

**IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY**

NO D5 OF 2013

On appeal from
the Northern Territory Court of Appeal

BETWEEN: **THE ATTORNEY-GENERAL OF THE
NORTHERN TERRITORY**
First Appellant

**THE NORTHERN TERRITORY OF
AUSTRALIA**
Second Appellant

AND

REGINALD WILLIAM EMMERSON
First Respondent
**DIRECTOR OF PUBLIC
PROSECUTIONS**
Second Respondent

**ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE
COMMONWEALTH (INTERVENING)**



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PART I FORM OF SUBMISSIONS

1. This submission is in a form suitable for publication on the Internet.

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).
3. The Commonwealth intervenes in relation to ground 1 of the First Respondent's Amended Notice of Contention, to argue that s 94(1) of the *Criminal Property Forfeiture Act 2002* (NT) (**CPF Act**) together with s 36A of the *Misuse of Drugs Act 1990* (NT) (**MoD Act**) are not laws with respect to an acquisition of property otherwise than on just terms within the meaning of s 50(1) of the *Northern Territory (Self-Government) Act 1978* (Cth) (**Self-Government Act**) (Appeal Book (**AB**) 257).

PART IV LEGISLATIVE PROVISIONS

4. The Commonwealth adopts the Appellants' statement of applicable legislative provisions.

PART V ISSUES PRESENTED BY THE APPEAL

Summary

5. In summary, the Commonwealth submits:
 - 5.1. The use of the civil law as an aid to the larger purposes of the criminal law through the forfeiture of property or the imposition of civil penalties falls outside the constitutional concept of 'acquisition of property on just terms'. Accordingly, a law which effects or authorises a forfeiture of property as a consequence of or in connection with the breach of a rule of conduct is not a law with respect to the 'acquisition of property' within the meaning of either s 51(xxxi) of the Constitution or s 50(1) of the Self-Government Act.
 - 5.2. Forfeitures may conveniently be divided into those which operate against property that was derived from or involved in unlawful activities, and those which operate against a person who has engaged in unlawful activities. In the former case, which might be described as forfeiture '*in rem*', the property can be subject to forfeiture even in the hands of an innocent party. In the latter case, which may be described as '*in personam*' in nature, the forfeiture can extend to property owned by the person whether or not that property is proven to be derived from or involved in the unlawful activities.
 - 5.3. Forfeiture amounts to a deprivation of property in response to a form of wrong recognised by the criminal or civil law. Whether operating '*in rem*'

or '*in personam*', civil forfeiture laws may be directed to a range of overlapping purposes or objects in support of a principal law which prescribes a rule of conduct:

5.3.1. By penalizing unlawful or prohibited conduct, or the use of property in connection with such conduct, the forfeiture renders the conduct unprofitable and advances the object of deterrence (both specific and general).

5.3.2. By confiscating property that is or may be derived from or as a result of unlawful or prohibited conduct, the forfeiture prevents unjust enrichment from such conduct.

5.3.3. By confiscating property used in connection with unlawful or prohibited conduct, the forfeiture serves to prevent the further use of the property and thereby disables future unlawful or prohibited conduct. Further, where the property is owned by a person who was not directly involved in the unlawful or prohibited conduct, the forfeiture enlists the owner's participation in ensuring the observance of the law.

5.3.4. A forfeiture may also have an object, consequence or effect of compensating the government and community for the costs of investigating and prosecuting breaches of the law or other public costs of unlawful or prohibited conduct. Such an object, consequence or effect does not preclude the confiscation of property from being characterised as a forfeiture.

5.4. These objects of forfeiture ultimately involve the vindication or enforcement of a law prescribing a rule of conduct, and are inconsistent or incongruous with the imposition of a requirement of just terms.

5.5. For a law to be characterised as a forfeiture (and therefore not a law with respect to the acquisition of property), it is not necessary to demonstrate proportionality (strict or otherwise) between the nature, extent or effect of the forfeiture on the one hand, and the nature or gravity of the breach of the rule of conduct on the other. Apart from cases in which the forfeiture is no more than a 'device' or disguised attempt to acquire property (and not to regulate conduct or advance one or more of the objects set out in para 5.3 above), the appropriateness, justice or wisdom of the forfeiture are matters for the legislature.

5.6. In order for property that is owned or effectively controlled by a person to be liable to forfeiture under s 94(1) of the CPF Act, it must be subject to a restraining order made under s 43 (in relation to specified property) or s 44 (in relation to property of a named person) of the CPF Act. Specifically:

- 5.6.1. Even where the criteria in s 44(1) of the CPF Act are established, the Supreme Court retains a discretion under s 44 of the CPF Act whether or not to make a restraining order on an application by the DPP.
- 5.6.2. Further, although not necessary for validity, the better view is that s 94(1) does not require the Court to adopt an 'all or nothing' approach whereby the Court either makes a restraining order in relation to all property owned or effectively controlled or subsequently acquired by a person who is involved or taken to be involved in criminal activities, or makes no restraining order at all. Rather, the Court has a discretion to limit the restraining order to particular property described or identified in the order.
- 5.6.3. The Court must exercise the discretions referred to in paras 5.6.1 and 5.6.2 judicially and having regard to the subject-matter, scope and purposes of the CPF Act and the MoD Act (in particular s 36A).
- 5.7. The nature and object of the forfeiture under s 94(1) of the CPF Act is to vindicate or enforce a rule of conduct prescribed by s 36A of the MoD Act in relation to recidivist drug offenders. It would be inconsistent or incongruous with the nature and object of those laws to subject the forfeiture to a requirement of just terms. Accordingly, s 94(1) of the CPF Act, when read with s 36A of the MoD Act, is not a law with respect to the 'acquisition of property' within the meaning of s 50(1) of the Self-Government Act, and is therefore within power under s 6 of the Self-Government Act.

Section 50(1) of the Self-Government Act

6. Section 6 of the Self-Government Act confers power on the Legislative Assembly of the Northern Territory 'to make laws for the peace, order and good government of the Territory'. This power is subject to a limitation under s 50(1) of the Self-Government Act, which provides:
- (1) The power of the Legislative Assembly conferred by section 6 in relation to the making of laws does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms.
7. Section 50(1) imposes a limitation on the legislative power of the Legislative Assembly which is comparable to the limitation on Commonwealth legislative power derived from s 51(xxxi) of the Constitution. It is accepted that the meaning of 'acquisition of property' in s 50(1) of the Self-Government Act corresponds to its meaning in s 51(xxxi), and is therefore governed by judicial decisions which have construed and applied s 51(xxxi).¹ However, rather than the limitation on power being 'indirect through a rule of construction' as in the

¹ *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 (*Chaffey*) at 659 [3] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

case of s 51(xxxi),² s 50(1) imposes an express restriction on an otherwise plenary legislative power.

8. The requirement of just terms contained in the grant of Commonwealth legislative power in s 51(xxxi) has the result that, in the absence of a contrary intention, the other legislative powers conferred by s 51 of the Constitution have been construed so as not to authorise a law with respect to the acquisition of property otherwise than on just terms.³ In other words, s 51(xxxi) 'abstracts the power to support a law for the compulsory acquisition of property from any other legislative power'.⁴
- 10 9. Nevertheless, the limitation derived from s 51(xxxi) is subject to the manifestation of a contrary intention in either the terms or the subject-matter of another legislative power.⁵ Further, there are 'sundry laws providing for the acquisition of property which are supported by heads of power other than s 51(xxxi) and which are not affected by the requirement of just terms'.⁶
10. Several approaches have been adopted to explain when a particular law will 'stand outside'⁷ or 'apart from'⁸ s 51(xxxi) so as not to attract the guarantee of just terms for any acquisition of property. These approaches may overlap and do not amount to 'discrete categories of exception',⁹ and include:¹⁰

20 10.1. *Contrary intention*: A contrary intention may be 'provided by the express terms in which a specific power is conferred or by the very nature of the

² *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 (*Nintendo*) at 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

³ *Mutual Pools & Staff Pty Limited v The Commonwealth* (1994) 179 CLR 155 (*Mutual Pools*) at 169 (Mason CJ), 177 (Brennan J), 185-186 (Deane and Gaudron JJ), 193 (Dawson and Toohey JJ), 219 (McHugh J); *Re Director of Public Prosecutions; Ex Parte Lawler* (1994) 179 CLR 270 (*Lawler*) at 283 (Deane and Gaudron JJ); *Newcrest Mining (WA) Limited v The Commonwealth* (1997) 190 CLR 513 (*Newcrest*) at 532-533 (Brennan CJ), 548-549 (Dawson J), 567 (Gaudron J), 593, 595-596 (Gummow J); *Theophanous v The Commonwealth* (2006) 225 CLR 101 (*Theophanous*) at 124 [55] (Gummow, Kirby, Hayne, Heydon and Crennan JJ); *JT International SA v Commonwealth* (2012) 86 ALJR 1297 (*JT International*) at 1333 [167] (Hayne and Bell JJ); *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 (*Schmidt*) at 370-372 (Dixon CJ).

⁴ *Mutual Pools* at 177 (Brennan J). In *Wurridjal v The Commonwealth* (2009) 237 CLR 309 (*Wurridjal*) at 387 [186], Gummow and Hayne JJ observed that the reference to s 51(xxxi) 'abstracting' the power of acquisition of property from other heads of legislative power could be traced to *Trade Practices Commission v Tooth & Co Limited* (1979) 142 CLR 397 (*Trade Practices Commission v Tooth*) at 445 (Aickin J); see also *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 (*ICM Agriculture*) at 197-198 [135] (Hayne, Kiefel and Bell JJ). In *Wurridjal* and *ICM Agriculture* respectively, the limitation derived from s 51(xxxi) was applied to the legislative powers conferred by s 122 and s 96 of the Constitution.

⁵ *Nintendo* at 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

⁶ *Mutual Pools* at 177-178 (Brennan J).

⁷ See eg *Mutual Pools* at 172 (Mason CJ), 188 (Deane and Gaudron JJ); *Lawler* at 283-284, 285 (Deane and Gaudron JJ).

⁸ *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 (*Airservices*) at 194 [148], 196 [153], 197 [157] (Gaudron J).

⁹ *Airservices* at 194 [148] (Gaudron J).

¹⁰ In addition, there are cases which raise the question whether particular rights or interests amount to 'property', or whether there has been an 'acquisition' of rights, interests or benefits that are proprietary in nature. In cases involving forfeiture, however, there is usually no dispute that property is acquired by the law which provides for the forfeiture.

subject matter of a specific power or what is included within it',¹¹ so as necessarily to encompass laws for the acquisition of property unrestricted by any requirement of just terms.¹²

10 10.2. *Characterisation*: The rule of construction by which s 51(xxxi) abstracts power from other heads of legislative power only extends to laws which are properly characterised as being with respect to the acquisition of property for a purpose in respect of which the Parliament has power to make laws.¹³ Conversely, a law which cannot properly be characterised as a law with respect to the acquisition of property within the meaning of s 51(xxxi) is not affected by the constitutional requirement of just terms, and is valid if it is supported by another head of legislative power.

20 10.3. *Inconsistency or incongruity with just terms*: Because the power conferred by s 51(xxxi) relates to the 'compound conception'¹⁴ of 'the acquisition of property on just terms', the acquisitions to which s 51(xxxi) is directed are 'acquisitions of a kind which permit of just terms'.¹⁵ If a law is of a kind that does not permit of just terms for any acquisition of property,¹⁶ or if 'the circumstances are such that the notion of fair compensation to the transferor is irrelevant or incongruous',¹⁷ the law will not be one with respect to the acquisition of property within the meaning of s 51(xxxi) and the constitutional requirement of just terms will not apply. The criterion of inconsistency or incongruity with the requirement of just terms is:

¹¹ *Mutual Pools* at 169-170 (Mason CJ), see also at 186-187 (Deane and Gaudron JJ); *Lawler* at 284 (Deane and Gaudron JJ); *Airservices* at 193-194 [147], 195 [150] (Gaudron J); *Newcrest* at 595-596 (Gummow J). The examples given include s 51(ii) (taxation), s 51(xvii) (bankruptcy and insolvency), s 51(xxxii) (the acquisition of railways of the State on terms arranged between the Commonwealth and the State), and s 85 (transfer of property of a State). In relation to taxation, see *Mutual Pools* at 170-171 (Mason CJ): 'Of its nature 'taxation' presupposes the absence of the kind of quid pro quo involved in the 'just terms' prescribed by s 51(xxxi).'

¹² Although the Self-Government Act does not confer enumerated powers on the Legislative Assembly, but rather contains in s 6 a plenary grant of power to make laws for the peace, order and good government of the Territory, the 'contrary intention' approach may still be useful in ascertaining the scope and application of s 50(1) of the Self-Government Act: compare *Chaffey* at 659 [4] (Gleeson CJ, Gummow, Hayne and Crennan JJ). For example, in so far as s 6 includes a power to make laws for taxation it may still in that operation give rise to a contrary intention displacing s 50(1). In any event, laws imposing taxation would also be laws of a kind that do not permit of just terms.

¹³ *Airservices* at 193 [147] (Gaudron J), 247 [332], 250 [339] (McHugh J); *Mutual Pools* at 171-172 (Mason CJ), 180-181 (Brennan J), 188-189 (Deane and Gaudron JJ). See also *Nintendo* at 161 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 306-307 (Mason CJ, Deane and Gaudron JJ); *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 510 (Mason CJ, Brennan, Deane and Gaudron JJ); *Airservices* at 298-300 [497]-[500] (Gummow J), 304-305 [517]-[519] (Hayne J); *Wurrildjal v The Commonwealth* (2009) 237 CLR 309 at 361 [91] (French CJ) and 439 [362] (Crennan J).

¹⁴ *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290 (Dixon J).

¹⁵ *Mutual Pools* at 187 (Deane and Gaudron JJ); *Lawler* at 285 (Deane and Gaudron JJ); *Newcrest* at 595 (Gummow J); *Theophanous* at 124-125 [56] (Gummow, Kirby, Hayne, Heydon and Crennan JJ), (approving *Lawler* at 285).

¹⁶ *Airservices* at 193-194 [147] (Gaudron J).

¹⁷ *Airservices* at 251 [342] (McHugh J); *Mutual Pools* at 219-220 (McHugh J).

grounded in the realisation that to characterise certain exactions of government (such as levying of taxation, imposition of fines, exaction of penalties or forfeitures, or enforcement of a statutory lien) as an acquisition of property would be incompatible with the very nature of the exaction.¹⁸

Forfeiture laws are not laws with respect to the 'acquisition of property'

11. The recognised exception of fines, penalties and forfeitures from the scope of s 51(xxxi) rests primarily on the second and third approaches identified above – that is, such laws do not permit of just terms and for that reason do not have the character of a law with respect to the acquisition of property within the meaning of s 51(xxxi). The inquiry focuses on the 'kind' of law in question.¹⁹ It is necessary to ascertain the nature of the law – relevantly, does the law fall within the class of laws 'imposing a fine or penalty, including by way of forfeiture'?²⁰ If so, the law will not be properly characterised as a law with respect to the 'acquisition of property' and the requirement of just terms will not apply.
12. There is a long history of laws for the forfeiture of property both at common law and under statute.²¹ Until the 19th century, the common law provided for the forfeiture of real and personal property upon conviction of treason or a felony.²² In the case of treason, the traitor forfeited all lands and goods to the Crown. A convicted felon forfeited all goods to the Crown, and the Crown was entitled to the waste and profits of the felon's lands for a year and a day, after which the lands *escheated* to his lord (irrespective of whether the felon had any heirs). Under the common law doctrine of *deodand*, property used in the commission of certain crimes was forfeited to the Crown.²³ Common law forfeiture and deodands were abolished in the UK by statute in the 19th century and in all Australian colonies by 1891.²⁴ Under these reform statutes, a range of civil law disqualifications, burdens and restrictions on property, on an '*in personam*' basis were continued. Statutory forfeiture provisions have remained in particular areas. As the plurality noted in *Theophanous*, the exaction of

¹⁸ *Theophanous* at 126 [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

¹⁹ *Theophanous* at 124-125 [56] (Gummow, Kirby, Hayne, Heydon and Crennan JJ), quoting from *Lawler* at 285 (Deane and Gaudron JJ) with added emphasis on '*Laws of that kind ...*'.

²⁰ *Lawler* at 285 (Deane and Gaudron JJ).

²¹ See generally *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319 at 344-345 [25]-[29] (French CJ); see also *Theophanous* at 125 [58] (Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Lawler* at 279 (Brennan J), 289 (Dawson J); *Director of Public Prosecutions v Toro-Martinez* (1993) 33 NSWLR 82 (*Toro-Martinez*) at 85-86 (Kirby P).

²² See K J Kesselring, "Felony Forfeiture in England, c. 1170-1870" (2009) 30 *Journal of Legal History* 201.

²³ *Lawler* at 279 (Brennan J), 289 (Dawson J); see also *Calero-Toledo v Pearson Yacht Leasing Co*, 416 US 663 (1974) (*Calero-Toledo*) at 680-681.

²⁴ See *Abolition of Deodands Act 1846* (9 & 10 Vict, c 62); *Forfeiture Act 1870* (33 & 34 Vict, c 23); see also *Imperial Act adopting* (37 Vict. No. 8) 1873 (WA); *Treason and Felony Forfeiture Act 1874* (SA); *Forfeitures for Treason and Felony Abolition Act 1878* (Vic); *Criminal Law Procedure Act 1881* (Tas) s 13; *Criminal Law Amendment Act 1883* (NSW) ss 416-421; *Escheat (Procedure Amendment) Act 1891* (Qld) s 12.

penalties and forfeitures (among other exactions) were 'regular features of the law in England, the Australian colonies and now of the Commonwealth'.²⁵

13. Against this background, the class of laws properly described as forfeiture laws in the context of s 51(xxxi) should be taken to extend beyond laws for the forfeiture of property used or involved in the commission of a criminal offence or property derived from the commission of a criminal offence to encompass laws operating by way of forfeiture 'in personam'.
14. In *Burton v Honan*,²⁶ the Court upheld the validity of laws providing for the forfeiture of prohibited imports in the possession of an innocent purchaser. Dixon CJ held that the authority to impose forfeitures arose directly from the powers conferred by s 51(i) and (ii) of the Constitution 'as something which is incidental to the main power',²⁷ and that 'the whole matter lies outside the power given by s. 51(xxxi)'.²⁸ Similarly, in *The Queen v Smithers; Ex parte McMillan*,²⁹ s 51(xxxi) was held not to apply to the imposition of a pecuniary penalty by civil action in respect of a contravention of the *Customs Act 1901* (Cth).
15. As Mason CJ stated in *Mutual Pools* in relation to 'a law which provides ... for forfeiture as a consequence of conviction for a criminal offence or for breach of some statutory provision which regulates conduct':³⁰

Such a law would not be described as a law with respect to the acquisition of property within s. 51(xxxi) simply because acquisition in the form of forfeiture of property is prescribed as a penalty for engaging in conduct proscribed by the law, proscription of that conduct being the primary purpose and effect of the law.

Similarly, Deane and Gaudron JJ said:³¹

There are some kinds of acquisition which are of their nature antithetical to the notion of just terms but which were plainly intended to be permissible under laws made pursuant to one or more of the grants of power contained in s. 51. An example of those kinds of acquisition is the compulsory forfeiture to the Commonwealth of money or specific property as punishment for breach of some general rule of conduct prescribed by a valid law of the Commonwealth. Such an acquisition stands apart from the kinds of 'acquisition of property' which constitute the subject-matter of s. 51(xxxi) and such laws are beyond the reach of the paragraph's guarantee of just terms.

16. In *Lawler*, these principles were applied to uphold a law providing for the forfeiture of a foreign fishing boat that had been used unlawfully for commercial fishing in breach of the *Fisheries Management Act 1991* (Cth). The boat had been leased by its owners, who were innocent of any complicity in the offence.

²⁵ *Theophanous* at 126 [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

²⁶ (1952) 86 CLR 169 (*Burton v Honan*).

²⁷ (1952) 86 CLR 169 at 177.

²⁸ (1952) 86 CLR 169 at 180.

²⁹ (1982) 152 CLR 477 (*Ex parte McMillan*) at 487-489 (Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ).

³⁰ At 170, referring to *Schmidt* at 372.

³¹ At 187.

The provision authorising a court to order the forfeiture of a boat used in the commission of an offence was supported as a law with respect to fisheries within s 51(x) of the Constitution, and was not a law with respect to the acquisition of property within s 51(xxxi). The forfeiture was in the nature of a penalty directed to the vindication or enforcement of the fisheries laws.³² As Brennan J stated:³³

10 A law which imposes a penalty or sanction for breach of a provision prescribing a rule of conduct and which, apart from its imposition of the penalty or sanction, is a law with respect to a head of power other than s. 51(xxxi) cannot be classified as a law with respect to the acquisition of property within s. 51(xxxi). To place it within the s. 51(xxxi) category would be to annihilate the penalty or sanction and thus to weaken, if not destroy, the normative effect of the prescription of the rule of conduct. The irrelevance of s. 51(xxxi) to the imposition of fines and forfeitures is trite law.

20 Similarly, Deane and Gaudron JJ held that laws imposing a fine or penalty, including by way of forfeiture, 'do not involve acquisitions that permit of just terms' and 'are not laws with respect to 'acquisition of property' within the meaning of s 51(xxxi)'.³⁴ McHugh J noted that '[t]he notion of paying fair compensation to the owner of property which is validly forfeited to the Crown for a breach of the law is simply absurd',³⁵ and that the relevant question was whether the forfeiture was 'reasonably incidental to the exercise of a power other than s. 51(xxxi).'

17. At federal level, if a law enacted by the Commonwealth Parliament is not characterised as one with respect to the acquisition of property within the meaning of s 51(xxxi), the law must still find support in another head of Commonwealth legislative power. There is therefore a 'two-stage' inquiry, first as to whether the law is one with respect to the acquisition of property within s 51(xxxi), and secondly whether the law is one with respect to another subject-matter of Commonwealth power.³⁶ In the federal context, issues might arise as to whether forfeiture provisions have a sufficient connection to the subject-matter of another Commonwealth legislative power (eg by advancing the enforcement of the relevant rule or norm of conduct).³⁷

18. The Northern Territory Legislative Assembly stands in a different position.³⁸ Subject to the limitation in s 50(1) of the Self-Government Act, the Legislative

³² See *Cheatley v The Queen* (1972) 127 CLR 291 at 310 (Mason J).

³³ *Lawler* at 278.

³⁴ *Lawler* at 285.

³⁵ *Lawler* at 293; compare *Trade Practices Commission v Tooth* at 408 (Gibbs J).

³⁶ See eg *Airservices* at 250 [339] (McHugh J). The two-stage approach advanced by McHugh J in *Airservices* is consistent with the order in which the issues were addressed by the plurality in *Theophanous* at 127 [64], 127-128 [68].

³⁷ See *Lawler* at 277-278 (Brennan J), 285-286 (Deane and Gaudron JJ), 292-293 (McHugh J), cf at 291-292 (Toohey J). On the question whether a law has a sufficient connection with a head of legislative power, see generally *Leask v The Commonwealth of Australia* (1996) 187 CLR 579; *Cunliffe v The Commonwealth of Australia* (1994) 182 CLR 272.

³⁸ See *Australian Capital Territory v Pinter* (2002) 121 FCR 509 (*Pinter*) at 530 [93] (Black CJ), 533 [112], 540 [164]-[165], 542 [170], 546 [201] (Higgins J), 557-558 [268]-[269] (Dowsett J).

10 Assembly has plenary power to make laws for the peace, order and good government of the Territory. The power conferred by s 6 of the Self-Government Act clearly extends to making laws with respect to taxation, and laws imposing fines, penalties or forfeitures. If a law made by the Legislative Assembly is not properly characterised as a law with respect to the acquisition of property within the meaning of s 50(1) of the Self-Government Act (and does not infringe any other limitation on power), the law will be supported by s 6 of the Self-Government Act. There is no equivalent to the 'second-stage' inquiry of whether a Commonwealth law which effects or authorises forfeiture has a sufficient connection to the subject-matter of an enumerated head of legislative power other than s 51(xxxi).³⁹

Characterisation of forfeitures

19. Forfeiture laws can conveniently be divided into two broad categories.

19.1. First, a forfeiture may operate by reference to the identity or nature of the property, such as property derived from unlawful or prohibited activities or property that is used in connection with unlawful or prohibited activities. Such forfeitures are akin to '*in rem*' proceedings on the basis that '[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing'.⁴⁰ The '*in rem*' character of the forfeiture is demonstrated by the fact that the property may be forfeited even in the hands of an owner who is innocent of any involvement in the unlawful or prohibited activities. Both *Burton v Honan* and *Lawler* illustrate the operation of laws which provided for the forfeiture of property involved in unlawful or prohibited activities – a motor car imported in contravention of customs legislation, or a boat used for commercial fishing without a licence in contravention of fisheries legislation⁴¹ – notwithstanding the effect of the forfeiture on an innocent owner of the property.

19.2. Secondly, a forfeiture may operate '*in personam*' in relation to a person who has engaged in unlawful or prohibited activities. Such a forfeiture

³⁹ See eg *Dickfoss v Director of Public Prosecutions* (2012) 31 NTLR 16 at 33 [57] (Riley CJ, with whom Southwood J and Kelly J agreed). Similarly, there is no equivalent in s 50(1) of the Self-Government Act to the words contained in s 51(xxxi) of the Constitution in granting power to make laws with respect to the acquisition of property 'for any purpose in respect of which the Parliament has power to make laws'. Such words are unnecessary in the context of the Self-Government Act, which contains a plenary grant of legislative power under s 6 subject to a limitation on laws with respect to the acquisition of property otherwise than on just terms.

⁴⁰ *The Palmyra* 25 US (12 Wheat) 1 (1827) at 14; see also *Calero-Toledo* at 682-683; *Bennis v Michigan* 516 US 442 (1996) (*Bennis v Michigan*) at 447; cf *United States v Bajakajian* 524 US 321 (1998) (*Bajakajian*) at 330-331. In the United States, the distinction between '*in rem*' civil forfeitures and '*in personam*' criminal forfeitures has been regarded as relevant to the application of the Excessive Fines clause of the Eighth Amendment ('Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'). See also *Lawler* at 278 (Brennan J).

⁴¹ See also *Olbers Co Ltd v Commonwealth* (2004) 143 FCR 449 (*Olbers*) (Black CJ, Emmett and Selway JJ) affirming the decision in *Olbers Co Ltd v Commonwealth of Australia* (2004) 136 FCR 67 (French J) to uphold the validity of s 106A of the *Fisheries Management Act 1991* (Cth), which provided for the automatic forfeiture (ie without the need for any judicial determination) of a foreign boat used in the commission of certain offences, including commercial fishing within the Australian Fishing Zone without a licence.

may apply to any property owned by the offender (whether or not that property is proven to have been derived from or used in connection with unlawful or prohibited activities), and is analogous to the imposition of a civil pecuniary penalty in response to a breach of a rule or norm of conduct prescribed by the legislature.⁴² *Theophanous* provides an example of 'in personam' forfeiture, by which a member of Parliament who was convicted of a 'corruption offence' was subject to an order for the forfeiture of his publicly funded superannuation benefits.⁴³

- 10 20. Laws for the forfeiture of property may be directed to a multiplicity of objects or purposes. In so far as the forfeiture operates as a penalty or sanction in respect of unlawful or prohibited conduct, it renders the conduct unprofitable and serves the purposes of specific and general deterrence. Such a deterrent purpose may be distinct from any punitive purpose, particularly where the owner of the forfeited property is not directly involved in the unlawful conduct.⁴⁴ Forfeiture of property used in connection with the commission of a crime serves the purposes of preventing further unlawful use of that property, imposing an economic penalty that renders the unlawful or prohibited conduct unprofitable, and (where the property is owned by a person who was not directly involved in the unlawful or prohibited conduct) enlisting the owner's participation in
- 20 ensuring the observance of the law.⁴⁵ Forfeiture of the proceeds of crime may be directed to the object of preventing or removing unjust enrichment. It may also be a legitimate object (or a consequential effect) of forfeiture to reimburse or compensate the government for the costs of enforcement of criminal laws, including the investigation and prosecution of the relevant offences, the institution and conduct of proceedings for forfeiture of property, and any ongoing costs of imprisonment.⁴⁶
21. These potentially overlapping objects or purposes ultimately involve the vindication and enforcement of a rule of conduct prescribed by legislation. They are incompatible with the application of a requirement of just terms for an
- 30 acquisition of property that is necessarily involved in the forfeiture.
22. The exclusion of such laws from s 51(xxxi) is not simply a matter of their statutory description as a 'forfeiture', but rather turns on the characterisation of

⁴² Compare *Ex parte McMillan* at 487-489 (Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ).

⁴³ See similarly *Australian Federal Police Act 1979* (Cth) Pt VA (the validity of which was upheld in *DPP (Cth) v Pirone* (1997) 68 SASR 106); *Public Officers Superannuation Benefits Recovery Act 1988* (Qld); *Sentencing Act 1991* (Vic) Pt 3D. See further s 106AA of the *Fisheries Management Act 1991* (Cth), which provides for the forfeiture of additional things on a boat forfeited to the Commonwealth under s 106A of that Act. See also s 30G of the *Crimes Act 1914* (Cth) (enacted in 1926 and repealed in 2010) which provided that all goods and chattels belonging to an unlawful association, and all books, periodicals, pamphlets, handbills, posters or newspapers issued by or on behalf of, or in the interests of, an unlawful association shall be forfeited to the Commonwealth.

⁴⁴ Compare *Bennis v Michigan* at 452; see also *Bajakajian* at 341-342, cf 346-347 (Kennedy J, dissenting).

⁴⁵ *Calero-Toledo* at 686-687, cited with approval in *Lawler* at 280 (Brennan J), 290 (Dawson J), 295 (McHugh J).

⁴⁶ As the US Supreme Court noted in *Calero-Toledo* at 687-688 (fn 26): 'Seizure and forfeiture statutes also help compensate the Government for its enforcement efforts and provide methods for obtaining security for subsequently imposed penalties and fines'.

the law having regard to its nature and object.⁴⁷ In particular, a law will be properly characterised as effecting or authorising a forfeiture where the purposes of the divestiture of property include the prevention or deterrence of a breach of another statutory provision prescribing a rule of conduct. Such a forfeiture may be effected either by judicial order⁴⁸ or by direct operation of statute.⁴⁹ In either case, forfeiture is in the nature of a penalty which facilitates compliance with the rule of conduct, such that to require just terms to be provided would 'be to annihilate the penalty or sanction and thus to weaken, if not destroy, the normative effect of the prescription of the rule of conduct'.⁵⁰

10 **Proportionality**

23. The First Respondent's submissions do not explicitly embrace a test of proportionality for determining whether a law providing for the confiscation of property can be properly characterised as a forfeiture. Nevertheless, there are suggestions in the First Respondent's submissions which might invite such an analysis in ascertaining the true character or function of the law – for example, by posing the question whether there is an 'attenuated connection between the law's claimed regulatory function and the substance of its practical and legal operation on the one hand, and the reality and scale of the interests or benefits of a proprietary nature obtained by the Crown from the law's practical and legal operation on the other',⁵¹ or by submitting that s 94 of the CPF Act and s 36A of the MoD Act do not play 'a legitimate role in the enforcement of the criminal law in relation to trafficking in illicit drugs'.⁵²
24. In determining whether a law is properly described as a forfeiture in respect of which the requirement of just terms would be inconsistent or incongruous, the Court should not adopt any test or requirement that the forfeiture must be shown to have a proportionate relationship (strict or otherwise) with the nature or gravity of the breach of the law or rule of conduct in question.⁵³ The statements made by McHugh J in *Lawler* as to whether forfeiture was a 'reasonably proportional consequence of a breach of a law' or 'a reasonably proportional means of achieving' the object of protection of Australian fishing grounds were directed to the second-stage inquiry of whether the forfeiture could be supported by a head of power other than s 51(xxxi) (that is, 'whether the forfeiture is reasonably incidental to the exercise of a power other than s 51(xxxi)').⁵⁴ Such an analysis does not enter into the prior question whether a

⁴⁷ *Airservices* at 181 [101] (Gleeson CJ and Kirby J); *Theophanous* at 126 [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

⁴⁸ See eg, the legislative provisions upheld in *Lawler* and *Theophanous*.

⁴⁹ See eg, the legislative provisions upheld in *Burton v Honan* and *Olbers*.

⁵⁰ *Lawler* at 278 (Brennan J).

⁵¹ First Respondent's Submissions, para 36 (citation omitted).

⁵² First Respondent's Submissions, para 39.

⁵³ *JT International* at 1364-1365 [335], 1365 [340] (Kiefel J), see also at 1343-1344 [233] (Heydon J); see further *Theophanous* at 128 [69]-[71] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

⁵⁴ *Lawler* at 292-293, 294 (McHugh J). See also at 295-296, where McHugh J explains why the purposes of forfeiture under s 106 of the *Fisheries Management Act 1991* (Cth) had a sufficient connection with the subject-matter of the power to make laws with respect to fisheries conferred by s 51(x) of the Constitution.

law effects or authorises a forfeiture and is therefore not a law with respect to the 'acquisition of property' within the meaning of s 51(xxxi) or s 50(1) of the Self-Government Act.

25. In particular, there is no need to establish strict proportionality between the nature, extent or effect of the forfeiture (eg measured by the value of the forfeited property) and the nature or gravity of the unlawful or prohibited conduct which attracts the forfeiture. Nor is it appropriate to introduce concepts of proportionality in a loose sense by asking this Court to make judgments about the necessity or 'legitimacy' of the forfeiture under the statute.⁵⁵ In some cases, the characterisation process might be assisted by asking whether or not the legislation represents no more than a disguised attempt or a 'device' to acquire property from a person, rather than a genuine regulation the effect of which is 'to deter or punish forbidden conduct'.⁵⁶ Such cases aside, characterisation of a law is not assisted by proportionality reasoning; and the 'justice and wisdom' of laws effecting or authorising a forfeiture of property remain matters within the exclusive province of the Parliament.⁵⁷
26. Nor is it useful to ask whether a law providing for forfeiture of property has a purpose of generating revenue or otherwise conferring financial benefits on the Crown.⁵⁸ As is the case with a law imposing a fine or penalty, the receipt or revenue or other property by the relevant polity is an inevitable consequence of a forfeiture law, and is not inconsistent with the punitive and deterrent (or 'regulatory'⁵⁹) objects of such a law.

The construction and validity of s 94 of the CPF Act

27. Division 3 of Part 7 of the CPF Act provides for forfeiture of property in a range of circumstances. The scheme of the Act distinguishes between:
- 27.1. forfeiture of the property of 'persons who are involved in or taken to be involved in criminal activities' (see s 10(1)(a), (4) and (5)(a)(i)-(iii)); and
- 27.2. forfeiture of 'crime-used' or 'crime-derived' property (s 10(1)(b), (c) and (5)(a)(iv) and (v)).

⁵⁵ See *Magaming v The Queen* (2013) 87 ALJR 1060 (*Magaming*) at 1071 [51]-[52] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

⁵⁶ See *Trade Practices Commission v Tooth* at 409 (Gibbs J).

⁵⁷ *Burton v Honan* at 179 (Dixon CJ); see also *Magaming* at 1080-1081 [103]-[108] (Keane J). Thus, it does not matter that 'among a range of reasonable measures to combat breaches of the Act, the Parliament has chosen a particularly drastic one': *Lawler* at 296 (McHugh J). See also *Airservices* at 300 [504] (Gummow J): 'The legislation is not invalid by reason of the circumstance that if the legislation had been in another form there would have been an even clearer case for validity.' See further *Toro-Martinez* at 88 (Kirby P).

⁵⁸ Cf First Respondent's Submissions, paras 35, 36, 38.1, 39. Indeed, the object of raising revenue is an essential characteristic of another class of laws which stand outside the acquisition of property within the meaning of s 51(xxxi) (or s 50(1) of the Self-Government Act), namely, laws imposing taxation.

⁵⁹ First Respondent's Submissions, paras 35.1, 36, 38.1, 38.2

The former may be regarded as a forfeiture which operates '*in personam*' against a person who is involved or taken to be involved in criminal activities, whereas the latter is analogous to an '*in rem*' forfeiture in relation to the proceeds or instruments of crime.

- 10 28. Section 10(4) of the CPF Act provides that a person is taken to be involved in criminal activities if the person is declared under s 36A of the MoD Act to be a drug trafficker, or if an unexplained wealth declaration or criminal benefit declaration is made in relation to the person, or if the person is found guilty of a forfeiture offence. While subs 10(2) provides that the property of such a person 'is forfeit to the Territory to the extent provided in this Act to compensate the Territory community for the costs of deterring, detecting and dealing with the criminal activities',⁶⁰ this remedial or compensatory object cannot be treated as an exhaustive statement of the purposes of '*in personam*' forfeitures under the CPF Act. For example, s 10(2) encompasses the forfeiture of property under ss 99 or 100 to satisfy a criminal benefit declaration or an unexplained wealth declaration, the objects of which extend beyond compensation and include both deterrence and preventing unjust enrichment. Further, in relation to forfeiture of property of a declared drug trafficker under s 94(1) of the CPF Act, it is necessary also to have regard to the purposes of s 36A of the MoD Act, and the general objective in s 3 of the CPF Act – to prevent the unjust enrichment of persons involved in criminal activities – must be borne in mind.
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29. Subdivision B of Division 3 of Part 7 (ss 95-97) provides for forfeiture of 'crime-used' property and 'crime-derived' property.⁶¹ The definitions of crime-used property and crime-derived property in ss 11 and 12 are based on the existence of a connection between the property in question and the commission of a forfeiture offence. A restraining order may be obtained under s 43 in relation to specified property if there are reasonable grounds for suspecting that it is crime-used or crime-derived, and an application may then be made under s 95 for an order that the property is forfeit to the Territory if the court is satisfied that it is more likely than not that the property is crime-used or crime-derived (ss 96-97). The CPF Act contains provisions to protect property in the hands of innocent parties.⁶²
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30. Subdivision C of Division 3 of Part 7 (ss 98-101) provides for forfeiture of property to satisfy a criminal benefit declaration, an unexplained wealth declaration, or a crime-used property substitution declaration. In each case, the Supreme Court must have made a declaration under Part 6 of the CPF Act on the application of the DPP, which has the effect that the respondent must pay to the Territory an amount ordered by the Court in respect of either unexplained wealth, criminal benefits, or the value of crime-used property that is not available for forfeiture (see ss 72, 80 and 86). The amount payable to the
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⁶⁰ Cf subs 10(3), which provides that '[c]rime-used or crime-derived property (real or personal) is forfeit to the Territory to deter criminal activity and prevent the unjust enrichment of persons involved in criminal activities'.

⁶¹ These provisions apply in relation to the commission of a 'forfeiture offence' as defined in s 6 of the CPF Act, including any 'offence against a law in force anywhere in Australia that is punishable by imprisonment for 2 years or more'.

⁶² See eg ss 12(8)(a), 63, 64, 66.

Territory under the declaration may be satisfied wholly or in part by forfeiture of property that is subject to a restraining order (ss 99-101), upon which the restraining order would cease to have effect in relation to the balance of the property (if any) once the liability under the declaration had been satisfied (see s 52(5)(d)). In other words, a forfeiture under Subdivision C of Division 3 of Part 7 is by way of satisfaction of an antecedent debt created by the Court's declaration in respect of unexplained wealth, criminal benefits, or the value of crime-used property.

- 10 31. Subdivision A of Division 3 of Part 7 (s 94) provides for forfeiture of property owned or effectively controlled by a person who is declared to be a drug trafficker under s 36A of the MoD Act.⁶³ The Court must make such a declaration on an application by the DPP where the person satisfies the criteria in s 36A(3). A person will satisfy s 36A(3) and be liable to be declared to be a drug trafficker if, having been found guilty of two or more relevant offences in the preceding 10 years,⁶⁴ he or she commits a further relevant offence. The relevant offences specified in s 36A(6) include supplying a dangerous drug to another person (s 5), cultivation of a prohibited plant in a commercial quantity or traffickable quantity (s 7(1) and (2)(a) or (b)), unlawful manufacture or production of a dangerous drug (s 8), unlawful possession of a dangerous drug in a commercial quantity or traffickable quantity (s 9(1) and (2)(a), (b), (d) or (e)), and conspiracy to commit such offences.⁶⁵
- 20
32. The effect of s 36A(3) of the MoD Act is to prescribe a rule or norm of conduct in relation to recidivist drug offenders who commit a further offence within a 10-year period after having been found guilty of two or more previous offences. Independently of the individual sentences imposed on the offender in respect of each of the offences,⁶⁶ such an offender is liable to have some or all of his or her property forfeited under s 94(1) of the CPF Act. The forfeiture is a civil consequence that attaches to the cumulative conduct comprising the repeat offending, and is distinct from the punishment imposed by way of sentence for each of the separate offences.
- 30
33. In the case of a declared drug trafficker, the forfeiture of property under s 94(1) is not limited to property used in connection with the commission of the relevant offence or property derived or realised from the commission of the relevant offence. Rather, s 94(1) provides for the forfeiture to the Territory of:

33.1. all property subject to a restraining order that is owned or effectively controlled by the person; and

⁶³ Section 94(1) also applies to a person who is taken to be a declared drug trafficker under s 8(2) or (3) of the CPF Act, which cover persons who die or abscond before the charge for the relevant offence is disposed of or finally determined: s 94(2) of the CPF Act.

⁶⁴ The 10-year period is extended by the length of time served in imprisonment for a qualifying offence during that period: s 36A(5) of the MoD Act.

⁶⁵ Section 36A(6) also specifies offences against s 233B of the *Customs Act 1901* (Cth) (repealed in 2005) or Division 307 of the *Criminal Code* (Cth), each of which prohibits or prohibited the import and export of certain drugs or plants.

⁶⁶ *Sentencing Act* (NT), s 5(4)(c). That section prohibits a court from taking into account a forfeiture of property (that is not crime used) when sentencing an offender.

33.2. all property that was given away by the person, whether before or after the commencement of the CPF Act.

- 10 34. Putting to one side property that was 'given away', property that is owned or effectively controlled by a declared drug trafficker is only liable to be forfeited under s 94(1) if it is subject to a restraining order made by the Court under ss 43 or 44 of the CPF Act. Section 43 deals with restraining orders in relation to specified property, including property that is reasonably suspected to be crime-used or crime-derived. Of more relevance to the present case, s 44 confers power on the Supreme Court to make a restraining order in relation to the property of a named person in certain circumstances, including where the person has been or will be charged with an offence that could lead to the person being declared to be a drug trafficker under s 36A of the MoD Act: s 44(1)(a). It is implicit in s 44(1)(a) that an application for a restraining order must be made before the person has been convicted of the relevant qualifying offence.
- 20 35. On an application under s 44, the Supreme Court has a discretion whether or not to make a restraining order in relation to the person named in the application.⁶⁷ The existence of such a discretion is indicated by the text of s 44(1), which provides that the Supreme Court 'may' make a restraining order.⁶⁸ Further, it is consistent with the discretion of the court under s 51(1) of the CPF Act to set the duration of a restraining order, and the discretion to extend the duration of the order for a further period or periods 'on as many occasions as the court sees fit': s 51(2) and (3).
- 30 36. If the Court makes a restraining order, s 44(2)(a) provides that the order 'can' apply to 'all or any' property that is owned or effectively controlled by the person at the time of the application, 'whether or not any of the property is described or identified in the application'. Although it is unnecessary for the application exhaustively to describe or identify the property in respect of which the order will in due course be made (see s 44(2)(a)), other provisions of the CPF Act seem to contemplate that the restraining order when issued will describe the property to which it applies.⁶⁹ The First Respondent's submission that a restraining order can be made only on an 'all or nothing' basis – ie that it must apply to all property owned or controlled by the person or not be made at all – implicitly assumes that an application by the DPP for a restraining order must also cover all such property. However, there is nothing in s 44 to justify any such assumption.

⁶⁷ *Burnett v Director of Public Prosecutions* (2007) 21 NTLR 39 at 112 [227] (Mildren J), 124 [277] (Southwood J); *Director of Public Prosecutions (NT) v Atkinson* (2011) 212 A Crim R 241 at 243-244 [7]-[8] (Barr J); *Director of Public Prosecutions v Dickfoss* (2011) 28 NTLR 71 at [91] (Mildren J). Cf *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1 at 11 [12] (Riley CJ) (AB 170), 24-25 [63]-[64] (Kelly J) (AB 193-194).

⁶⁸ Cf *Criminal Property Confiscation Act 2000* (WA), ss 8, 9, 30.

⁶⁹ For example, s 47(1) requires that notice of the restraining order must be served on any person known to the applicant who has, may have or claims to have an interest in 'the property subject to the order'. The notice must advise 'that *the property described in the order* may be forfeited under this Act' (emphasis added): s 47(5)(b)(i). If a restraining order is issued in relation to land or other registrable property, the Registrar-General or appropriate registrar must be notified: ss 47(2), 53. Section 48 cannot operate unless the order describes or identifies the property.

37. On the ordinary meaning of the words used in s 44(2)(a), the Court has a discretion to make a restraining order in relation to 'all or any' property owned or controlled by the person named in the application.⁷⁰ Such a discretion, like the discretion whether or not to make an order at all, must be exercised having regard to the subject-matter, scope and purposes of both the CPF Act and the MoD Act, including:

37.1. the general objective stated in s 3 of the CPF Act to 'target the proceeds of crime in general and drug-related crime in particular in order to prevent the unjust enrichment of persons involved in criminal activities';

10 37.2. the specific purpose set out in s 10(2) of the CPF Act 'to compensate the Territory community for the costs of deterring, detecting and dealing with the criminal activities [in which the person is involved or taken to be involved]'; and

37.3. the purposes of the MoD Act to make provision for the prevention of the misuse of drugs, particularly in relation to persons found guilty of multiple offences falling within s 36A.

38. Accordingly, contrary to the concession recorded as having been accepted in the Court of Appeal,⁷¹ the Supreme Court has power to limit the property that is the subject of a restraining order made under s 44(1)(a) of the CPF Act. The Court is not bound to make a restraining order only in relation to *all* of the property owned or effectively controlled by the person at the time of the application and *all* property acquired by the person after the restraining order is issued.⁷² The Court's ability to limit the scope of the property the subject of a restraining order is further recognised in s 46(1), which gives the Court a range of discretionary powers including power to direct that income or other property derived from the property while the order is in force is to be treated as part of the property the subject of the order,⁷³ and to make provision for the reasonable living and business expenses of the owner of the property.⁷⁴ More generally, the conferral of power to make a restraining order in relation to 'all or any' property owned or effectively controlled by the person encompasses a discretion to limit the property to which the order applies where appropriate and consistent with the purposes of the CPF Act.

⁷⁰ Cf *Criminal Property Confiscation Act 2000* (WA), ss 8, 9, 30.

⁷¹ *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1 at 11-12 [13]-[16] (Riley CJ) (AB 170-172), 25-26 [68]-[70] (Kelly J) (AB 195-196), 35 [97] (Barr J) (AB 212-213).

⁷² Section 44(2)(b) refers to 'all property', as opposed to 'all or any property', acquired after the restraining order is issued. However, as s 44(2) sets out the property to which a restraining order 'can apply' (emphasis added), the court is under no obligation to apply the restraining order to all property subsequently acquired by the person.

⁷³ CPF Act, s 46(1)(a). This provision implies that the court can direct that income or other property derived from the property shall not be treated as property the subject of the order – s 49(2) should be read as operating subject to any direction made under s 46.

⁷⁴ CPF Act, s 46(1)(e). See also s 49(3) of the CPF Act, which allows a person to apply to the court for the release of property to meet reasonable living and business expenses of the owner of the property.

39. The restraining order made by the Supreme Court in the present case (which was made by consent⁷⁵) applied to specified real and personal property owned or effectively controlled by the First Respondent, along with 'all other property owned or effectively controlled by [the First Respondent] at the time of the order, or acquired by him after the time of the order *with the exception of lawfully derived income or benefits payable under statute*' (emphasis added).⁷⁶ Thus, while the restraining order covered all property owned or effectively controlled by the First Respondent as at 11 April 2011, the order did not cover all property subsequently acquired by the First Respondent. In particular, it was agreed that certain preference shares redeemable by him on 31 December 2013 valued at \$124,237.60 were beyond the ambit of the restraining order.⁷⁷
40. The Commonwealth as intervener should be permitted to put the construction submissions set out in paras 36 to 39 above, notwithstanding that such submissions depart from what was apparently common ground between the parties before the Court of Appeal.
- 40.1. The Commonwealth's right of intervention arises by reason that the proceedings include a matter involving the interpretation of the Constitution. The full resolution of that matter requires the Court to determine whether, on the proper construction of the relevant provisions of the CPF Act and MoD Act, s 94(1) of the CPF Act has the character of a forfeiture law. In so far as that question turns on the nature of the discretion conferred by s 44 of the CPF Act, the Court will give the provision its correct construction and will not be bound by any concession made by the Appellant in the court below if the Court regards that concession to be mistaken. Where an Attorney-General exercises their right to intervene in proceedings before this Court under s 78A of the Judiciary Act, it is open to that Attorney-General to make submissions on any questions of construction which arise in connection with the constitutional matter.
- 40.2. In any event, it appears that the Appellant does not adhere to any concession made in the Court of Appeal on the operation of s 44 of the CPF Act.⁷⁸
- 40.3. Further, as shown in para 39 above, the restraining order as made in fact assumes the correctness of the construction that the Commonwealth wishes to advance in the present appeal.
41. The forfeiture effected by s 94(1) of the CPF Act upon the making of a declaration under s 36A of the MoD Act is a consequence of a breach by the declared drug trafficker of the rule of conduct prescribed by s 36A(3) of the

⁷⁵ *Director of Public Prosecutions v Emmerson* (2012) 32 NTLR 180 at 197 [32] (Southwood J) (AB 98); *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1 at 9 [4] (Riley CJ) (AB 166).

⁷⁶ *Director of Public Prosecutions v Emmerson* (2012) 32 NTLR 180 at 197 [33] (Southwood J) (AB 99).

⁷⁷ *Director of Public Prosecutions v Emmerson* (2012) 32 NTLR 180 at 198 [36] (Southwood J) (AB 100).

⁷⁸ See Appellants' Reply dated 23 December 2013, paras 3, 4.

MoD Act – namely, committing a further relevant offence after having been found guilty of two or more separate offences in the prior 10 years. The Legislative Assembly has determined that such recidivist drug offending should result in the exposure to forfeiture of property owned or controlled by the offender, where that property has previously been made the subject of a restraining order. The forfeiture is a penalty which deters repeat drug offending by persons with a particular criminal history, and thereby enforces the rule of conduct established by s 36A(3) of the MoD Act. In so doing, the forfeiture further compensates the Territory community for the costs of deterring, detecting and dealing with the offender’s criminal activities.

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42. It was open to the Legislative Assembly to determine that, in respect of repeat offenders found guilty of multiple drug crimes, the larger purposes of the criminal law require the exposure to forfeiture of all or any property owned or controlled by the offender, whether or not that property is proven to be crime-used or crime-derived. Contrary to the First Respondent’s submissions, s 94 of the CPF Act and s 36A of the MoD Act do not “target legitimately derived wealth”.⁷⁹ The property of a declared drug trafficker that is liable to forfeiture under s 94 of the CPF Act might include crime-used or crime-derived property – however, the restraint and forfeiture encompass any property owned or controlled by the drug trafficker irrespective of any need to establish that the property is crime-used or crime-derived.

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43. Section 94(1) of the CPF Act is a law of a kind which does not permit of just terms, and in relation to which the provision of compensation would be inconsistent or incongruous. It bears the true character of a forfeiture which stands outside the concept of ‘acquisition of property’ within the meaning of s 50(1) of the Self-Government Act.

43.1. The fact that property forfeited under s 94(1) can extend beyond crime-used or crime-derived property does not deprive it of the character of a law for the forfeiture of property. Forfeiture laws are not necessarily limited to the reversal of unjust enrichment or the disabling of criminal activity (eg by preventing the future use of property in the commission of crimes).⁸⁰ In the present case, the connection between the forfeiture and the criminal conduct is provided by the findings of guilt on which the declaration under s 36A of the MoD Act is based. The exposure to forfeiture of property owned and controlled by the offender operates to penalise and to deter such criminal conduct. The categories of forfeiture are not exhausted by the facts of previous cases.⁸¹

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43.2. Nor does the stated purpose in s 10(2) of the CPF Act of compensating the Territory for the costs associated with the investigation and enforcement of the criminal law preclude s 94(1) from being characterised as a forfeiture, and not a law with respect to the acquisition of property

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⁷⁹ Cf First Respondent’s Submissions, paras 30, 38.2.

⁸⁰ Cf First Respondent’s Submissions, para 38.2.

⁸¹ Cf First Respondent’s Submissions, para 37.

otherwise than on just terms.⁸² Any suggested dichotomy between laws of a 'regulatory' character and laws providing financial benefits to the Crown is flawed, and is of no assistance to the characterisation of a forfeiture.⁸³

- 10 44. It is not relevant to the characterisation of s 94(1) of the CPF Act to consider whether the effect or extent of the forfeiture is proportionate to the conduct of the First Respondent giving rise to the forfeiture. In the proper exercise by the Court of its discretion to determine the property that is subject to a restraining order, the Court may consider proportionality, amongst other things; but as noted above the characterisation exercise for constitutional purposes is not informed by proportionality.
45. For the avoidance of doubt, even if the Court were to conclude that as a matter of construction the discretion to make a restraining order under s 44(1) must be exercised on an 'all or nothing' basis – a restraint over all property owned, controlled or subsequently acquired by the offender or no restraint at all – it would not take the law outside the character of a forfeiture for which a requirement of just terms would be incongruous.

PART VI ESTIMATED HOURS

- 20 46. It is estimated that 30-40 minutes will be required for the presentation of the oral argument of the Commonwealth.
- Dated: 15 January 2014

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⁸² In this regard, s 3 of the *Forfeiture Act 1870* (33 & 34 Vict, c 23) conferred a power to order a person who was convicted for treason or felony to pay 'the costs or expenses incurred in and about the prosecution and conviction for the offence'.

⁸³ Cf First Respondent's Submissions, paras 36, 38.1, 38.2.