Commonwealth and States: see Commonwealth Parliamentary Debates (House of Representatives), 30 April 1987 at 2314f. There are similar provisions in the legislation of New South Wales, Tasmania, Western Australia, the Australian Capital Territory and the Northern Territory. By the Commonwealth Statutory Rules 1989, No 236, reg 3; 1993 No 199, reg 2 and 1994 No 17 reg 2, the State and Territorial laws have been declared to be "corresponding laws" for the purpose of the (Federal) Act.

In these circumstances, there are powerful arguments for uniform decisions of courts such as this upon the interpretation of the comparable provisions of the Federal and State Territory Acts. In *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ (at 492) in the context of the corporations law, noted the powerful argument in favour of uniform construction of uniform legislation:

> "It is a sufficiently important consideration to require that an intermediate appellate court … should not depart from the interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that the interpretation is plainly wrong."

It is true that the present legislation is not strictly uniform in the sense that the Corporations Law is. But it is based upon a common source, and with sufficient identity in its provision, to invoke the same principle. This Court has accepted that principle in many cases, including recently: see, eg, *Camden Park Estate Pty Ltd v O'Toole* (1969) 72 SR (NSW) 188; 90 WN (Pt 2) (NSW) 98, see discussion in *Fernando v Commissioner of Police* (1995) 36 NSWLR 567. It should do so in the present case. Far from considering that the holding of the Victorian Full Court in *McCoid* is plainly wrong, I believe that it is plainly right. It applied the majority view of the High Court in *Griffiths*. It accords with the approach taken by this Court in *Frodsham*. The use of a particular formula of conviction is unnecessary: see *Frodsham* (at 691). All that is necessary is that the judge should accept and proceed upon the jury's verdict. This, Slattery A-J sufficiently did when he remanded the appellant in custody for sentence.

To adapt the words of Hope JA in *Frodsham* (at 688):

> "… in the circumstances of the present case, whatever formal record there may have been, that conviction of the defendant occurred [when] … the learned judge accepted the [jury] verdict and entered upon that stage of the proceedings which follows conviction, namely, a consideration of what should be done in relation to sentence."

By inviting the commencement of discussion about sentence, signified by the Crown Prosecutor's announcement about the prior criminal record of the appellant and her co-accused, and by remanding each of the prisoners in custody until the following Wednesday, Slattery A-J clearly indicated that he accepted and proposed to act upon the jury's verdict. No possible application of s 556A being arguable (or argued) in the case, the conviction must be taken to have occurred at the moment of the remand in custody. His order of remand sufficiently indicated acceptance of the jury verdict. Time then began to run under the Act for the application for relief under s 48.

James J was right so to hold. The grounds of appeal which challenge that holding fail.

85 What is of particular significance, for the purposes of this appeal, is Kirby P's observation that *McCoid* was "plainly right". It would take a powerful argument, in the face of that conclusion by the New South Wales Court of Appeal, to persuade this court that both *McCoid* and *Della Patrona* were "plainly wrong".

86 Both *McCoid* and *Della Patrona* were again the subject of consideration by the New South Wales Court of Appeal in *Director of Public Prosecutions v Helou* ("*Helou*").[67] The Proceeds of Crime Act 1987 (NSW) provided for automatic forfeiture of restrained property in relation to a person convicted of a serious offence, provided that a restraining order remained in force at the end of the period of six months "starting on the day of the conviction". The critical issue in *Helou* was — once again — the meaning of the term "conviction".

87 Davies AJA (with whom Meagher and Ipp JJA agreed) rejected a submission that the law, as enunciated in *McCoid* and in *Della Patrona*, had to be reconsidered in light of *Maxwell*. His Honour recognised that the joint judgment of Dawson and McHugh JJ in *Maxwell* had apparently narrowed the concept of "conviction", their Honours having concluded that, in modern times, a plea of guilty was not, in the ordinary course of events, accepted until sentence was passed on the accused.[68]

88 Davies AJA went on to point out that in *Maxwell* the court was concerned with the principle of autrefois convict. As Dawson and McHugh JJ recognised, in the application of that principle, finality of adjudication was essential. His Honour concluded that the observations of Dawson and McHugh JJ were largely to be confined to autrefois convict. He cited a passage from the joint judgment in which it was made abundantly clear that their Honours did not intend to proffer a single, comprehensive definition of that term. Everything turned upon context, and it was in the specific context of autrefois convict that the narrower definition was favoured.[69]

89 Davies AJA went on to say:[70]

> In my opinion, the law as enunciated in *Maxwell* provides no ground for failing to apply the law as enunciated in *Director of Public Prosecutions v McCoid* and *Della Patrona*, decisions which are now of many years standing and which dealt with the meaning of the term "conviction" for the purposes of the relevant statutes. Indeed, the more recent Proceeds of Crimes Act 2002 has, in s 331(1), adopted the identical definition of "conviction". If Parliament was dissatisfied with the interpretation adopted in *Director of Public Prosecutions v McCoid* and *Della Patrona*, it had the opportunity to make its intention plain. In *Director of Public Prosecutions v McCoid* and in *Della Patrona*, it was held that the concept of conviction in its broader sense should be adopted. I see no reason to dissent from that view.
>
> Accordingly, the course taken by Kinchington DCJ on 26 November 2001 of remanding Mr Helou in custody for sentence, was a conviction for the purposes of the Act. It matters not that there was not complete finality about the matter or that Mr Helou had an opportunity to seek to change his plea up until the time when he was formally convicted and sentenced.

67. (2003) 58 NSWLR 574.
68. At 579, [17], citing *Maxwell* (1996) 184 CLR 501 at 509.
69. At 579, [17].
70. At 579–80, [18]–[19].

90 The fact that the term "conviction" must be construed in context is exemplified by a decision of the Full Federal Court in *Hellenic Republic v Tzatzimakis*.[71] There it was held that, for the purposes of extradition, a person may have been "convicted" albeit that he had absconded during his trial and had never been sentenced. Similarly, the extended definition of "conviction" for the purposes of confiscation legislation means that a person who has absconded during a trial is deemed to have been convicted of a serious offence. This suggests that the narrow view of that term, as favoured by Dawson and McHugh JJ in *Maxwell,* is not of universal application.[72]

Conclusion

91 There is thus a wealth of authority to support the DPP's contention that a broader, rather than narrower, interpretation of the term "conviction" is warranted for the purposes of the time limits under the Act. *McCoid*, in particular, is of critical importance. As previously noted, the Full Court in that case held that a person who pleads guilty at arraignment, and whose plea is adjourned to another day, is to be regarded as having been "convicted" when arraigned. Of particular significance is the fact that one of the two respondents to the appeal in that case was actually remanded on bail after arraignment.[73]

92 *McCoid* is therefore virtually on all fours with the present case. *Helou* establishes that the High Court's decision in *Maxwell* did not have the effect of overruling *McCoid*, which therefore remains good law.

93 In the case of each of the present respondents, following arraignment and the plea of guilty, the judge adjourned the matter for the hearing of the plea and extended bail. With respect to both Smith J and Judge McInerney, we do not think that there can be any meaningful distinction for this purpose between the *adjournment* of a case for plea and sentence, and the *remand* of an accused on bail pending plea and sentence. It follows that, on the authority of *McCoid*, each respondent was convicted then and there.

The significance of administering the allocutus

94 There is another strand to the DPP's argument, which we would also uphold. It arises out of a separate line of authority, emanating principally from Queensland, which holds that the administration of the allocutus is itself sufficient to demonstrate that a plea of guilty has been accepted, and that there has therefore been a judicial determination of guilt.

95 "Allocutus" is a Latin word meaning "spoken to". In law, the phrase "putting the allocutus" is used to describe that step in a criminal proceeding which occurs when, following a plea of guilty or a finding of guilt by the jury, the court asks the accused person whether there is any reason why the court should not proceed to pass judgment according to law.

---

71. (2003) 127 FCR 130.
72. *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at 187, [13]. It can be argued that Parliament has recognised that *Maxwell* did not overrule *McCoid* because, despite several amendments having been made to the section, s 5(2A) of the Sentencing Act 1991 seems to contemplate that a "conviction" precedes the sentencing of an offender.
73. *McCoid* [1988] VR 982 at 983.

96 The origins of this procedure were considered in detail by the English Court of Criminal Appeal in *R v Rear* ("*Rear*").[74] In that case, on a charge of felony, namely office breaking and larceny, the defendant elected to be tried summarily in the Magistrates' Court. He pleaded guilty, and was committed to quarter sessions for sentence. There he was represented by counsel, who made a plea in mitigation. Then, without having had the allocutus put to him, he was sentenced to a term of imprisonment. He applied for leave to appeal against sentence, his sole ground being that the failure to administer the allocutus had vitiated the sentence.

97 The court held that there was no need for the allocutus to be administered, and that the failure to administer it gave the defendant no right to complain of his sentence. The court explained the original purpose of the allocutus in these terms:[75]

> In days long ago when the punishment for felony was death, when a prisoner was not allowed the benefit of counsel and was not even allowed to give evidence on his own behalf, the common law insisted that, upon a conviction for felony, he should be given an opportunity, before the grim sentence was passed, of "pleading his clergy" as it was called, that is to say, claiming the benefit of clergy, or moving on other grounds in arrest of judgment. Should the allocutus not be put, or should the court fail to give effect to any proper grounds put forward by the prisoner in arrest of judgment, his remedy lay by way of a writ of error heard in the Queen's Bench Division. Writ of error has been abolished and in its stead a prisoner may complain to this court of his sentence by way of an application for leave to appeal. On that application the court can consider all the matters whether of law or of fact which are relevant, and, if leave to appeal is granted, can either confirm the sentence or impose such other sentence, if any, as the justice of the case requires.

98 The court expressed the view that the practice of putting the allocutus did not seem "to serve any useful purpose today" and that it might be to the public advantage if steps were taken to abolish it.[76] Almost half a century later, we would respectfully endorse that view. The original rationale for the putting of the allocutus has long since disappeared, along with "benefit of clergy". Motions in arrest of judgment are these days almost unheard of, having long since been replaced by special pleas and motions to quash, or stay, presentments. We return to this subject below.[77]

99 For the present, however, the allocutus survives in Victoria. It is firmly embedded in the criminal procedure of this State. The allocutus is routinely — though not invariably — administered as a prelude to the making of a plea. It has acquired a particular, almost ritualistic, significance, far removed from its original rationale.

100 The DPP relied upon a series of Queensland cases which hold that, once the allocutus is administered, there is deemed to be, from that moment, a conviction.[78] These cases require further analysis. In Queensland, the allocutus is administered pursuant to s 648 of the Criminal Code 1899. The question put is

74. [1965] 2 QB 290.
75. At 294.
76. At 295.
77. See [102] and [109].
78. *R v Shillingsworth* [1985] 2 Qd R 537 at 543; *R v Lowrie* [2000] QCA 405; *R v Holland* [2008] QCA 200 and *R v SBJ* [2009] QCA 100.

not quite the same as that put at common law. It asks whether the person has anything to say why sentence should not be passed upon him or her, but adds that failure to ask the question does not invalidate the judgment. (We note that s 649 makes specific provision for a motion in arrest of judgment at any time before sentence, though only on the basis that the indictment does not disclose an offence. That section, which predates the right of appeal against conviction, must now be taken to be largely obsolete.)

101 The Queensland procedure provides a direct and immediate link between the plea of guilty, or verdict, and the sentence to be imposed. The matter is made even clearer by reg 51 of the Criminal Practice Rules 1999 (Qld), which sets out the precise words to be spoken by the judge's associate, in compliance with s 648. The question to be put is: "Have you anything to say as to why sentence should not *now* be passed upon you."[79]

102 The DPP relied upon the inclusion of the following statement in the *Victorian Sentencing Manual* ("manual"), prepared by the Judicial College of Victoria:

> The sentencing hearing proper commences with a finding of guilt by a jury, or a plea of guilty by the offender, and the acceptance of that finding or plea by the sentencer. That acceptance is most commonly indicated by the recitation of the formula known as the allocutus.

That passage accords with the judgment of the Queensland Court of Criminal Appeal in *R v Shillingsworth* ("*Shillingsworth*"),[80] which the manual cites as authority for, at least, the last sentence set out above. *Shillingsworth* has been followed repeatedly in Queensland[81] and is itself a restatement of earlier authority.[82] It is well understood in that State that a conviction occurs only upon some intimation by the court that it accepts the plea as its determination of guilt and, in effect, "adopts it as its verdict".[83] In the normal course, that intimation is regarded as being evidenced by the administration of the allocutus.[84]

103 The position in Western Australia is essentially the same. In *Tihanyi v R*,[85] Murray J said:[86]

> It seems to me therefore, that to put the allocutus and to receive the formal answer that there is no reason why the law should not take its course is the formal process by which the plea of guilty, or the verdict of guilty returned by the jury, is generally converted into a judgment of conviction.

Malcolm CJ said:[87]

> I agree with Murray J that to put the allocutus and to receive the formal answer that there is no reason why the law should not take its course is the process by which the acceptance by the judge of a plea of guilty, or a verdict of guilty returned by the jury, is converted into judgment of conviction. While it is true that the Code requires no formality in pronouncing the judgment of conviction, it is also true that many judges,

79. Emphasis added.
80. [1985] 1 Qd R 537.
81. *R v Collins* [1996] 1 Qd R 631 at 638–9; *R v Lowrie* [1999] 2 Qd R 529 at 539; *R v Holland* [2008] QCA 200; and *R v SBJ* [2009] QCA 100.
82. *R v Phillips* [1967] Qd R 237 at 288 per Hart J.
83. *R v Collins* [1996] 1 Qd R 631 at 638.
84. Ibid.
85. (1999) 21 WAR 377.
86. At 385, [26].
87. At 380, [8].

> including myself, do make such a formal pronouncement. That involves a statement directing that a judgment of conviction be entered. In my opinion it is desirable that there be a formal pronouncement of judgment of conviction in each case …

104 The respondents contended that, whatever the usual consequence of the administration of the allocutus might be, they did not attach here because of the particular character of the respective hearings in which the allocutus was put to these respondents.

105 Arraignments before a listing judge are carried out, as Judge McInerney indicated, essentially for case management purposes. The allocutus is usually, though not invariably, put. It may readily be accepted that where 20 or more arraignments take place in the space of an hour or so, it is unlikely that, as a matter of practical reality, the judge will have any close familiarity with the background to any of these cases. Before us, the entire process was described by counsel for the respondents as little more than a "clearing house". It is at all times clear that the matter will be adjourned to another day and to another judge for the hearing of the plea.

106 In those circumstances, so the submission went, the putting of the allocutus should not be regarded as an indication that the plea has been accepted. It was submitted that the allocutus was nothing more than a relic of the past, administered today solely for historical reasons, and signifying nothing of any consequence. It was little more than the recitation of a mantra. The position might be different if the case were listed before the judge who was to hear the plea in mitigation. The administration of the allocutus might then properly be regarded as indicating that the plea had been accepted by the court. But this would be so because, viewed objectively, a judge who knew something about the case, and the background to the plea, had allowed the allocutus to be put. It was submitted that this was a far cry from what had occurred in this case.

107 As we have indicated, historically the allocutus provided an opportunity for a prisoner to challenge his or her conviction and move in arrest of judgment.[88] In *Director of Public Prosecutions v Ferguson*,[89] Smith J, in a careful and scholarly judgment, set out something of its history. After analysing both *Rear* and *Shillingsworth*, his Honour referred to a passage in the *Victorian Trial Manual*, which suggested that the asking of the question in the allocutus indicated the court's acceptance of the verdict or the plea of guilty. He noted that it was further suggested in the manual that "unless some relevant matter is raised in response to the allocutus, the trial process is at an end, and the sentencing process commences".[90]

108 His Honour considered whether the proposition that the putting of the allocutus constituted an acceptance of the plea could be reconciled with the proposition that the accused retained the right, subsequently, to seek leave to withdraw his plea. The answer, so his Honour thought, lay in the following observation of Toohey J in *Maxwell*:[91]

---

88. *R v Tayler* (1928) 21 Cr App R 20; *R v Hodgkinson* [1954] VLR 140; *R v Gombos* [1965] 1 WLR 575 and *Director of Public Prosecutions (Vic) v Ferguson* (2004) 148 A Crim R 244 at 255–6.
89. (2004) 148 A Crim R 244.
90. *Victorian Trial Manual,* 27.301.
91. See *Maxwell* (1996) 184 CLR 501 at 523 (citations omitted).

> The Crown argued that because the court may allow a plea of guilty to be withdrawn at any point until sentence, there can be no conviction until that point. But there is no necessary inconsistency in finding that a conviction occurs before sentence is passed and holding that there is power to allow a change of plea before sentence is passed. In that situation the change of plea sets aside the conviction. The view has been taken that a conviction on a plea of guilty is to be regarded as provisional in the sense that, until sentence, it is subject to be vacated.

109 The respondents also relied heavily upon the findings of fact made by Judge McInerney in support of their contention that neither the allocutus, nor the fact that they were, in effect, remanded on bail, was sufficient to signify unequivocal acceptance of their pleas. It was submitted that Judge McInerney had referred in detail to what had occurred at each arraignment and must be taken to have found, implicitly, that neither Judge Nicholson nor the Chief Judge had turned their minds to the question of such acceptance.

110 Although the putting of the allocutus no longer serves its original purpose, it clearly remains an accepted part of criminal trial procedure in this State. The authorities to which we have referred establish — beyond argument — that it is a step which has objective legal significance. The putting of the allocutus signifies, as a matter of law, the court's unequivocal acceptance of the plea of guilty — and hence signifies conviction.

111 We reject the respondents' contention that the significance of the putting of the allocutus might vary according to the nature of the hearing during which it is put. The correct analysis is the reverse. That is, the putting of the allocutus stamps its own character on the relevant part of the hearing, however short it may be. Even if the allocutus is put during what is otherwise to be regarded as an administrative or listing hearing, the putting of the allocutus will always have the legal significance to which we have referred.

112 Nothing turns on the subjective knowledge of the judge who is conducting the hearing. The legal effect of the putting of the allocutus does not depend on whether the judge has knowledge of the facts of the matter to which the plea of guilty relates, nor on whether the particular judge can be said to have "unequivocally accepted" the plea. If it is right, as was suggested in argument, that frequently neither the judge nor counsel appreciates the legal significance of the putting of the allocutus, this is a further reason why this ancient procedure should be abolished, and some modern process adopted by which the conviction of the accused person can be marked.

Question of fact or question of law?

113 For completeness we should say that we reject the respondents' submission that whether they were "convicted" was a question of fact, and could not give rise to an error of law, and/or jurisdictional error. The question whether, on the facts as found, the relevant respondent had been "convicted" within the meaning of the Act was a question of law.[92]

114 The DPP was right to characterise the alleged error as being jurisdictional in nature. If, as the DPP argues, the property was forfeited under s 35(1) because of the expiry of the 60 day period from conviction, a court has no jurisdiction to entertain an application under s 22 for an order excluding property from the

92. *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 450, [24]. See also *R v ACR Roofing Pty Ltd* (2004) 11 VR 187 at 202, [42].

scope of the restraining order. In this sense, we think it correct to describe the time limit in s 35(1) as going to jurisdiction.[93]

115 The outcome of this appeal may seem harsh, particularly in the case of Mr Duncan who at least endeavoured to make an application for exclusion within time. If so, that is the result of the legislative regime established by the Parliament. Ordinary prudence would have dictated that an application for exclusion, which is easily made, ought to have been made well within the 60 day period following arraignment.

Alternative submission on behalf of Mr Duncan

116 Judge McInerney upheld an alternative submission made on behalf of Mr Duncan that if — contrary to the view which his Honour ultimately came to — he was held to have been convicted on 30 March 2005, there should be an extension of time under s 20(1B) for the filing of an application for an exclusion order under s 22. In that case, his Honour held, time should be extended to 2 June 2005. In a supplementary submission filed after the conclusion of argument in the appeal, counsel for Mr Duncan sought to uphold that conclusion.

117 That argument must be rejected. An exclusion order under s 22 is an order "excluding the applicant's interest in the property from the operation of the restraining order". Once property has been automatically forfeited under s 35(1), there is no longer any restraining order in operation in respect of the property. It follows that no exclusion order could be made under s 22 and, hence, there could be no occasion to exercise the power under s 20(1B) to extend the time for making application for such an order.

118 After forfeiture, the only procedure for seeking an exclusion order is that provided by s 51(1). That procedure is available only to a person other than the defendant. Judge McInerney noted that Mr Duncan's mother had filed such an application. The power to extend time for the making of such an application is conferred by s 51(3).

Orders

119 The DPP has made good his challenge to the refusal of the judge below to grant prerogative relief. The appeal in relation to each respondent must be allowed. There should be orders in the nature of certiorari setting aside the orders made by Judge McInerney on 9 August 2007 and 1 April 2008. There should also be orders dismissing each respondent's application for exclusion as having been brought out of time.

Final observations

120 This case illustrates the need for a clear statutory definition of the point at which time runs for the purpose of s 35(1)(e). One solution might be to enact that time runs not from "conviction", but from a plea of guilty on arraignment (where such a plea is made). There would then be no question as to whether the plea has been "accepted", unequivocally or otherwise. The use of the term "conviction" brings with it too much uncertainty, as we have seen.

121 Although we have held that, in accordance with the authorities, the putting of the allocutus signifies the acceptance of a plea, we reiterate our view that this procedure should be abolished and replaced with something simple and

93. *David Grant & Co Pty Ltd v Westpac Banking Corp* (1995) 184 CLR 265 at 277.

comprehensible to all. That would be consistent with the modern approach to case management procedures in the County Court.

122 Consideration might also be given to the development of a practice whereby judges state formally the acceptance of a plea at the arraignment stage, and go on to say, in most cases, that the accused has thereupon been convicted.[94] That, too, would obviate the need for recourse to be had to the vast body of learning associated with the meaning of the word "conviction".

Appeals allowed; orders of the Trial Division set aside.

Solicitor for the appellant: *Craig Hyland*, Solicitor for Public Prosecutions.

Solicitors for the first respondent Nguyen: *Robert Stary and Associates*.

Solicitors for the first respondent Duncan: *F W Robson and Co*.

C R WILLIAMS
BARRISTER-AT-LAW

94. The exception would be that of the rare case, in relation to a plea in the County Court, where a non-conviction disposition might be a realistic possibility. In such a case, the judge could still state formally that the plea has been accepted.