

BETWEEN:

ATTORNEY-GENERAL FOR THE
NORTHERN TERRITORY
First Appellant

and

THE NORTHERN TERRITORY
OF AUSTRALIA
Second Appellant

and

REGINALD WILLIAM EMMERSON
First Respondent

And

THE DIRECTOR OF PUBLIC
PROSECUTIONS
Second Respondent



FIRST RESPONDENT'S SUBMISSIONS (cont.)

Statement of argument in answer to the argument of the Interveners

1. These submissions are suitable for publication on the internet.
- 10 2. These submissions are made in answer to the written submissions of the Attorneys General for New South Wales, Queensland, South Australia and Western Australia. The majority of the matters raised in these submissions reflect points made by the appellants in their written submissions. Emmerson's answers to these matters are set out in his written submissions filed 6 December 2013. The submissions below respond to matters raised by the Attorneys General which are not dealt with in Emmerson's written submissions.

Reply to submissions of the Attorney-General for New South Wales

- 20 3. The intervener places particular reliance on the Court's discretion under s.44(1)(a) of the CPFA in relation to the making of a restraining order to support the submission that the tasks given to the Court under the Scheme do not substantially impair the institutional integrity of the Court¹, including by making

¹ Submissions of the Attorney-General for New South Wales at [22]-[27].

the submission that the Court would exercise its discretion by reference to the objective in s.3 of the CPFA “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”². In response, Emmerson submits:

10 3.1. before the Northern Territory Court of Appeal (the NTCA) it was common ground that Southwood J was wrong to hold that, on an application for a restraining order under s.44(1)(a) of the CPFA, the Court was entitled to confine the ambit of a restraining order “to property of a value that is proportional to the likely cost of deterring, detecting and dealing with the criminal activities³ of the particular offender who is the respondent to the application for a restraining order”.⁴ The NTCA agreed with the parties’ position in this respect and explained why this was correct;⁵

3.2. for the same reasons, the Court would not have power to confine the ambit of a restraining order to “the proceeds of crime...in order to prevent unjust enrichment”⁶;

20 3.3. the Court should note that Emmerson made an application to Southwood J to exercise the Court’s inherent power to set aside the restraining order in relation to his assets which reflect genuinely derived wealth for the reasons set out at (2012) 32 NTLR 180 at [83]. His Honour rejected this application noting that:

30 *I am not aware of any decision of a superior court setting aside a restraining order (which has been regularly obtained) because of the hardship that a respondent will suffer if the final relief sought by an applicant is granted. Nor am I aware of any decision of a superior court setting aside a restraining order (which has been regularly obtained) because the value of the property which may be forfeited is disproportionate to the seriousness of the respondent’s criminal conduct.*⁷

3.4. a concession was made below by the appellants that “the court’s discretion on an application under s.44 for a restraining order was limited to the power to restrain an abuse of its processes, and not to limit the amount of property to be restrained for other reasons”.⁸

40 4. In these circumstances, the intervener’s reliance on this discretion as a factor which militates against the application of the *Kable* principle to the Scheme is misconceived. Further, in the light of the concession of the appellants below and the fact that, consistently with this concession, the appellants do not

² Submissions of the Attorney-General for New South Wales at [24].

³ The term found in s.10(2) of the CPFA.

⁴ (2012) 32 NTLR 180 at [106].

⁵ (2013) 33 NTLR 1 per Riley CJ at [13]-[16]; per Kelly J at [64]-[70]; per Barr J at [97]-[98].

⁶ CPFA, s.3.

⁷ (2012) 32 NTLR 180 at [85].

⁸ (2013) 33 NTLR 1 per Kelly J at [72], footnote 53.

appear to place any reliance on this discretion in this Court⁹, by making this submission the intervener risks exceeding his proper role.¹⁰

5. In response to the matters raised in paragraph 43 and 44 of these submissions rejecting the characterisation of the imposition effected by the Scheme as “double punishment”, Emmerson submits:

10 5.1. the suggested alternative of preventing unjust enrichment is not sustainable. The practical operation of the Scheme targets legitimately derived wealth only;¹¹

5.2. the suggested alternative of compensating “the Territory community for the costs of deterring, detecting and dealing with the criminal activities”¹² should also not be accepted. There is no credible link between the forfeiture effected by the Scheme and the provision of compensation to the “Territory community” for any such costs.¹³ Further, the appellants do not seek to justify it as such and, accordingly, this submission also risks exceeding an intervener’s proper role;¹⁴

20 5.3. in contrast to the legitimate objects to be achieved from the “legislative consequences” listed in paragraph 44, the Scheme’s achievements are confined to providing a substantial financial benefit to the Territory by imposing the most significant financial penalty which it is possible to impose on an offender who has already been punished for the relevant offending.

Reply to submissions of the Attorney-General for Western Australia

6. With respect to the reference to the “countless epithets used in the course of the judicial process” some of which are “highly stigmatic” as referred to in paragraphs 19 and 20 of these submissions, Emmerson submits:

30 6.1. there is a material difference between the use by a legislature of such terms in the title or mechanics of legislation¹⁵ and a legislative injunction to the Court to make a declaration in relation to a person in “highly stigmatic” terms which fall outside the terms of any declaration which the Court might make in the exercise of a judicial function;

6.2. Emmerson’s research suggests that legislation which compels the making of declarations of this kind about a person is confined to s.36A of the MDA and its Western Australian equivalent, s.32A of the Misuse of Drugs Act 1981: see the attached appendix.

⁹ See the references at Emmerson’s submissions at [18].

¹⁰ *Pape v Commissioner of Taxation of the Commonwealth of Australia* (2009) 238 CLR 1 per Gummow, Crennan and Bell JJ at [253].

¹¹ Emmerson’s submissions at [38.2].

¹² CPFA, s.10(2).

¹³ *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133; see also paragraph 3 above.

¹⁴ *Supra* at footnote 10.

¹⁵ E.g., whereby a person is “taken to have been convicted of a serious offence”: *Silbert v DPP* (2004) 217 CLR 181.

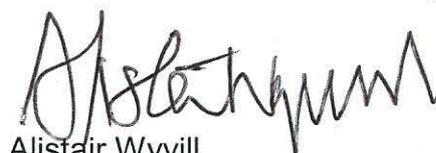
Reply to submissions of the Attorney-General for South Australia

7. Emmerson respectfully agrees with the submissions at paragraph 23 *et seq* that the effect of the Scheme is to impose an additional penalty on an offender.
8. The submissions at paragraphs 45 to 50 that “a statutory scheme to impose additional penalties, by way of forfeiture, does not offend the *Kable* doctrine” and that “there is no constitutional prohibition against double punishment” are not to the point:
- 10 8.1. the *Kable* principle is offended in this instance not because the Scheme imposes additional penalties by way of forfeiture *per se* but because of the manner in which the Scheme deploys the Court to achieve that outcome, particularly by clothing executive decision-making with the appearance of the exercise of judicial power on the part of the Court;
- 8.2. legislative power is exceeded in this instance not because the Scheme imposes double-punishment but because it gives a discretion to the executive to impose double-punishment.¹⁶

Reply to submissions of the Attorney-General for Queensland

- 20 9. Contrary to the submission in paragraph 22(a), the procedure for filing an objection under the CPFA¹⁷ does not provide a genuine adjudicative process which might counter its invalidity on *Kable* grounds. It will only provide assistance to a person claiming an interest in the restrained property who is not the respondent¹⁸. No such submission is made by the appellants.
10. Contrary to the submission at paragraph 30, adding “within the meaning of s.36A of the MDA” to the declaration provides no greater clarity to the meaning and effect of the declaration which the Court is required to make and does not save the Scheme. As noted by the majority¹⁹, “drug trafficker” is not defined by
- 30 the MDA.

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¹⁶ Emmerson’s submissions at [28]-[30].

¹⁷ see ss.59, 60 and 65.

¹⁸ CPFA, s.65(1).

¹⁹ (2013) 33 NTLR 1 per Kelly J at [85]; per Barr J at [105].

“Court Must Declare”

Commencement	Title of the Act	Section	Provision
1994	<i>Electoral Act 1992</i> (Qld)	128(14)	<p>Official Counting of votes If, on any count at which the candidate with the fewest number of votes must be excluded, 2 or more candidates have an equal number of votes and the candidates are the only continuing candidates –</p> <ul style="list-style-type: none"> (a) The returning officer must refer the matter to the commission, which must refer it to the Court of Disputed Returns; and (b) The court must determine the validity of any disputed ballot papers and recount all of the ballot papers by applying subsection (3)(b) and (c) and subsections (5) and (12) and (c) If the determination and recount results in a candidate being elected – the court must declare the candidate elected; and (d) If not – the court must order that a fresh election be held.
1995	<i>Customs Act 1901</i> (Cth)	205D(5)	<p>Treatment of goods seized if a claim for return is made Subject to subsection (6) if:</p> <ul style="list-style-type: none"> (a) Goods seized as special forfeited goods have not been dealt with under section 206 or 207; and (b) Proceedings of the kind referred to in paragraph (2)(d) or (e) are commenced in respect of the goods; and (c) On completion of the proceedings, the court is satisfied that the goods are special forfeited goods; <p>the court must declare the goods to be special forfeited goods and make an order for condemnation of the goods as forfeited to the Crown.</p>
1997	<i>Electoral Act 1985</i> (SA)	95(16)	<p>Scrutiny of Votes in Legislative Council election If in respect of the last vacancy, the continuing candidates have an equal number of votes, the matter must be referred, on the application of the Electoral Commissioner, to the Court of Disputed Returns for the Court to determine the validity of any disputed ballot papers and</p> <ul style="list-style-type: none"> (a) if the deadlock is resolved – the court must declare the appropriate candidate elected; but (b) if the deadlock is not resolved – the Court must order a fresh election to be held in accordance with any directions of the Court with the continuing candidates as the sole candidates in that election.
1997	<i>Sentencing Act 1991</i> (Vic)	18(4)	<p>Time held in custody before trial etc. to be deducted from sentence If an offender was held in custody in circumstances to which subsection (1) applies, then the court must declare the period to be reckoned as already served under the sentence and cause to be noted in the records of the court the fact that the declaration was made and its details.</p>
1997	<i>Sentencing Act 1991</i> (Vic)	35(2)	<p>Time held in custody before trial etc. to be deducted from sentence - Young Offenders If a young offender was held in custody in circumstances to which subsection (1) applies, then the court must declare the period to be reckoned as already served under the sentence and cause to be noted in the records of the court the fact that the declaration was made and its details.</p>
1997	<i>Penalties and Sentences Act 1992</i> (Qld)	S161B (1)	<p>Declaration of Conviction of Serious Violent Offence If an offender is convicted of a serious violent offence under section 161A(a), the sentencing court must declare the conviction to be a conviction of a serious violent offence as part of the sentence.</p>
1997	<i>Local Government Act 1993</i> (TAS)	278(2)	<p>Electoral Advertising. If a court convicts under this section a candidate who is successful at an election, the court must declare that candidate’s election void, unless the court is satisfied that there are special circumstances that make it undesirable or inappropriate for it to make such a declaration.</p>
2000	<i>Criminal Property Confiscation Act 2000</i> (WA)	22(1)	<p>The Making of Crime-Used Property Substitution Declarations On hearing an application under section 21, the court must declare that property owned by the respondent is available for confiscation instead of crime-used property if</p> <ul style="list-style-type: none"> (a) the crime-used property is not available for confiscation as mention in subsection (2); and (b) it is more likely than not that the respondent made criminal use of the crime-used property.

2000	<i>Criminal Property Confiscation Act 2000 (WA)</i>	12(1)	On hearing an application under section 11(1), the court must declare that the respondent has unexplained wealth if it is more likely than not that the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth.
2000	<i>Criminal Property Confiscation Act 2000 (WA)</i>	16(1)	On hearing an application under section 15(1), the court must declare that the respondent has acquired a criminal benefit if it is more likely than not that - (a) The property, service, advantage or benefit described in the application is a constituent of the respondent's wealth; (b) The respondent is or was involved in the commission of the confiscation offence; and (c) The property, service, advantage or benefit was wholly or partly derived or realised, directly or indirectly, as a result of the respondent's involvement in the commission of the confiscation offence, whether or not it is lawfully acquired.
2002	<i>Criminal Code Act 1983 (NT)</i>	43X(4)	Findings at a Special Hearing If the jury at a special hearing finds, on the evidence available, that the accused person committed the offence charged, the finding: (a) is taken to be qualified finding of guilt and does not constitute a basis in law for a finding of guilt of the offence to which the finding relates; (b) constitutes a bar to further prosecution in respect to the same conduct and circumstances; and (c) is subject to appeal in the same manner as if it were a finding of guilt at a criminal trial. and the court must declare that the accused person is liable for supervision under Division 5 or discharge the accused unconditionally.
2002	<i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)</i>	28 (4)	Nominal term of a supervision order In setting a nominal term for a supervision order, the court must declare the day from which the nominal term runs.
2003	<i>Confiscation of Criminal Assets Act 2003 (ACT)</i>	24	Setting aside dealings with restrained property (1) The DPP may apply to a relevant court for an order that a dealing with restrained property be set aside if - (a) the dealing was in contravention of the restraining order; and (b) the dealing - i. was not for sufficient consideration; or ii. transferred property to a person who was not acting honestly; or iii. transferred property to a person who did not take reasonable care to establish that the property may be lawfully acquired by the person. (2) On application under subsection (1), the court may make an order setting aside a dealing with property in contravention of the restraining order. (3) The order may be expressed to take effect on: (a) the day when the dealing took place; or (b) the day when the order setting aside the dealing is made. (4) If the court makes the order mentioned in subsection (3)(b), the court must declare the rights of anyone who acquired an interest in the property on or after the day of the dealing and before the day the order is made.
2003	<i>Confiscation of Criminal Assets Act 2003 (ACT)</i>	126	Buyback Orders (1) On application under section 125, the court may by order, declare that a person may buy an interest in a forfeited property from the Territory if it is satisfied that - (a) The interest is still vested in the Territory; and (b) It would be contrary to the public interest to do so; and (c) If the order applied for is in relation to an interest other than the interest formerly held by the person - no-one else who held an interest in the forfeited property immediately before forfeiture objects to the making of the order (2) In making the order, the court must declare - (a) The extent, nature and value of the interest in the forfeited property that is bought from the Territory; and (b) That the interest may be bought from the Territory for the value declared under paragraph (a) within 1 month after the day the order is made.

2004	<i>Health Professional s Regulation 2004 (ACT)</i>	79	Bribery or undue influence by person election If the Court of Disputed Health Elections finds that a person who was declared elected committed, or attempted to commit, bribery or undue influence in relation to any election, the court must declare the election of the person void.
2007	<i>Family Relationship s Act 1975 (SA)</i>	11B	Declaration as to domestic partners (1) A person whose rights or obligations depend on whether – (a) He or she and another person; or (b) 2 other persons, were, on a certain date, domestic partners, 1 of the other may apply to the Court for a declaration under this section (2) If, on an application, the Court is satisfied that – (a) The persons in relation to whom the declaration is sought were, on the date in question, domestic partners within the meaning of section 11A; or (b) In another case – (i) The persons in relation to whom the declaration is sought, were on the date in question, domestic partners living together in a close personal relationship; and (ii) The interests of justice require that such a declaration be made, the Court must declare that the person were, on the date in question, domestic partners 1 of the other.
2007	<i>Corporation s Act 2001 (Cth)</i>	473(8)	General Provisions about Liquidators If more than one liquidator is appointed by the Court, the Court must declare whether anything that is required or authorised by the Act to be done by the liquidator is to be done by all or any one or more of the persons appointed.
2008	<i>Status of Children Act 1974 (VIC)</i>	28(3)	Court may order discharge of substitute parentage order If the court makes an order discharging the substitute parentage order, the court must declare the name by which the child is to be known, having regard to the principle that a child's first name should not be changed except in exceptional circumstances.

Court Shall Declare

Comment	Title of the Act	Section	Provision
1890	<i>Moore-Street Improvement Act 1890 (NSW)</i> (Repealed)	7	Appeal by owner aggrieved at assessment ... The giving of notice of appeal as herein provided shall not discharge any appellant from his liability under this Act until the appeal shall be determined, but the Council shall refund together with interest thereon at five pounds per centum per annum to the appellant any sum which the Court shall declare to have been paid to the Council without authority or in excess of the proper amount.
1943	<i>Companies (Co-Operative) Act 1943 (WA)</i> (Repealed)	200(3)	General provisions as to official liquidators If more than one official liquidator is appointed by the court, the Court shall declare whether any act by this Act required or authorised to be done by the official liquidator is to be done by all or any more of the persons appointed.
1981	<i>Companies Act 1981 (Cth)</i> (Repealed)	373(8)	General provisions as to liquidators If more than one liquidator is appointed by the Court, the Court shall declare whether anything that is required or authorized by this Act to be done by the liquidator is to be done by all or any one or more of the persons appointed.

1989	<i>Crown Proceedings Act 1958</i> (Vic)	5	<p>Recovery of moneys payable under forfeited recognisances</p> <p>(1) Where a court is satisfied that a person has failed to observe a condition of a recognisance to Her Majesty the court shall declare the recognisance to be forfeited and shall order that the amount of the recognisance be paid to the proper officer of the court forthwith or within such time as the court allows and that in default of payment of that amount in accordance with the order—</p> <p>(a) in the case of a principal—that he be imprisoned for the term (not exceeding two years) fixed by the order; and</p> <p>(b) in the case of a surety—that the amount be obtained by seizing and selling the property of the surety and in default, in whole or in part, that the surety be imprisoned for the term (not exceeding two years) fixed by the order.</p>
1989	<i>Crown Proceedings Act 1958</i> (Vic)	6	<p>Breach of bail</p> <p>(1) Where a court is satisfied that a person has failed to observe a condition of bail the court shall declare the bail to be forfeited and shall order that the amount undertaken by the surety or sureties to be paid to Her Majesty in event of such a breach to be paid to the proper officer of the court forthwith or within such time as the court allows and that in default of payment of that amount in accordance with the order that the amount be obtained by seizing and selling the property of the surety or sureties and in default, in whole or in part, that the surety or sureties be imprisoned for the term (not exceeding two years) fixed by the order.</p>
1994	<i>Electoral Act 1992</i> (ACT)	267	<p>Bribery or Undue Influence by person elected</p> <p>If the Court of Disputed Elections finds that a person who was declared elected committed, or attempted to commit, bribery or undue influence in connection with any election, the court shall declare the election of that person void.</p>