IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No: D5 of 2013

BETWEEN

ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY
First Appellant

10 **THE NORTHERN TERRITORY OF AUSTRALIA**
Second Appellant

and

REGINALD WILLIAM EMMERSON
First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS
20 Second Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Part I: Certification

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

30 ## Part II: Basis of Intervention

2. The Attorney-General for South Australia (**South Australia**) intervenes as of right under s78A of the *Judiciary Act 1903* (Cth) in support of the Appellants.

Part III: Why leave to intervene should be granted

3. Not applicable.

Filed by:
Crown Solicitor's Office
Level 9, 45 Pirie Street
ADELAIDE SA 5000

Ref: Nerissa Schwarz - 138366
Telephone: (08) 8207 1720
Facsimile: (08) 8207 2500
E-mail: schwarz.nerissa@agd.sa.gov.au

Solicitor for the Attorney-General of South Australia

Part IV: Constitutional and legislative provisions

4. South Australia adopts the Appellants' statement of the applicable constitutional and legislative provisions.

Part V: Argument

Issue

5. In the Northern Territory a declared drug trafficker, in addition to any sentence imposed for his or her offending, forfeits to the Territory all property belonging to him or her that is the subject of a prior restraining order and all property given away by him or her. That forfeiture is effected by force of s94(1) of the *Criminal Property Forfeiture Act* (NT) (**CPFA**). The trigger for that forfeiture is a declaration under s36A of the *Misuse of Drugs Act* (NT) (**MDA**). Under that section, if, upon hearing the parties and taking evidence, the Supreme Court of the Northern Territory is satisfied that the person has been found guilty of three specified offences within a 10 year period, the Court must declare the person a drug trafficker. In those circumstances, does the function conferred on the Court by s36A MDA undermine the institutional integrity of the Court by requiring it to make a declaration that may be inconsistent with the common understanding of what is a drug trafficker? Or, does it impermissibly enlist the Court in a substantially executive process thereby sapping its decisional independence? Or lastly, does it impermissibly undermine the institutional integrity of the Court by enlisting it in a process that results in the imposition of double punishment?

South Australia's submissions in summary

6. South Australia makes no submissions in relation to First Respondent's Notice of Contention.

7. South Australia submits that nothing in the statutory scheme created by s36A of the MDA and s94(1) of the CPFA impairs the institutional integrity of the Supreme Court so as to render it an unfit repository of federal jurisdiction. In summary, South Australia contends that:

    a. Section 36A of the MDA confers a power on the Court, coupled with a duty to exercise it, if the Court is satisfied of the existence of certain facts. In determining an application under s36A, the Court conforms to the usual standards and methods of the judicial process.

b. The existence of a discretion in the executive as to whether to bring an application for either a restraining order or a s36A declaration does not undermine the Court's decisional independence or enlist the Court in a substantially executive process.

c. Forfeiture under s94(1) CPFA constitutes an additional penalty, imposed by force of statute, representing the legislature's assessment of the seriousness of certain recidivist offending. There is no constitutional prohibition against the imposition of such an additional penalty.

The Kable Doctrine - Institutional Integrity and Chapter III

8. The Supreme Court of the Northern Territory is capable of being invested with the judicial power of the Commonwealth. The *Kable* doctrine, which operates as an implied limitation on legislative power, applies to legislation passed by the Parliament of the Northern Territory.[1]

9. Chapter III of the *Constitution* allows the judicial power of the Commonwealth to be vested in State and Territory courts.[2] This constitutional structure, and the assumptions that underpin it, provide the basis of the implied limitation on legislative power that was first recognised by this Court in *Kable v Director of Public Prosecutions (NSW)*.[3] The integrated Australian court system created by Chapter III requires that the institutional integrity of State and Territory courts be maintained so that they are suitable repositories of the judicial power of the Commonwealth. As Gageler J explained in *Assistant Commissioner Condon v Pompano*:

> To render State and Territory courts able to be vested with the separated judicial power of the Commonwealth, Ch III of the *Constitution* preserves the institutional integrity of State and Territory courts. A State or Territory law that undermines the actuality or appearance of a State or Territory court as an independent and impartial tribunal is incompatible with Ch III because it undermines the constitutionally permissible investiture in that court of the separated judicial power of the Commonwealth.[4]

---

1 *Ebner v Official Trustee in Bankruptcy* (2000) 105 CLR 337 at 363 [81] (Gaudron J); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ). See also *South Australia v Totani* (2010) 242 CLR 1 at 49 [72] (French CJ); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 497 [181] (Gageler J).

2 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 497 [180]-[181] (Gageler J).

3 (1996) 189 CLR 51. See also *South Australia v Totani* (2010) 242 CLR 1 at 38 [50] (French CJ). As with other constitutional implications, it must be "securely based": *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 134 (Mason CJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 453 [389] (Hayne J). See also See also *McGinty v Western Australia* (1996) 186 CLR 140 at 168-169 (Brennan CJ).

4 (2013) 87 ALJR 458 at 498 [183] (Gageler J).

10. Thus, the *Kable* doctrine requires that State and Territory courts are able to act "judicially".[5] No functions or powers may be conferred on State and Territory courts which are substantially repugnant to, or incompatible with, their institutional integrity.[6] If "the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics that mark a court apart from other decision-making bodies."[7]

11. Although the "defining characteristics" of a court elude precise definition, it is clear that independence and impartiality are crucial characteristics.[8] As Gummow, Hayne and Crennan JJ noted in *Forge v Australian Securities and Investments Commission*:

> It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so. An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal.[9]

12. In order to answer the description of a "court", within the meaning of Chapter III, a court must satisfy the minimum requirements of independence and impartiality.[10] These requirements must be maintained in both reality and appearance.[11]

13. Underpinning these requirements of impartiality and independence, and critical to the integrity of Chapter III courts, is the notion of "decisional independence". According to French CJ in *South Australia v Totani*:

> At the heart of judicial independence, although not exhaustive of the concept, is decisional independence from influences external to proceedings in the court, including, but not

---

5 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 497 [182] (Gageler J).

6 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 [101] (Gummow J); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1 at 48 [70] (French CJ), 63 [131]-[132] (Gummow J); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 487 [123] (Hayne, Crennan, Kiefel and Bell JJ).

7 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ).

8 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 477 [67] (French CJ), 488 [125] (Hayne, Crennan, Kiefel and Bell JJ); *Wainohu v New South Wales* (2011) 243 CLR 181 at 208 [49] (French CJ and Kiefel J).

9 (2006) 228 CLR 45 at 76 [64] (footnote omitted).

10 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29] (McHugh, Gummow, Kirby, Hayne Callinan and Heydon JJ); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 67-68 [41] (Gleeson CJ), 77 [66] (Gummow, Hayne and Crennan JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 552 [10] (Gummow, Hayne, Heydon and Kiefel JJ); *South Australia v Totani* (2010) 242 CLR 1 at 47 [69] (French CJ); 157 [427] (Crennan and Bell JJ).

11 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 363 [81] (Gaudron J).

> limited to, the influence of the executive government and its authorities. Decisional independence is a necessary condition of impartiality.[12]

By way of example, French CJ suggested that a law "which requires that a court give effect to a decision of an executive authority, as if it were a judicial decision of the court" would be inconsistent with the court's decisional independence.[13]

14. It is the decisional independence of the Supreme Court of the Northern Territory that is in issue in this case.

The Legislative Scheme

15. To determine whether the *Kable* doctrine has been infringed, the Court is required to engage in an "evaluative process".[14] This process requires close scrutiny of the legislative scheme in order to determine its legal and practical effect.

16. The MDA and the CPFA create a legislative scheme for the forfeiture to the Northern Territory of property of persons who have been found guilty of certain drug offences. The legislative scheme has a number of steps.

17. First, pursuant to s41(2) of the CPFA, the DPP may apply to the Supreme Court for a restraining order over a person's property, which the Court "may" make pursuant to s44(1) CPFA.

18. Under s50(2) of the CPFA, the applicant in relation to a restraining order under s44(1) (namely, the DPP) must request the Court to set the order aside if the person could not be declared a drug trafficker under s36A of the MDA. In addition, the DPP may request the Court to set the order aside for any other reason: see s50(3).

19. The CPFA also contains an objection process whereby a person may, prior to the forfeiture of property, apply to the Supreme Court objecting to the restraint of property.[15]

20. After a restraining order has been made by the Supreme Court,[16] the DPP may apply to the Supreme Court under s36A(1) of the MDA for a declaration that a person is a drug trafficker.

---

12 (2010) 242 CLR 1 at 43 [62] (footnote omitted).
13 *South Australia v Totani* (2010) 242 CLR 1 at 48 [70].
14 *K-Generation Pty Ltd v Licensing Court of South Australia* (2009) 237 CLR 501 at 530 [90] (French CJ).
15 *Criminal Property Forfeiture Act* (NT), Part 5.
16 A party may also apply for leave to appeal against the order to the Supreme Court: see *Supreme Court Act* (NT), ss 51, 53. See also *Burnett v Director of Public Prosecutions* (2007) 21 NTLR 39 at 116 [247] (Mildren J).

Section 36A(3) of the MDA specifies that, upon application by the DPP, the Court "must" declare a person to be a drug trafficker if the person has been:

a. found guilty by the court of an offence specified in subsection (6); and

b. in the 10 years prior to the day on which the offence was committed,[17] the person has been found guilty on 2 or more occasions of an offence corresponding to an offence referred to in subsection (6), or on one occasion of 2 separate charges relating to separate offences of which 2 or more correspond to an offence or offences referred to in subsection (6).

21. If the Court finds that those conditions are satisfied, the Court is required to make a declaration that the named person is a drug trafficker.

22. Once a s36A declaration is made, s94(1) of the CPFA operates of its own force to effect the forfeiture to the Territory of all property subject to a restraining order that is owned or effectively controlled by the person or was given away by the person. The Court does not order forfeiture. Rather, the Court's declaration operates as the trigger for a legislative consequence.

23. The effect of the scheme created by s94(1) of the CPFA and s36A of the MDA is to impose an additional penalty on an offender who satisfies the criteria listed in s36A.[18]

24. In the ordinary course, sentencing judges may only sentence an offender for the particular offence before the court. A court cannot sentence an offender for an offence not charged[19] nor increase a sentence by reason of an offender's prior offending.[20] Prior convictions and the sentences imposed thereon are relevant to sentence only insofar as they inform the court's assessment of what is necessary to fulfil the purposes of the punishment to be imposed in the case before the court (i.e. they are relevant to the assessment of the need for retribution, personal deterrence and the protection of the community).[21]

25. In contrast, the forfeiture imposed by s94(1) operates independently of the sentences which have been imposed for each qualifying offence; it represents an additional penalty upon the person

---

17 Or the first day on which the offence was committed, as the case requires: see s36A(3)(b).

18 Whether or not the jurisdiction is civil does not necessarily determine that characterisation; see *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Limited* (2003) 216 CLR 161 at 198-199 [114] (Hayne J).

19 *R v De Simoni* (1981) 147 CLR 383 at 389 (Gibbs CJ), 395 (Wilson J), 406 (Brennan J).

20 *Baumer v The Queen* (1988) 166 CLR 51 at 57 (Mason CJ, Wilson, Deane, Dawson and Gaudron JJ).

who has committed three offences. It reflects the legislature's acknowledgment of the constraints within which sentencing for a particular offence occurs, an assessment that an additional penalty is warranted for a declared drug trafficker, and that the repetitive nature of the declared drug trafficker's offending, and the social cost of that offending and the drug trade more generally, warrants the forfeiture of all of his or her property in every case.

The Court's function under s36A MDA

26. The function of the Court in making a drug trafficker declaration is to determine whether the criteria set out in s36A(3) are met. The s36A declaration does not purport to describe a person as a "drug trafficker" in other contexts or for all purposes, but is limited to a statement that the person meets the necessary criteria to be a "drug trafficker" for the purposes of the MDA. It is a short-hand expression by which the Court states its conclusion that certain provisions of the MDA are satisfied. In the process of determining whether the person meets the statutory criteria, the Court engages in an orthodox fact-finding process.

27. To the extent that the Court engages in making a declaration of fact, the content of the declaration is that expressed in the scheme, namely that the person has been found guilty of certain offences within a certain timeframe. It is therefore not to the point that the declaration under s36A may not correlate to what, in common parlance, is understood by the term "drug trafficker".[22]

28. At all stages of the process under the CPFA and the MDA scheme, the Court conforms to the usual standards and methods of the judicial process. Hearings are conducted in public, the onus of proof is generally on the applicant, the rules of evidence apply, the duty to make a declaration is contingent upon the satisfaction of specified criteria, the outcome of each case is to be determined on the merits and there is a right of appeal. The Court also retains its inherent powers to ensure fairness and prevent an abuse of process.[23] The Court's determination as to whether the specified criteria pertain is made independent of any "instruction, advice or wish of the Legislature or the Executive Government."[24]

---

21 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477-478 (Mason CJ, Brennan, Dawson and Toohey JJ); *DPP v Ottewell* [1970] AC 642 at 650 (Lord Donovan); *Baumer v The Queen* (1988) 166 CLR 51 at 57 (Mason CJ, Wilson, Deane, Dawson and Gaudron JJ); R *v McNaghton* (2006) 66 NSWLR 566.

22 As recognised by Riley CJ in the Court of Appeal: *Emmerson v Director of Public Prosecutions* [2013] NTCA 4 at [31]. Cf [83]-[84] (Kelly J), [127], [131] (Barr J).

23 *Director of Public Prosecutions v Emmerson* (2012) 32 NTLR 180 at 222 [107] (Southwood J).

24 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

29. It may be accepted that proof of a finding of guilt is likely in many cases to be as simple as tendering the Court record or the defendant's antecedent report. In some cases, the facts may be agreed. However, that does not in any sense undermine the requirement that the Court must satisfy itself that the findings of guilt in fact occurred. The decisional independence of the Court in considering those matters remains. Further, the facts of which the Court must be satisfied, namely the findings of guilt, represent the outcome of the ordinary judicial process in determining criminal guilt, with its usual attendant safeguards.

30. In addition, the role of the Supreme Court should be viewed in the context of the whole statutory scheme. As explained above, the precursor to a declaration is a restraining order made by the Court under s44 of the CPFA. The scheme includes specific procedures governing objections and the setting aside of restraining orders (see above at [19]-[20]).

31. The conferral of a power in s36A, coupled with a duty to exercise the power if the conditions listed in s36A(3) are satisfied, does not substantially impair the Court's institutional integrity. Statutory provisions which confer powers on a court, coupled with a duty to exercise the power if certain conditions are satisfied, are by no means exceptional.[25] It has been accepted by this Court that a legislative provision requiring a court to make specified orders if particular conditions are met will not, for that reason alone, render such provision invalid on the ground of the *Kable* doctrine.[26]

Direction by the Executive?

32. It is also apparent that the DPP does not impermissibly direct the Court as to the content of its judicial decisions so as to infringe the *Kable* doctrine.[27]

33. The majority of the Court of Appeal held that the Court's declaration under s36A amounted to an enlistment of the Supreme Court in the implementation of legislative and executive decisions. The "reputation"[28] and "neutral"[29] colour of judicial decision-making was said to have been

---

25 *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319 at 360 [77] (Gummow and Bell JJ), 386 [157] (Heydon J).

26 *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319 at 352 [49]. See also, *Palling v Corfield* (1970) 123 CLR 52 at 58-59 (Barwick CJ), 64 (Menzies J), 67 (Owen J), 69-70 (Walsh J); *South Australia v Totani* (2010) 242 CLR 1 at 49 [71] (French CJ), 129 [339] (Heydon J); *Director of Public Prosecutions (SA) v George* (2008) 102 SASR 246 at 270 [112] (Doyle CJ). This is consistent with other cases in which the validity of Commonwealth and State laws creating a duty upon the courts to impose mandatory sentences has been upheld: *Magaming v The Queen* [2013] HCA 40; *R v Ironside* (2009) 104 SASR 54; *Lloyd v Snooks* (1999) 9 Tas R 41; *Wynbyne v Marshall* (1997) 177 NTR 11.

27 *South Australia v Totani* (2010) 242 CLR 1 at 49 [71] (French CJ).

28 *Emmerson v Director of Public Prosecutions* [2013] NTCA 4 at [132] (Barr J).

given to what is in reality an executive decision of the DPP. While Barr J considered that the adjudicative process by which a s36A application was determined did not suffer "judicial process" or procedural flaws to the extent of *International Finance Trust Company Ltd*[30] and *Totani*,[31] Kelly J was of the view that the legislation was "functionally equivalent" to that invalidated by a majority of this Court in *Totani*.[32]

34. The legislative scheme here is distinguishable from that considered in *Totani*.[33] The vice identified in *Totani* was the anterior enquiry undertaken by the executive branch which formed an essential element and effectively pre-ordained the curial decision of the court in making a control order.[34] It was the coupling of the court's duty with the anterior classification by the Attorney-General which infected the judicial function, which brought the decisional independence of the court into question.

35. In the present case, there is no analogous executive determination permeating and infecting the judicial function.[35]

36. The fact that the DPP has a discretion whether or not to make an application for a restraining order or a s36A drug trafficker declaration does not offend the institutional integrity of the Supreme Court. It is axiomatic that judicial power is not exercised other than at the initiative of a party.[36] Courts do not act of their own motion. The exercise of judicial power does not begin until a court is called upon by application of a party to make a binding and authoritative decision.[37]

---

29 *Emmerson v Director of Public Prosecutions* [2013] NTCA 4 at [92] (Kelly J).

30 *International Finance Co Limited v New South Wales Crime Commission* (2009) 240 CLR 319.

31 *South Australia v Totani* (2010) 242 CLR 1.

32 *Emmerson v Director of Public Prosecutions* [2013] NTCA 4 at [126] (Barr J); [92] (Kelly J). Note that Kelly J also considered that the legislation was "functionally equivalent" to the impugned provisions invalidated by Kourakis CJ in *Bell v Police* [2012] SASC 188. Note that this judgment has recently been reversed by the Full Court of the Supreme Court of South Australia: *Attorney-General for the State of South Australia v Bell* [2013] SASCFC 88.

33 Cf *Emmerson v Director of Public Prosecutions* [2013] NTCA 4 at [92] (Kelly J).

34 *South Australia v Totani* (2010) 242 CLR 1 at 21 [4], 35 [41], 52-53 [80]-[82] (French CJ), 56 [100], 65 [139], 67 [149] (Gummow J), 88-89 [226] (Hayne J), 157 [428], 160 [436] (Crennan and Bell JJ), 163 [445], 169 [469] (Kiefel J).

35 Nor does any interference with the judicial process arise because of the legislative consequence under s94(1) CPFA. That forfeiture occurs by force of statute independently of the court process.

36 It is central to the notion of judicial power that there exists some controversy between citizen and state or citizen and citizen requiring resolution by a court: R *v Davison* (1954) 90 CLR 353 at 368 (Dixon CJ and McTiernan J).

37 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ); *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 87 ALJR 410 at 420 [28] (French CJ and Gageler J).

37. Here, the DPP, just as any other moving party, engages the Court's jurisdiction by making an application for a particular order. The DPP, in exercising this discretion, in no way directs or dictates the Court's exercise of judicial power. The DPP merely applies to the Court for it to exercise a power, which it must exercise if satisfied of the statutory criteria.

38. That the scheme "leaves it to the DPP to determine those people to whom the consequences" of forfeiture shall apply[38] is similar to the DPP's usual discretion to determine which charges, if any will be laid.

39. Both criminal offences, and the overlapping statutory scheme created by the MDA and the CPFA, support a norm of conduct. In both cases a breach of the norm renders the individual liable to a penalty. In both cases, a defendant is able to order his or her affairs to avoid the penalty.

40. As with the commission of an offence, enforcement of the norm under s36A of the MDA and s94(1) of the CPFA is not automatic upon breach. In neither case is the imposition of penalty for breach of the norm a certainty.

41. Rather, in each instance an offender merely becomes liable to penalty. In each case, the DPP determines whether proceedings will be commenced against the person which, depending upon their conclusion, may result in the imposition of a penalty.

42. As this Court confirmed in *Magaming v The Queen*, there is no constitutional difficulty with the prosecution making decisions which have an impact upon the punishment that a court will ultimately impose.[39] Prosecutorial choice between two different charges, or between whether to proceed summarily or on indictment, may have significant repercussions in terms of the penalty that a Court will ultimately, or may be required, to impose.[40]

43. Further, the DPP's discretion, both to apply for a restraining order under s41(3) of the CPFA and a declaration under s36A(1) of the MDA, though broad, is not at large. It is confined by the subject-matter scope and purpose of the legislation.[41]

---

38 *Emmerson v Director of Public Prosecutions* [2013] NTCA 04 at [88] (Kelly J).

39 *Magaming v The Queen* [2013] HCA 40 at [25]-[27], [38]-[39] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Palling v Corfield* (1970) 123 CLR 52 at 58-59 (Barwick CJ), 64 (Menzies J), 67 (Owen J), 69-70 (Walsh J).

40 *Magaming v The Queen* [2013] HCA 40 at [38]-[39] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

41 *Wotton v Queensland* (2012) 246 CLR 1 at 9 [9] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

44. For the reasons above, the overlapping statutory scheme created by the CPFA and the MDA does not interfere with the decisional independence of the Supreme Court. It confers no functions or powers on the Court which compromise, either in fact or appearance, its independence or impartiality.

Additional penalty

45. As explained above, forfeiture is to be understood as an additional penalty. Such additional penalty is not to be taken into account by the Court in the process of sentencing for the third offence.[42]

46. A statutory scheme to impose additional penalties, by way of forfeiture, does not offend the *Kable* doctrine. It is open to Parliament to determine that the objective of deterrence requires further penalties to be imposed, beyond the sentence that has been imposed for each individual qualifying offence. Just as it is a matter for Parliament to gauge the seriousness of certain offending and to determine the level of punishment necessary to suppress that activity,[43] Parliament may choose to impose additional penalties in relation to recidivist offending.

47. The additional penalty is not imposed for the underlying offences alone, but reflects a broader assessment of the need to deter the offender having regard to all of the underlying offences, taken as a whole.

48. In any event, there is no constitutional prohibition against double punishment. The rule of sentencing practice (if not of law) against double punishment is a manifestation of the concept of double jeopardy, and has a common law or statutory foundation.[44] Accordingly, it is amenable to legislative modification.[45] The historical source of that rule does not elevate it to the status of a constitutional requirement.[46] That is so even in respect of common law rules that are developed as a means of affording fairness to a party.[47] It is only those common law principles that manifest some fundamental characteristic of judicial power that attract constitutional protection under the *Kable* doctrine.

---

42 *Sentencing Act* (NT), s5(4)(c).
43 *Magaming v The Queen* [2013] HCA 40 at [105] (Keane J).
44 *Pearce v The Queen* (1998) 194 CLR 610 at 614 [9]-[10], 621-622 [34]-[38], 623 [40] (McHugh, Hayne and Callinan JJ), 629 [66] (Gummow J), 637 [92] (Kirby J).
45 *Pearce v The Queen* (1998) 194 CLR 610 at 623 [40] (McHugh, Hayne and Callinan JJ).
46 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 87 ALJR 410 at 421 [35] (French CJ and Gageler J).
47 *Nicholas v The Queen* (1998) 193 CLR 173 at 273 [236] (Hayne J).

49. Finally, s94(1) CPFA does not constitute a bill of pains and penalties. The distinctive characteristic of a bill of attainder (or bill of pains and penalties) is:

> ... a legislative enactment adjudging a specific person or specific persons guilty of an offence constituted by past conduct and imposing punishment in respect of that offence.[48]

50. No such adjudgment occurs here. Both the findings of guilt in relation to the underlying offences, and the finding that a person meets the statutory criteria, are undertaken by the Court. It is only the forfeiture which occurs by force of the legislation. Provisions which provide for forfeiture of property pursuant to legislation are well-known to the law and existed prior to and after federation.[49]

Part VI: Estimate of time for oral argument

51. South Australia estimates that 15 minutes will be required for the presentation of oral argument.

Dated 22 November 2013

M G Hinton QC
Solicitor-General for South Australia
T: 08 8207 1536
F: 08 8207 2013
E: solicitor-general'schambers@agd.sa.gov.au

A C Carter
Counsel
T: 08 8207 1747
F: 08 8207 2013
E: carter.anne@agd.sa.gov.au

---

48 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 535 (Mason CJ).

49 For example, *Birds Protection Act 1900* (SA) s5, *An Act to impose certain Rates and Duties upon Wheat and other Grain Flour Meal and Biscuit exported from the province of South Australia and to prevent the clandestine Exportation of the same* (Act No 3 of 1839) (SA) s3, *An Act for the General Regulation of the Customs in the Colony of Victoria* (Act No 23 of 1852) (Vic), s29, *Distillation Act 1869* (Tas), s87. See also the Acts referred to in *Burton v Honan* (1952) 86 CLR 169 at 173-174 (A L Bennett QC in argument).