HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY & ANOR — APPELLANTS

AND

REGINALD WILLIAM EMMERSON & ANOR — RESPONDENTS

Attorney-General (NT) v Emmerson
[2014] HCA 13
10 April 2014
D5/2013

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Northern Territory made on 28 March 2013 and paragraphs 1, 2 and 4 (first appearing) of the order of the Court of Appeal made on 13 May 2013 and, in their place, order that the appeal to that Court be otherwise dismissed with costs.*

3. *The second appellant pay the first respondent's costs in this Court.*

On appeal from the Supreme Court of the Northern Territory

Representation

M P Grant QC, Solicitor-General for the Northern Territory with R H Bruxner and S L Brownhill for the appellants (instructed by Solicitor for the Northern Territory)

A Wyvill SC and N Christrup with P W Johnston for the first respondent (instructed by Ward Keller Lawyers)

Submitting appearance for the second respondent

Interveners

J T Gleeson SC, Solicitor-General of the Commonwealth with C J Horan for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with N L Sharp for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor (NSW))

W Sofronoff QC, Solicitor-General of the State of Queensland with G J D del Villar for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

M G Hinton QC, Solicitor-General for the State of South Australia with A C Carter for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

G R Donaldson SC, Solicitor-General for the State of Western Australia with K E McDonald for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

CATCHWORDS

Attorney-General (NT) v Emmerson

Constitutional law (Cth) – Judicial power of the Commonwealth – Constitution, Ch III – Section 36A of *Misuse of Drugs Act* (NT) and s 94 of *Criminal Property Forfeiture Act* (NT) effect statutory scheme for forfeiture of property – Section 36A provides that Supreme Court can declare a person to be a "drug trafficker" – Section 94(1) provides for forfeiture to Northern Territory of property subject to restraining order that is owned, effectively controlled or given away by that person – Where Director of Public Prosecutions successfully applied to Supreme Court for declaration that first respondent was a drug trafficker – Whether statutory scheme enlists Supreme Court to give effect to decisions of Executive – Whether statutory scheme compatible with independence and institutional integrity of Supreme Court as repository of federal jurisdiction.

Legislative power – Acquisition of property on just terms – Section 50(1) of *Northern Territory (Self-Government) Act* 1978 (Cth) provides that power of Northern Territory Legislative Assembly does not extend to making laws with respect to acquisition of property otherwise than on just terms – Where statutory scheme provides for forfeiture to Northern Territory of property subject to restraining order that is owned, effectively controlled or given away by person declared to be a "drug trafficker" – Whether statutory scheme effects acquisition of property otherwise than on just terms.

Words and phrases − "acquisition of property", "forfeiture", "institutional integrity", "just terms", "*Kable* principle".

Constitution, Ch III, s 51(xxxi).
Criminal Property Forfeiture Act (NT), ss 3, 10, 44, 52(3), 94.
Criminal Property Forfeiture (Consequential Amendments) Act 2002 (NT).
Misuse of Drugs Act (NT), s 36A.
Northern Territory (Self-Government) Act 1978 (Cth), s 50(1).

1 FRENCH CJ, HAYNE, CRENNAN, KIEFEL, BELL AND KEANE JJ. The sole ground in this appeal from the Court of Appeal of the Northern Territory (Kelly and Barr JJ, Riley CJ dissenting)[1] is error in that Court in holding invalid a statutory scheme for the forfeiture of property, effected by the combined operation of s 36A of the *Misuse of Drugs Act* (NT) and s 94 of the *Criminal Property Forfeiture Act* (NT) ("the Forfeiture Act").

2 Section 36A of the *Misuse of Drugs Act* provides that the Supreme Court of the Northern Territory can declare that a person who, within a 10 year period, has been convicted three or more times of certain offences is a "drug trafficker". Section 94(1) of the Forfeiture Act provides for the forfeiture to the Northern Territory of property owned, effectively controlled or given away by that person without the need for further curial order.

3 The Director of Public Prosecutions ("the DPP") applied to the Supreme Court for a declaration that the first respondent was a drug trafficker. It was not contested that the relevant conditions specified in s 36A were satisfied[2], or that the property listed in an extant restraining order was owned or effectively controlled by the first respondent[3] as required by s 94(1).

The questions

4 The principal questions raised in the appeal are whether the provisions are beyond the legislative power of the Northern Territory Legislative Assembly, and invalid, either for contravention of the principle first stated in *Kable v Director of Public Prosecutions (NSW)*[4] or for contravention of the limitation[5] on legislative power that the power does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms.

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1 *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1.

2 *Director of Public Prosecutions v Emmerson* (2012) 32 NTLR 180 at 196 [23]; *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1 at 9 [6].

3 *Director of Public Prosecutions v Emmerson* (2012) 32 NTLR 180 at 197 [34].

4 (1996) 189 CLR 51; [1996] HCA 24.

5 *Northern Territory (Self-Government) Act* 1978 (Cth), s 50(1).

5 Both questions should be answered "No". A subsidiary issue regarding the construction and application of s 52(3) of the Forfeiture Act, in the particular circumstances of the first respondent, should also be resolved against the first respondent and in favour of the appellants.

The course of proceedings

6 Between August 2007 and September 2011, the first respondent was convicted of a series of drug-related offences. Two of those offences, the subject of charges laid on 21 February 2011, were the supply of 18.6646kg of cannabis and the possession of $70,050, which the first respondent was alleged to have obtained directly from the commission of offences under the *Misuse of Drugs Act*.

7 On 28 February 2011, the DPP applied to the Supreme Court for a restraining order pursuant to ss 41(2) and 44 of the Forfeiture Act on the basis that, if the first respondent were to be found guilty of the offence of supplying 18.6646kg of cannabis, his history of drug offences during the previous 10 years meant that he was likely to be declared a drug trafficker under s 36A(3) of the *Misuse of Drugs Act*. As a consequence, the first respondent's property would be forfeited to the Northern Territory (the second appellant) under s 94(1) of the Forfeiture Act.

8 On 2 March 2011, an interim restraining order was made over some of the first respondent's property. On 11 April 2011, the Supreme Court (Mildren J) made a further restraining order, by consent, in respect of all real and personal property owned or effectively controlled by the first respondent[6]. It was common ground that, apart from the $70,050 seized from the first respondent, the rest of the property subject to the restraining order was not "crime-derived property"[7], "crime-used property"[8] or "unexplained wealth"[9] within the meaning of those expressions in the Forfeiture Act. Rather, it was property (valued in excess of

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6 *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1 at 9 [4].

7 Forfeiture Act, s 12.

8 Forfeiture Act, s 11.

9 Forfeiture Act, s 68.

$850,000) which the first respondent had acquired through legitimate means, and which had no connection with any criminal offence.

9 On 22 September 2011, the first respondent was convicted of the offences charged on 21 February 2011. On 15 August 2012, the DPP's application to have the first respondent declared a drug trafficker (made on 13 February 2012) succeeded before the primary judge (Southwood J) and an application by the first respondent to have the restraining order set aside was dismissed[10].

10 Subsequently, the Court of Appeal allowed the first respondent's appeal and made orders which set aside the primary judge's declaration that the first respondent was a drug trafficker and dismissed the DPP's application for a declaration under s 36A of the *Misuse of Drugs Act*[11]. In setting aside the declaration made by the primary judge, the majority in the Court of Appeal concluded that the statutory scheme effected by s 36A and s 94 was invalid because it required the Supreme Court to act in a manner incompatible with the proper discharge of the Court's function as a repository of federal jurisdiction, and with its institutional integrity. In dissenting reasons, Riley CJ found to the opposite effect, that the powers and functions reposed in the Court under s 36A required the resolution of a real justiciable controversy in accordance with ordinary judicial processes.

11 All members of the Court of Appeal rejected the first respondent's submission that the statutory scheme was invalid within the meaning of s 50(1) of the *Northern Territory (Self-Government) Act* 1978 (Cth)[12] as an acquisition of property otherwise than on just terms. Further, all members of the Court of Appeal rejected a construction of s 52(3) of the Forfeiture Act essayed by the first respondent, about which more will be said later.

12 Special leave to appeal was granted upon an undertaking by the appellants to pay the first respondent's costs of the appeal and of the special leave application. The Northern Territory has provided a written undertaking in those

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10 *Director of Public Prosecutions v Emmerson* (2012) 32 NTLR 180.

11 *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1.

12 Section 5 of the *Northern Territory (Self-Government) Act* establishes the Northern Territory of Australia as a "body politic under the Crown".

terms. The DPP (as second respondent) made a submitting appearance in this Court.

13 The appellants' case in this Court is that there is no feature in the operation of the statutory scheme which provides any foundation for the first respondent's various attacks on validity, described in more detail below, and that the first respondent's construction of s 52(3) is incorrect.

14 In this Court, the Attorneys-General of the Commonwealth and the States of New South Wales, Queensland, South Australia and Western Australia intervened to support the appellants' case for validity. As foreshadowed, the reasons which follow explain why the appellants' case should be accepted and the appeal allowed.

Some history

15 The statutory scheme in question exemplifies the acceptance by legislatures in Australia and elsewhere of the utility of the restraint and forfeiture of property, not only as a strong and drastic sanction vindicating a law and encouraging its observance[13], but also as a means of depriving criminals of profits and preventing the accumulation of significant assets by those involved in criminal activity, particularly in relation to drug offences[14].

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13 *Burton v Honan* (1952) 86 CLR 169 at 178-181 per Dixon CJ; [1952] HCA 30; *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 115 [10], 116 [14] per Gleeson CJ; [2006] HCA 18.

14 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 344-345 [25]-[29] per French CJ, 361-362 [81]-[82] per Gummow and Bell JJ; [2009] HCA 49. See generally Freiberg and Fox, "Forfeiture, Confiscation and Sentencing", in Fisse, Fraser and Coss (eds), *The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting*, (1992) 106; Australian Law Reform Commission, *Confiscation That Counts: A review of the Proceeds of Crime Act 1987*, Report No 87, (1999).

16 Forfeiture or confiscation of property, in connection with the commission of serious crime, has a long history in English law[15]. Until its abolition by statute in 1870[16], a felon incurred general forfeiture of property[17], a sanction stretching back to medieval times. Felony forfeiture provided Crown revenue and constituted the subject matter, at certain times, of Crown patronage[18]. In distinguishing between a felon's forfeiture of land (strictly, escheat of land), a consequence of attainder following a judgment of death or outlawry, and the forfeiture of goods and chattels, a consequence of conviction and sentence[19], Blackstone noted the severe deterrent effect of forfeiture as a punishment for serious crime because it affected posterity as well as the individual offender[20].

17 In a parallel development, another long-standing species of forfeiture[21] arose at common law, as Blackstone put it "from the misfortune rather than the crime of the owner" of a chattel[22]. Until its abolition in 1846[23], a deodand – a

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15 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 289 per Dawson J; [1994] HCA 10; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 344 [25] per French CJ, 361-362 [82] per Gummow and Bell JJ.

16 *Forfeiture Act* 1870 (UK) (33 & 34 Vict c 23).

17 Kesselring, "Felony Forfeiture in England, c 1170-1870", (2009) 30 *Journal of Legal History* 201; Freiberg, "Criminal Confiscation, Profit and Liberty", (1992) 25 *Australian and New Zealand Journal of Criminology* 44 at 46-47.

18 See, for example, *Magna Carta* (1297), c 22; *Bill of Rights* (1688), "Grants of Forfeitures".

19 Sentence was necessary because following the issue of *capias* after conviction, a person could pray the "benefit of clergy" and thereby arrest the judgment and avoid the consequence of forfeiture.

20 Blackstone, *Commentaries on the Laws of England*, (1769), bk 4, c 29 at 375-376.

21 Sutton, "The Deodand and Responsibility for Death", (1997) 18(3) *Journal of Legal History* 44.

22 Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 8 at 290.

23 *An Act to abolish Deodands* 1846 (UK) (9 & 10 Vict c 62).

personal chattel occasioning accidental death – was forfeit to the Crown, originally as "an accursed thing" which might fund pious acts of expiation and, later, compensation to relatives[24], but it came over time also to be part of the Crown's revenue[25]. The abolition of the institution was part of the legislative reforms which included Lord Campbell's Act[26], placing on a modern footing compensation to relatives for wrongful death.

18 Further, there have been many historical instances of statutory forfeiture[27]. To take a familiar example, procedures for the imposition of penalties and forfeiture of goods, in the context of customs and excise legislation, have a unique history. As explained by Hayne J in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*[28], such procedures were founded upon proceedings in the Exchequer for the recovery of sums owed to the Crown. They were much affected by statute and were distinctly different from either proceedings brought in the Crown's name for the punishment of crime, or civil proceedings for the vindication of rights and duties between subjects[29]. Despite common historical origins, in the United States of America procedures for forfeitures and penalties under customs and excise legislation do not engage the double jeopardy clause in the Constitution, or violate due process requirements,

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24 Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 8 at 290-291. See also Sutton, "The Nature of the Early Law of Deodand", (1999) 30 *Cambrian Law Review* 9 at 10, 12, 16.

25 Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 8 at 290-292.

26 *Fatal Accidents Act* 1846 (UK) (9 & 10 Vict c 93).

27 See, for example, *Treason Act* 1351 (25 Edw 3 Stat 5 c 2), which clarified the common law in respect of treason. The course of successive statutory amendment over the centuries in respect of treason can be found in *Treason Act* 1695 (7 & 8 Will 3 c 3); *Treason Act* 1795 (UK) (36 Geo 3 c 7); *Treason Felony Act* 1848 (UK) (11 & 12 Vict c 12).

28 (2003) 216 CLR 161 at 192 [101]; [2003] HCA 49.

29 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 193-195 [103]-[107].

because the remedies available do not include conviction of a defendant[30]. For that reason, one remedial purpose recognised as being secured by such forfeitures is the reimbursement of government losses accruing from the evasion of customs or excise duties[31].

19 Modern civil forfeiture laws for confiscating the proceeds of, or profits from, crime go beyond the condemnation of goods used in, or derived from, crime. Many are designed expressly to render a person's pursuit of certain crimes unprofitable in the economic sense[32]. No single precept drawn from historical examples of forfeiture could be said to inform modern civil forfeiture laws. What the historical examples show, however, is that overlapping rationales underpinning forfeiture as a criminal or civil sanction, which include both strong deterrence and the protection of society, are not especially novel. Protection of the public is a familiar factor in judicial decision-making in sentencing after the determination of criminal guilt[33]. In the context of terrorism, it has been said that the protection of the public is a permissible legislative purpose, not alien to adjudicative processes[34].

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30 *The Palmyra* 25 US 1 at 14-15 (1827); *United States v Ursery* 518 US 267 at 274-288 (1996) per Rehnquist CJ, 295-296 per Kennedy J, cited in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 173 [31] per Gummow J; see also at 197 [112] per Hayne J.

31 *United States v Bajakajian* 524 US 321 at 342 (1998).

32 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 345 [28]-[29] per French CJ, 361-362 [82] per Gummow and Bell JJ, the latter citing *R v May* [2008] AC 1028 at 1034 [9] per Lord Bingham of Cornhill. See generally Australian Law Reform Commission, *Confiscation That Counts: A review of the Proceeds of Crime Act 1987*, Report No 87, (1999) at [7.14]-[7.21].

33 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476; [1988] HCA 14; *Muldrock v The Queen* (2011) 244 CLR 120 at 129 [20] fn 54; [2011] HCA 39.

34 *Thomas v Mowbray* (2007) 233 CLR 307 at 354-355 [108]-[109]; [2007] HCA 33; see also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592 [20] per Gleeson CJ; [2004] HCA 46.

20 As Dawson J observed in *Re Director of Public Prosecutions; Ex parte Lawler*[35], the rationale for employing forfeiture as a punishment may go beyond the common aims of deterrence and retribution, and involve "an element of incapacitation" (affecting even innocent holders of property), so as to ensure that an offence will not be repeated by the same means. Undoubtedly the aim of incapacitating an offender can inform sentencing and justify removal from society and detention in custody[36]. It was not suggested, nor could it be, that economic incapacitation of a repeat offender of drug crimes may not inform a political decision resulting in an enactment imposing "an economic penalty" rendering such crime "unprofitable"[37]. This is particularly so given the incontestable proposition, stated in *Wong v The Queen*[38], that the commission of serious drug crime has "great social consequences". These might include significant social costs for a state, over and above the economic costs of law enforcement.

21 Whilst there are a number of important differences, statutes with objects not dissimilar to those under consideration in this appeal have been enacted throughout Australia[39].

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35 (1994) 179 CLR 270 at 290, referring to *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 at 686-687 (1974).

36 *Ryan v The Queen* (2001) 206 CLR 267 at 283 [47] per McHugh J; [2001] HCA 21.

37 *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 at 686-687 (1974).

38 (2001) 207 CLR 584 at 607 [64] per Gaudron, Gummow and Hayne JJ; [2001] HCA 64.

39 See, for example, *Customs Act* 1901 (Cth), s 229A; *Criminal Assets Recovery Act* 1990 (NSW); *Crime (Confiscation of Profits) Act* 1993 (Tas); *Confiscation Act* 1997 (Vic); *Criminal Property Confiscation Act* 2000 (WA); *Proceeds of Crime Act* 2002 (Cth); *Criminal Proceeds Confiscation Act* 2002 (Q); *Confiscation of Criminal Assets Act* 2003 (ACT); *Criminal Assets Confiscation Act* 2005 (SA). See generally, Skead, "Drug-trafficker property confiscation schemes in Western Australia and the Northern Territory: A study in legislation going too far", (2013) 37 *Criminal Law Journal* 296.

The statutory scheme

22 Proceedings on applications made under the Forfeiture Act are taken to be civil proceedings for all purposes[40]. The rules of evidence applicable to civil proceedings apply and any question of fact is to be decided in accordance with the civil standard of proof, on the balance of probabilities[41].

23 It is desirable to set out the critical provisions of the statutory scheme.

24 Section 36A of the *Misuse of Drugs Act* relevantly provides:

> "(1) The Director of Public Prosecutions may apply to the Supreme Court for a declaration that a person is a drug trafficker.
>
> (2) An application under subsection (1) may be made at the time of a hearing for an offence or at any other time.
>
> (3) On hearing an application by the Director of Public Prosecutions under subsection (1), the court must declare a person to be a drug trafficker if:
>
> (a) the person has been found guilty by the court of an offence referred to in subsection (6) that was committed after the commencement of this section; and
>
> (b) subject to subsection (5), in the 10 years prior to the day on which the offence was committed (or the first day on which the offence was committed, as the case requires), the person has been found guilty:
>
> (i) on 2 or more occasions of an offence corresponding to an offence referred to in subsection (6); or
>
> (ii) on one occasion of 2 (or more) separate charges relating to separate offences of which 2 or more

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40 Forfeiture Act, s 136(1).

41 Forfeiture Act, s 136(2)(b) and (d).

correspond to an offence or offences referred to in subsection (6)."

25 An offence referred to in sub-s (3)(b) may have been committed before or after the commencement of the section and may have been tried either summarily or on indictment[42].

26 As can be seen, establishing the statutory criteria to be satisfied requires reference to be made to sub-s (6). Sub-section (6) lists a series of offences relevant for the purposes of sub-s (3), and includes certain categories of cultivation and possession of drugs (which may involve minor quantities) as well as offences which might be commonly understood as directed to drug traffickers and cultivators of commercial or trafficable quantities of drugs.

27 Section 94(1) of the Forfeiture Act provides:

"If a person is declared to be a drug trafficker under section 36A of the *Misuse of Drugs Act*:

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

(b) all property that was given away[43] by the person, whether before or after the commencement of this Act;

is forfeited to the Territory."

28 Section 44 of the Forfeiture Act sets out the conditions under which a restraining order may be made and the property to which such an order may apply. It relevantly provides:

"(1) The Supreme Court may, on application by the DPP, make a restraining order in relation to the property of a person named in the application if:

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42 *Misuse of Drugs Act*, s 36A(4).

43 This appeal does not concern any property that was given away by the first respondent.

(a) the person has been charged, or it is intended that within 21 days after the application the person will be charged, with an offence that, if the person is convicted of the offence, could lead to the person being declared to be a drug trafficker under section 36A of the *Misuse of Drugs Act*; or

…

(2) A restraining order under this section can apply to:

(a) all or any property that is owned or effectively controlled by the person at the time of the application for the restraining order, whether or not any of the property is described or identified in the application; and

(b) all property acquired:

(i) by the person; or

(ii) by another person at the request or direction of the person named in the application for the restraining order;

after the restraining order is issued."

29 The DPP is not bound (whether by the Forfeiture Act or otherwise) to make an application in every case in which there are reasonable grounds for believing that a restraining order would be made. However, it should be noted that the Forfeiture Act casts a duty on the DPP to apply to the Supreme Court to set aside a restraining order in certain circumstances[44].

30 Part 5 of the Forfeiture Act[45] provides for "objection proceedings" whereby an order obtained in the circumstance covered by s 44(1)(a) may be set aside on limited grounds[46]. A number of orders may be made by the Supreme

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44 Forfeiture Act, s 50(2).

45 Forfeiture Act, ss 59-66.

46 Forfeiture Act, s 65(1).

Court in respect of property which is subject to a restraining order, including appointing the Public Trustee to manage the property[47]. The effect of a restraining order, subject to Div 3 of Pt 4 (covering "permitted" as well as "prohibited" dealings), is that property subject to a restraining order cannot be dealt with[48], although the Court may release property to meet the "reasonable living and business expenses of the owner"[49]. Furthermore, the making and receiving of mortgage payments in respect of property subject to a restraining order is not prevented[50]. As soon as practicable after a restraining order is made, a copy must be served personally on affected persons[51]. It was accepted that, under the statutory scheme, persons who are innocent third parties in respect of restrained property are not excluded from any relevant adjudicative process.

31 Some parts of the Forfeiture Act plainly use the word "property" to refer to land and things which are the subject of property interests, even though "property" is defined to mean "real or personal property of any description, wherever situated and whether tangible or intangible" or "a legal or equitable interest" in the same[52], a not unfamiliar ambulatory definition[53].

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47 Forfeiture Act, s 46(1)(c).

48 Forfeiture Act, s 49(1)(a).

49 Forfeiture Act, s 49(3).

50 Forfeiture Act, s 57.

51 Forfeiture Act, s 47(1).

52 Forfeiture Act, s 5.

53 *White v Director of Public Prosecutions (WA)* (2011) 243 CLR 478 at 483 [5] per French CJ, Crennan and Bell JJ, 489 [28] per Gummow J; [2011] HCA 20. See also *Corporations Act* 2001 (Cth), s 9, definition of "property". See generally *Yanner v Eaton* (1999) 201 CLR 351 at 365-367 [17]-[20] per Gleeson CJ, Gaudron, Kirby and Hayne JJ; [1999] HCA 53.

32 Section 52 of the Forfeiture Act governs the cessation of a restraining order and relevantly states:

> "(3) If a restraining order has been issued under section 44(1)(a) in relation to property of a person who has been charged, or who was to be charged and a charge has been laid within 21 days after the date of the order, the order ceases to have effect:
>
> (a) if the charge is finally determined but the person is not declared under section 36A of the *Misuse of Drugs Act* to be a drug trafficker; or
>
> (b) if the charge is disposed of without being determined."

As foreshadowed, the correct construction of sub-s (3) of s 52 is in issue.

33 Whilst not immediately relevant to the first respondent's challenge to the validity of the statutory scheme, as it operates in respect of a declared drug trafficker, it can be noted that property which is "crime-used" or "crime-derived" is also targeted under the Forfeiture Act, as is "unexplained wealth"[54]. Relevant declarations in respect of those categories of property may be sought by the DPP and made by the Supreme Court under the Forfeiture Act. Each category of targeted property is subject to separate forfeiture regimes[55], reflecting differences between forfeiture *in rem*, attaching to the property connected to an offence, and forfeiture *in personam*[56], applied to a particular person (here a declared drug trafficker) after criminal proceedings against that person.

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54 See Forfeiture Act, ss 10(3), 11, 12 and 67.

55 Part 6, entitled "Proceedings for declarations", provides for the DPP to apply to the Supreme Court for the making of declarations in respect of "unexplained wealth" (Div 1 – ss 67-72), "a criminal benefit" (Div 2 – ss 73-80) and "crime-used property" (Div 3 – ss 81-86).

56 Young (ed), *Civil Forfeiture of Criminal Property*, (2009), Pts I and II.

Objectives of the statutory scheme

34 Section 3 of the Forfeiture Act provides:

> "The objective of this Act is 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."

35 In pursuit of the objective in s 3, s 10(2) provides that the Forfeiture Act is to apply to forfeit to the Territory property owned or effectively controlled by persons "involved or taken to be involved in criminal activities" so as "to compensate the Territory community for the costs of deterring, detecting and dealing with" those activities. Relevantly for present purposes, a person is "taken to be involved in criminal activities" if "the person is declared under section 36A of the *Misuse of Drugs Act* to be a drug trafficker"[57].

36 Although there is no challenge in these proceedings to the statutory provisions concerning "crime-used" or "crime-derived" property, it can be noted that s 10(3) states that such property is also forfeit to the Territory so as "to deter criminal activity and prevent the unjust enrichment of persons involved in criminal activities."

37 That the stated objectives are penal, and additional to punishment imposed in criminal proceedings, was explained prior to the enactment of the statutory scheme. Section 36A was inserted into the *Misuse of Drugs Act* by the *Criminal Property Forfeiture (Consequential Amendments) Act* 2002 (NT). In the second reading speech for the Bill which became the amending Act, the Attorney-General for the Northern Territory described the proposed legislation as "a mechanism outside the criminal jurisdiction for forfeiture of property"[58]. By

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57 Forfeiture Act, s 10(4)(a); see also s 8.

58 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 May 2002 at 1321.

reference to an Australian Law Reform Commission report[59], he stated that the objectives of laws for the forfeiture of proceeds of crime are threefold[60]:

> "(1) to deter those who may be contemplating criminal activity by reducing the possibility of gaining a profit from that activity;
>
> (2) to prevent crime by diminishing the capacity of offenders to finance future criminal activities; and
>
> (3) to remedy the unjust enrichment of criminals who profit at society's expense."

38 Some argument was directed to whether, and how, the stated objectives cast light on the construction and application of the critical provisions of the Forfeiture Act. It is not necessary to resolve those issues. In particular, it is not necessary to decide whether a court asked to make a forfeiture order is permitted or required to examine whether, or to what extent, the particular order sought would, in some sense, either "prevent the unjust enrichment"[61] of the offender whose property it is sought to forfeit or "compensate the Territory community for the costs of deterring, detecting and dealing with"[62] the criminal activities of that person.

Kable

39 The error alleged by the appellants in the reasoning of the majority in the Court of Appeal is expressed in the notice of appeal as:

> "holding that the statutory scheme comprised by the inter-operation of s 36A ... and s 94 ... is invalid because the scheme enlists the Supreme Court of the Northern Territory to give effect to executive decisions

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59 Australian Law Reform Commission, *Confiscation That Counts: A review of the Proceeds of Crime Act 1987*, Report No 87, (1999).

60 Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 May 2002 at 1321-1322.

61 Forfeiture Act, s 3.

62 Forfeiture Act, s 10(2).

> and/or legislative policy in a manner which undermines its institutional integrity in a degree incompatible with its role as a repository of federal jurisdiction."

40 The incompatibility referred to is identified in *Kable*, a case which considered the involvement of a Supreme Court in a decision-making process concerning detention. The principle for which *Kable* stands is that because the Constitution establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts[63], State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid[64].

41 In *Mistretta v United States*[65], the fundamental nature of judicial independence and the relationship between institutional integrity and impartiality were identified by the Supreme Court of the United States:

> "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action."

Ultimately the inquiry in respect of a function or process bestowed upon, or required of, a court was "whether [it] undermines the integrity of the Judicial Branch."[66]

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63 Constitution, s 77(iii).

64 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 101-103 per Gaudron J, 114-116 per McHugh J, 138, 143 per Gummow J; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; [2004] HCA 31.

65 488 US 361 at 407 (1989), cited in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 133 per Gummow J.

66 *Mistretta v United States* 488 US 361 at 404 (1989).

42 The *ad hominem* legislation in *Kable* (the stated object of which was "to protect the community"[67]) authorised the Supreme Court of New South Wales to order preventive detention without any breach of the law being alleged or any adjudication of guilt[68]. A majority of this Court found that task incompatible with the institutional integrity of the Supreme Court because the legislation drew the Court into implementing what was essentially a political decision or government policy that Mr Kable should be detained, without the benefit of ordinary judicial process[69]. This Court has subsequently confirmed that *Kable* applies beyond its extraordinary circumstances to the Supreme Courts of the Territories[70] and to all State and Territory courts as Ch III courts[71]. Some mention should be made of the authorities in this Court, after *Kable*, which were relied upon in argument in this appeal.

43 By comparison with *Kable*, in *Fardon v Attorney-General (Qld)*[72], legislation of general application authorising the continued detention or supervised release of prisoners who were "a serious danger to the community" was upheld as valid. This was because the adjudicative process required of the State Supreme Court in that case supported the maintenance of the institutional

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67 *Community Protection Act* 1994 (NSW), s 3(1) and (2).

68 *Community Protection Act* 1994 (NSW), ss 3(1), 3(3) and 5(1).

69 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98 per Toohey J, 106-107 per Gaudron J, 122, 124 per McHugh J, 133-134 per Gummow J.

70 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 363 [81] per Gaudron J; [2000] HCA 63; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; *South Australia v Totani* (2010) 242 CLR 1 at 49 [72] per French CJ; [2010] HCA 39.

71 *South Australia v Totani* (2010) 242 CLR 1 at 47-48 [69] per French CJ, 81-83 [201]-[208] per Hayne J, 156-157 [425]-[428] per Crennan and Bell JJ. See also *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 487-488 [123]-[126] per Hayne, Crennan, Kiefel and Bell JJ; 295 ALR 638 at 673-674; [2013] HCA 7.

72 (2004) 223 CLR 575.

integrity of the Court[73] and the adjudicative process required could be performed "independently of any instruction, advice or wish of the legislative or executive branches of government."[74]

44 Since *Kable*, it has been stated often that a court must satisfy minimum requirements of independence and impartiality[75], even though it is not possible to make a single statement embracing all of the defining characteristics of a court[76]. In the context of the arguments advanced in this appeal, it is worth repeating the well-established proposition that independence and institutional impartiality mark a court apart from other decision-making bodies[77]. A legislature which imposes a judicial function or an adjudicative process on a court, whereby it is essentially directed or required to implement a political decision or a government

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73 (2004) 223 CLR 575 at 592 [19]-[20] per Gleeson CJ, 596-597 [34] per McHugh J, 621 [114]-[115] per Gummow J, 648 [198] per Hayne J, 658 [234] per Callinan and Heydon JJ.

74 (2004) 223 CLR 575 at 621 [116] per Gummow J. See also at 598 [35], 600-602 [41]-[44] per McHugh J.

75 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 67-68 [41] per Gleeson CJ; [2006] HCA 44; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 552 [10] per Gummow, Hayne, Heydon and Kiefel JJ; [2008] HCA 4; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 544 [153] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 4; *South Australia v Totani* (2010) 242 CLR 1 at 41 [58] per French CJ, 157 [427] per Crennan and Bell JJ.

76 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [30] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [64] per Gummow, Hayne and Crennan JJ.

77 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 78 [68] per Gummow, Hayne and Crennan JJ; *South Australia v Totani* (2010) 242 CLR 1 at 157 [428] per Crennan and Bell JJ; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 477 [67] per French CJ; 295 ALR 638 at 659.

policy without following ordinary judicial processes, deprives that court of its defining independence and institutional impartiality.

45 This was exemplified in *International Finance Trust Co Ltd v New South Wales Crime Commission*[78]. Section 10 of the *Criminal Assets Recovery Act* 1990 (NSW) required the Supreme Court of New South Wales to hear and determine an application, made ex parte, for a restraining order in respect of property, if a law enforcement officer suspected that the owner of the property had committed one of a range of crimes or that the property in question derived from criminal activity. Members of the majority in this Court found that s 10 conscripted the Supreme Court into a process incompatible with, and repugnant in a fundamental degree to, the judicial function of the Court and ordinary judicial processes[79]. That conclusion embraced a proposition established in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[80] that legislation which purports to direct the courts as to the *manner* and *outcome* of any exercise of jurisdiction is apt to impair, impermissibly, the character of courts as independent and impartial tribunals[81].

46 In *South Australia v Totani*[82], the legislation under consideration was directed to the making of control orders. Section 14(1) of the *Serious and Organised Crime (Control) Act* 2008 (SA) provided that, on application by a member of the Executive (the Commissioner of Police), the Magistrates Court of South Australia was required to make a "control order" against a defendant if satisfied the defendant was a member of a "declared organisation", without the need to determine, by ordinary judicial processes, whether the defendant engaged in, or had engaged in, serious criminal activity. A "declared organisation" was an organisation that was subject to an anterior declaration by another member of the Executive (the Attorney-General). By majority, s 14(1) was held invalid on the

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78 (2009) 240 CLR 319.

79 (2009) 240 CLR 319 at 355 [56] per French CJ, 366-367 [97]-[98] per Gummow and Bell JJ, 386-387 [159]-[161] per Heydon J.

80 (2008) 234 CLR 532 at 560 [39] per Gummow, Hayne, Heydon and Kiefel JJ.

81 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 360 [77] per Gummow and Bell JJ.

82 (2010) 242 CLR 1.

ground that it authorised the "enlistment" or "recruitment" of the Magistrates Court to implement the decisions of the Executive in a manner incompatible with the proper discharge of its federal judicial responsibilities and its institutional integrity[83].

Reasoning in the Court of Appeal

47 As noted earlier, the majority in the Court of Appeal held the statutory scheme invalid because it was said to enlist the Supreme Court to give effect to executive decisions or legislative policy (or both) in a manner which undermined that Court's institutional integrity. Using the language of *Totani*[84], and echoing *Mistretta*[85], Kelly J found that the statutory scheme represented "a substantial recruitment of the judicial function of [the Supreme Court] to an essentially executive process", thus giving "the neutral colour of a judicial decision" to the DPP's decision to make an application under s 36A[86]. In agreeing that the statutory scheme engaged the *Kable* principle, Barr J was chiefly influenced by his view that a declaration under s 36A could be made "contrary to the actual facts"[87], by which his Honour meant contrary to a common understanding of the expression "drug trafficker"[88].

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83 (2010) 242 CLR 1 at 52 [82] per French CJ, 67 [149] per Gummow J, 88-89 [226] per Hayne J, 160 [436] per Crennan and Bell JJ, 173 [481] per Kiefel J.

84 (2010) 242 CLR 1 at 52 [82] per French CJ.

85 488 US 361 at 407 (1989), cited in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 133 per Gummow J; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 602 [44] per McHugh J, 615 [91] per Gummow J; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 593 [168] per Crennan J; *South Australia v Totani* (2010) 242 CLR 1 at 172 [479] per Kiefel J; *Momcilovic v The Queen* (2011) 245 CLR 1 at 228 [602] per Crennan and Kiefel JJ; [2011] HCA 34.

86 *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1 at 34 [92].

87 *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1 at 45 [127].

88 *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1 at 47 [131].

The parties' submissions

The appellants

48 The appellants submitted that such discretions as the Supreme Court has under both s 36A of the *Misuse of Drugs Act* and s 44 of the Forfeiture Act were to be exercised judicially in accordance with ordinary judicial processes without any government interference in respect of the outcome. It was contended that the role of the DPP in the statutory scheme was a familiar and unexceptional role, distinguishable from the role of the Attorney-General which was critical to a finding of legislative invalidity in *Totani*. Forfeiture, said to operate by reference to the first respondent's status, did not engage the common law values encapsulated in the expressions "double jeopardy" or "double punishment". Further, it was submitted that forfeiture under the statutory scheme exacted or imposed punishment for breach of provisions prescribing a rule of conduct. Accordingly, it was said that the guarantee of just terms was incompatible with that exaction. Finally, the appellants contested the first respondent's construction of s 52(3) of the Forfeiture Act.

The first respondent

49 It is necessary to describe in a little more detail the first respondent's case that s 36A, and the statutory scheme comprising s 36A and s 94, involve an invalid exercise of the legislative power of the Northern Territory.

50 By way of response to the appeal, the first respondent sought to support the conclusion of the majority in the Court of Appeal by making three points. It was contended that the statutory scheme (1) contravened the *Kable* principle; (2) conferred an impermissible discretion on the DPP; and (3) effected an acquisition of property other than on just terms.

51 Relying on *Kable*, and focussing on the process of obtaining a declaration, it was contended that s 36A was incompatible with, and repugnant to, the institutional integrity of the Supreme Court because a function was conferred on the Court pursuant to which it was directed to make orders which "brand respondents pejoratively". More broadly, it was contended that the *outcome* of any proceedings under the statutory scheme, namely forfeiture by operation of s 94(1), was dominated impermissibly by decisions of the DPP to apply for a s 36A declaration and a restraining order. Subsumed into that complaint was a complaint that the Supreme Court's discretion under s 44 was limited, such that the Court could not remedy alleged "harshness" of any forfeiture worked by the

statutory scheme, to the extent that it could encompass assets said to be lawfully acquired.

52 Next it was contended that the statutory scheme empowered a member of the Executive, the DPP, to impose a penalty constituting a "double punishment" on a declared drug trafficker without the benefit of ordinary judicial processes. It was asserted that the discretion of the DPP to make applications under the statutory scheme was "open-ended, unconstrained and unreviewable"[89]. It was further contended that in making an application under the statutory scheme for either a restraining order or a drug trafficker declaration, the DPP exercised a discretion which was "impermissibly arbitrary in the constitutional sense."

53 These arguments appeared to evoke constitutional principles and common law values, rooted in British legal history, which preclude the arbitrary exercise of sovereign power. For example, a financial exaction imposed by a legislature, such as a tax, must be clear both as to the identification of the taxpayer and as to the taxpayer's liability to pay the tax. Delegation by a legislature to a member of the Executive of a discriminatory dispensing power in respect of such an exaction would offend against the separation of powers[90]. Another example is that administrative decisions in respect of the issue of search warrants are subject to stringent limitations, imposed first by judges in the common law courts and often now found in statutes[91]. Detention of a person in custody without just cause is also prohibited, which evokes the constitutional principle derived from Ch III of the Constitution stated in *Chu Kheng Lim v Minister for Immigration,*

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89 See *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 512 [101] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; [2003] HCA 2. That language can be traced back, in part at least, to *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 258 per Fullagar J; [1951] HCA 5; *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 372-373 per Barwick CJ; [1969] HCA 5.

90 *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 383-384; *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639-641; [1984] HCA 20; *Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678 at 683-685; [1985] HCA 36. See generally *Vestey v Inland Revenue Commissioners* [1980] AC 1148 at 1172, 1174, 1176.

91 *New South Wales v Corbett* (2007) 230 CLR 606 at 610-612 [16]-[22] per Kirby J, 628-632 [89]-[105] per Callinan and Crennan JJ; [2007] HCA 32.

Local Government and Ethnic Affairs[92] and referred to in *Kable*[93]: "adjudging and punishing criminal guilt" is an "exclusively judicial function", not to be delegated to the Executive.

54 The first respondent's next argument – that the statutory scheme effected an acquisition of property other than on just terms – depended on the proposition that the particular form of forfeiture imposed on a declared drug trafficker stood outside categories of forfeiture for which the requirement of just terms has been found by this Court not to apply. It was contended that the "reality and scale" of the forfeiture under the statutory scheme was such that a point was reached "where the law is no longer inconsistent or incongruous with the guarantee" of just terms.

55 Finally, the construction of s 52(3) of the Forfeiture Act accepted in the courts below was challenged by the first respondent.

Application of *Kable*

56 The impugned provisions are compatible with the constitutional requirements imposed on a Ch III court because they do not require the Northern Territory Supreme Court to give effect to any decision made by the Executive, here the DPP. This is demonstrated by the powers, and concomitant duties, conferred on the Supreme Court, the role of the DPP, and the judicial processes required to be undertaken to give effect to the statutory scheme.

57 Section 36A authorises and empowers the Supreme Court to make a declaration that a person is a drug trafficker if the conditions attached to the power are satisfied. It is well established that Australian legislatures can empower courts to make specified orders if certain conditions are satisfied, even if satisfaction of such conditions depends on a decision, or application,

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92 (1992) 176 CLR 1 at 27; [1992] HCA 64. See also *Polyukhovich v The Commonwealth* (1991) 172 CLR 501; [1991] HCA 32.

93 (1996) 189 CLR 51 at 97-98 per Toohey J, 131-132 per Gummow J. See also at 107 per Gaudron J, 121-123 per McHugh J.

made by a member of the Executive[94]. A statement of McHugh J in *Fardon* is apt[95]:

> "The exercise of judicial power often involves the making of orders upon determining that a particular fact or status exists. It does so, for example, in the cases of matrimonial causes, bankruptcy, probate and the winding up of companies."

58 Such provisions are not, for that reason alone, taken to trespass on the judicial function[96] or to be impermissibly determinative of the outcome of an exercise of jurisdiction[97]. In selecting the Supreme Court as the repository of a power to determine a particular fact or status, in the absence of any express or implicit contrary legislative intention, it can be inferred that Parliament accepts that the power will be exercised in accordance with standards characterising ordinary judicial processes[98].

59 In *Silbert v Director of Public Prosecutions (WA)*[99], a statutory provision empowering a court to make forfeiture or pecuniary penalty orders, in circumstances where a person was "to be taken to have been convicted", was

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94 *Palling v Corfield* (1970) 123 CLR 52 at 58-59 per Barwick CJ, 62-63 per McTiernan J, 64-65 per Menzies J, 67 per Owen J, 69-70 per Walsh J; [1970] HCA 53; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 352 [49] per French CJ, 360 [77] per Gummow and Bell JJ, 373 [121] per Hayne, Crennan and Kiefel JJ; *South Australia v Totani* (2010) 242 CLR 1 at 48-49 [71] per French CJ, 154-155 [420] per Crennan and Bell JJ.

95 (2004) 223 CLR 575 at 597 [34].

96 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469-470 per Mason CJ, Dawson and McHugh JJ; [1992] HCA 29.

97 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 360 [77] per Gummow and Bell JJ.

98 *Thomas v Mowbray* (2007) 233 CLR 307 at 340 [55] per Gummow and Crennan JJ; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 360 [79] per Gummow and Bell JJ.

99 (2004) 217 CLR 181; [2004] HCA 9.

upheld by this Court as valid. Faced with the similarity between the operation of the relevant provisions in *Silbert* and the operation of s 36A, senior counsel for the first respondent acknowledged that the attack on the validity of s 36A was occasioned, in large part, by the circumstance that not all offences encompassed by the statutory criteria would be commonly understood to be drug trafficking offences.

60 That attack is based on a misconception of the Supreme Court's powers and duties under the statutory scheme. The Supreme Court is authorised to determine whether the statutory criteria set out are satisfied and, if they are, the Court must make the declaration sought. The Forfeiture Act provides the consequences which follow from the Supreme Court's declaration. Together, these steps are an unremarkable example of conferring jurisdiction on a court to determine a controversy between parties which, when determined, will engage stated statutory consequences.

61 That the controversy is initiated by an officer of the Executive, the DPP, does not deprive the Supreme Court of its independence. The DPP's decision to make an application to the Supreme Court in respect of an individual (whether under s 36A or s 44) is a discretionary decision, similar to the well-recognised prosecutorial discretion to decide who is to be prosecuted and for what offences[100]. As Menzies J observed in *Palling v Corfield*[101], in exercising a discretion to initiate judicial action (a common necessity in an adversarial system of justice, in which a court can only act if a party makes an application) a member of the Executive "makes no law". An executive or administrative decision which exposes an individual to a risk of conviction, or the imposition of a penalty, is not an adjudication of rights and liabilities[102] and therefore not an exercise of judicial power. So much was recently confirmed by five members of this Court in declining to overrule *Fraser Henleins Pty Ltd v Cody*[103], the source

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100 *Magaming v The Queen* (2013) 87 ALJR 1060 at 1067 [20] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; 302 ALR 461 at 466; [2013] HCA 40.

101 (1970) 123 CLR 52 at 64-65.

102 *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100; [1945] HCA 49.

103 See *Magaming v The Queen* (2013) 87 ALJR 1060 at 1068-1069 [34]-[38] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; 302 ALR 461 at 468-469, citing *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100.

of that proposition. The role of the DPP in the statutory scheme reflects no more than procedural necessity in the adversarial system.

62 Unlike the position in *Kable*, the statutory scheme is not directed *ad hominem*. The Supreme Court is not required to make any order providing for the further detention of any person who is alleged to meet the statutory criteria[104].

63 The DPP is a statutory officer. In representing the state in the prosecution of an accused person, the DPP is subject to what are sometimes called "traditional considerations" (or obligations) of fairness[105]. Those obligations, and the standards of fairness which they entail, spring not so much from statute as from rules of practice; established by judges over the years, they are calculated to enhance the administration of justice by ensuring that an accused has a fair trial[106]. Certain discretions exercised by a prosecutor in the initiation and conduct of criminal proceedings are not readily subject to review[107]. Nonetheless, the fact that criminal proceedings in Australia are adversarial in character, and accusatorial by nature, obliges the maintenance of those standards of fairness. That maintenance has long rested on the powers of a trial judge, and appellate courts, in discharging their responsibilities to ensure that an accused has a fair trial[108] and to prevent an abuse of the court's process in criminal proceedings[109].

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104 See other civil penalty schemes: *Burton v Honan* (1952) 86 CLR 169 at 179-180 per Dixon CJ; *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 125-127 [58]-[63] per Gummow, Kirby, Hayne, Heydon and Crennan JJ.

105 See *Whitehorn v The Queen* (1983) 152 CLR 657 at 664; [1983] HCA 42; *Cannon v Tahche* (2002) 5 VR 317 at 339 [56].

106 *Cannon v Tahche* (2002) 5 VR 317 at 339 [56].

107 *Maxwell v The Queen* (1996) 184 CLR 501; [1996] HCA 46.

108 *Whitehorn v The Queen* (1983) 152 CLR 657 at 665; *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1347-1348.

109 *Jago v District Court (NSW)* (1989) 168 CLR 23; [1989] HCA 46; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.

64 The appellants and several interveners, particularly the Attorney-General for the State of South Australia, sought to draw an analogy between the discretions a prosecutor has in criminal proceedings and the role of the DPP in the statutory scheme. The DPP commits to the Supreme Court for its decision, in civil forfeiture proceedings, the question of whether a person meets certain statutory criteria, the consequences of which are penal. It could not be doubted that the Supreme Court has an inherent power to prevent an abuse of process in respect of any decision of the DPP under that statutory scheme. The possibility that a member of the Executive may exercise an administrative discretion unfairly, or engage in some malpractice, does not, without more, enliven the constitutional implications recognised in *Kable* so as to narrow the scope of a grant of legislative power[110].

65 A declaration can only be made by the Supreme Court on receipt of evidence sufficient to satisfy the civil standard of proof in respect of a person's requisite number of past convictions. There is nothing in the statutory scheme which indicates that the determination to be made by the Supreme Court is to be undertaken other than in open court, in circumstances where an affected party has a right to be heard, may have legal representation, and may make submissions and receive reasons. That the determination of whether the statutory criteria are satisfied may readily be performed, because of the ease of proof of the criteria, does not deprive the process of its judicial character.

66 The effect of a declaration is the creation of a legal status for the purposes of the *Misuse of Drugs Act*, reflecting the satisfaction of the statutory criteria. As submitted by the Attorney-General of the State of Queensland intervening, which submission should be accepted, there is nothing in the statutory scheme which would inhibit a judge making a declaration from treating the expression "drug trafficker" as the reflex of the statutory criteria set out, and recording that the declaration is made for the purposes of the *Misuse of Drugs Act*. The usual rights of appeal subsist in respect of the making of any declaration[111].

67 Equally, an application by the DPP for a restraining order under the statutory scheme involves a judicial assessment of the merits of the application, an exercise of discretion, and the making of a judgment. Such an application is

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110 *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365.

111 *Supreme Court Act* (NT), s 51.

also subject to reconsideration under the objection procedures and to the usual rights of appeal.

68 There were differences of views in the courts below as to the width of the discretion covered by the use of the word "may" in s 44 of the Forfeiture Act, governing the making of a restraining order[112]. The condition upon which the discretion is granted under s 44(1)(a) arguably makes it clear that the discretion is of the type which *must* be exercised upon proof of the particular case to which the power to make a restraining order is directed[113]. In the Court of Appeal, the appellants never contended otherwise[114]. There is no challenge in this Court to the validity of s 44, or to the Court of Appeal's findings in respect of that provision. For the purposes of the first respondent's argument it may be assumed, without deciding, that the discretion given to the Supreme Court under s 44 is limited. Notwithstanding that circumstance, the Supreme Court is obliged to engage in orthodox adjudicative processes involving the hearing of evidence and the making of a determination which is subject to the usual processes of appeal.

69 Nothing in the detail of the statutory scheme supports the first respondent's submission that the scheme requires the Supreme Court to act at the behest of the Executive – the DPP – or to give effect to government policy without following ordinary judicial processes. Further, the authorities in this Court after *Kable*, including *Totani*, do not support any contrary conclusion.

DPP's discretion impermissible?

70 As already explained, the assertion that the statutory scheme conferred a discretion on the DPP which was constitutionally impermissible touched on a number of long-standing constitutional principles and common law values,

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112 *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1 at 11-12 [13]-[14], 25-26 [64], [68]-[70], 35 [97].

113 As to which see *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 373 [121] per Hayne, Crennan and Kiefel JJ, citing *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106; [1971] HCA 12.

114 *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1 at 26 [72] fn 53 per Kelly J. See also at 11-12 [12]-[16] per Riley CJ.

particularly in respect of double punishment and double jeopardy, but never distinctly articulated why the discretion was impermissible.

71 Whilst the first respondent's submissions in respect of this branch of the argument were said to be distinct from his arguments based on *Kable*, the submissions depended equally on a misconception of the DPP's role in the statutory scheme.

72 First, as explained, the DPP's decision to make an application under the statutory scheme is a familiar procedural necessity in the adversarial system and is subject to the Supreme Court's inherent jurisdiction to take whatever steps are necessary to avoid any abuse of process. Further, senior counsel for the first respondent rightly accepted (as he was bound to do) that penal ends may be pursued in civil proceedings which result in additional punishment.

73 Second, this branch of the argument also critically turned on the proposition that the DPP's exercise of discretion to make an application under the statutory scheme (chiefly under s 36A, but also under s 44) was the *operative* decision determining which persons answering the statutory criteria would forfeit their property. For the reasons given, which do not need repeating, that proposition not only misconceives the DPP's role, it leaves out of account the statutory scheme's requirements that not one but two curial orders, following ordinary judicial processes, are the cumulative conditions stated as necessary for the operation of s 94(1) of the Forfeiture Act.

Acquisition of property

74 As has been explained, the relevant operation of the Forfeiture Act depends upon the Supreme Court making a declaration that a person is a drug trafficker. That is, the relevant operation of the Forfeiture Act depends upon the person's conviction for certain crimes within a specified time. The stated objectives of the statutory scheme, set out in ss 3 and 10 of the Forfeiture Act, must be read in the recognition that the Forfeiture Act prescribes penal consequences which flow from a person's conviction for crime. Two consequences follow from these observations.

75 First, because the forfeiture worked by the Forfeiture Act is imposed as punishment for crime, the impugned provisions do not amount to an acquisition of property other than on just terms. Second, whether that punishment fits the crime (in this case, the repeated commission of certain crimes) is a matter for the legislature. It is irrelevant (and wrong) for the courts to attempt to determine

whether any forfeiture which may be worked by the Forfeiture Act (or which is worked in this particular case) is proportionate to the stated objectives.

76 Section 50(1) of the *Northern Territory (Self-Government) Act* restricts the power conferred on the Legislative Assembly to make laws "for the peace, order and good government" of the Territory[115], by providing that the power does not extend to "the making of laws with respect to the acquisition of property otherwise than on just terms." The contrast between the way in which the *Northern Territory (Self-Government) Act* confers legislative power on the Territory's Legislative Assembly and the way in which the Constitution confers powers upon the federal Parliament, by reference to the enumerated heads of power in s 51 of the Constitution[116], was acknowledged.

77 In relying on s 50(1), the first respondent referred to well-established principles concerning s 51(xxxi) of the Constitution. It was accepted that several authorities in this Court have found, in s 51 of the Constitution, heads of legislative power in respect of which just terms "is an inconsistent or incongruous notion."[117] This development was traced in *Theophanous v The Commonwealth*[118]. Marking the boundary of "just terms", by reference to the application of a requirement that an exaction is "inconsistent" or "incongruous"

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115 *Northern Territory (Self-Government) Act*, s 6.

116 See *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 659 [4]; [2007] HCA 34.

117 *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 124 [56] per Gummow, Kirby, Hayne, Heydon and Crennan JJ, quoting *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285 per Deane and Gaudron JJ.

118 (2006) 225 CLR 101 at 125-126 [57]-[60] per Gummow, Kirby, Hayne, Heydon and Crennan JJ, citing *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397; [1979] HCA 47; *R v Smithers; Ex parte McMillan* (1982) 152 CLR 477; [1982] HCA 76; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129; [2004] HCA 42.

with them, may admittedly involve difficult questions of degree and judgment[119]. Notwithstanding such difficulties, marking the boundary in that way is[120]:

> "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."

The first respondent did not urge any reconsideration or overruling of authorities illustrative of that proposition[121].

78 The first respondent's submissions sought to distinguish the statutory scheme from earlier statutory schemes for forfeiture, including forfeiture provisions fastening on property connected with an offence[122], or property used to commit an offence[123], or where property had been originally conferred so as to deter commission of an offence[124], or the value of property forfeited had a commensurate relationship with the offence[125]. That effort turned on a distinction sometimes made between "forfeiture", directed to property used in or

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119 *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 126 [60].

120 *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 126 [60].

121 *Burton v Honan* (1952) 86 CLR 169 at 180-181; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 408; *R v Smithers; Ex parte McMillan* (1982) 152 CLR 477 at 488-489; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 288-289.

122 *Burton v Honan* (1952) 86 CLR 169 at 175, 180-181.

123 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 275-276, 279, 285, 289, 291.

124 *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 127 [63].

125 *R v Smithers; Ex parte McMillan* (1982) 152 CLR 477 at 485, 488.

derived from crime, and "confiscation" of the proceeds or profits of crime made by a person from drug offences[126].

79 By reference to the statutory objectives "to compensate the Territory community for the costs of deterring, detecting and dealing with … criminal activities"[127], the statutory scheme was then characterised by the first respondent as a non-regulatory revenue-raising scheme which played no legislative role in the enforcement of the criminal law in relation to drug offences or in the deterrence of such activities. The argument subsumed a complaint that the statutory scheme targeted "legitimately generated wealth", which suggested some want of proportion between the purposes of the statutory scheme and the possible adverse impacts on persons declared to be drug traffickers.

80 It was never explained how or why the concept of "proportionality", which may not be applicable to non-purposive heads of legislative power enumerated in s 51 of the Constitution[128], confines the scope of the legislative powers granted to the Territory legislature. These arguments, raising issues of substance and form in relation to "property" that are familiar in the established doctrine concerning s 51(xxxi) of the Constitution[129], invite a speculative inquiry as to the topics which were the main preoccupation of the Territory's legislature in enacting the legislation. The proper inquiry, however, is the subject matter of the statutory scheme[130]. The question is whether the statutory scheme can be properly characterised as a law with respect to forfeiture, that is, a law which exacts or imposes a penalty or sanction for breach of provisions which prescribe

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126 As to which, see Hodgson, *Profits of Crime and Their Recovery*, (1984) at 5; Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime*, (2003) at 71-88.

127 Forfeiture Act, s 10(2).

128 *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 128 [69]-[70] per Gummow, Kirby, Hayne, Heydon and Crennan JJ.

129 *JT International SA v The Commonwealth* (2012) 86 ALJR 1297 at 1329-1331 [144]-[154] per Gummow J, 1335-1336 [180]-[189] per Hayne and Bell JJ; 291 ALR 669 at 705-708, 713-714; [2012] HCA 43.

130 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 6-7, 11-13 per Kitto J; [1965] HCA 64.

a rule of conduct[131]. That inquiry must be answered positively, which precludes any inquiry into the proportionality, justice or wisdom of the legislature's chosen measures[132].

81 The provisions comprising the statutory scheme in respect of declared drug traffickers do not cease to be laws with respect to the punishment of crime because some may hold a view that civil forfeiture of legally acquired assets is a harsh or draconian punishment. As Dixon CJ said, concerning the customs legislation providing for forfeiture considered in *Burton v Honan*[133]:

> "once the subject matter is fairly within the province of the Federal legislature the justice and wisdom of the provisions which it makes in the exercise of its powers over the subject matter are matters entirely for the Legislature and not for the Judiciary."

82 More recently, in *R v Smith (David)*[134], Lord Rodger of Earlsferry said:

> "If in some circumstances [a confiscation scheme] can operate in a penal or even a draconian manner, then that may not be out of place in a scheme for stripping criminals of the benefits of their crimes. That is a matter for the judgment of the legislature".

83 The reference in the statutory objectives to the costs of "deterring" or "dealing with" the consequences of a drug trafficker's activities is not fairly to be read as restricted to the "costs" of law enforcement, capable of arithmetical calculation for the purposes of raising revenue. A remedial purpose confined thus might raise a question of proportionality, but the social consequences of drug crime referred to in *Wong v The Queen*[135] are not so confined. Further, the legislative purpose of protecting society by incapacitating a drug trafficker

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131 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 278.

132 *Burton v Honan* (1952) 86 CLR 169 at 180; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 290, 294.

133 (1952) 86 CLR 169 at 179.

134 [2002] 1 WLR 54 at 61 [23]; [2002] 1 All ER 366 at 373.

135 (2001) 207 CLR 584 at 607-608 [64].

through forfeiture or confiscation of his or her assets is a method of "dealing with" the consequences of such criminal activities.

84 The Territory legislature has determined that a person who is proven to have committed at least three qualifying drug offences within a specified period is liable to have his or her property forfeited or confiscated. Characterising those provisions as an acquisition of property without provision of just terms is erroneous. The requirement of just terms is "incompatible with the very nature of the exaction"[136], being a punishment for crime.

85 It is within the province of a legislature to gauge the extent of the deleterious consequences of drug trafficking on the community and the soundness of measures, even measures some may consider to be harsh and draconian punishment, which are thought necessary to both "deter" and "deal with" such activities. The political assessments involved are matters for the elected Parliament of the Territory and complaints about the justice, wisdom, fairness or proportionality of the measures adopted are complaints of a political, rather than a legal, nature[137].

Construction of s 52(3)

86 The first respondent contended that s 52(3)(a) of the Forfeiture Act, set out above, contained a temporal limitation. The principle relied upon is the principle of legality. Shortly stated for present purposes, legislation affecting fundamental rights must be clear and unambiguous, and any ambiguity must be resolved in favour of the protection of those fundamental rights[138]. Statutory forfeiture abrogates fundamental property rights. The next step in the argument involved construing s 52(3)(a) as though it were amended by addition and alteration to read "if *at the time* the charge is finally determined the person *has*

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136 *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 126 [60] per Gummow, Kirby, Hayne, Heydon and Crennan JJ.

137 *Magaming v The Queen* (2013) 87 ALJR 1060 at 1081 [108] per Keane J; 302 ALR 461 at 485.

138 *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ; [1994] HCA 15; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 271 [58] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; [2010] HCA 23.

not been declared under section 36A of the *Misuse of Drugs Act* to be a drug trafficker". The first respondent was convicted and sentenced in respect of the third relevant charge on 22 September 2011. The s 36A declaration was made on 15 August 2012. Applying the first respondent's construction, as set out immediately above, it was then contended that s 52(3)(a) operates so that the restraining order ceased to have effect on 22 September 2011. The consequence of applying that construction of s 52(3)(a) is that a necessary condition of forfeiture under s 94(1), namely an extant restraining order in respect of property, did not exist at the time of the making of the s 36A declaration.

87 The Court of Appeal rejected this construction. It held that s 52(3)(a) provides for the cessation of the effect of a restraining order without the need for further court order where the relevant charge is finally determined and the Supreme Court does not make a s 36A declaration[139]. The circumstances in which this might occur could at least include a finding in the criminal proceedings that a person is not guilty, or a failure of the DPP to proceed, or to prove what is required, under s 36A. The Court of Appeal's construction accords with numerous textual considerations: the words used, the specified requirement that a s 36A declaration cannot be made until at least three relevant convictions have been recorded, and the provision that an application for such a declaration may be made "at the time of a hearing for an offence or at any other time."[140]

88 Unlike the first respondent's proffered construction, the Court of Appeal's interpretation of s 52(3)(a) accords with, and does not frustrate, the stated objectives of the statutory scheme and must be upheld.

Conclusions

89 The result is that s 36A of the *Misuse of Drugs Act* and s 94(1) of the Forfeiture Act do not, singly or together, operate to deny the Supreme Court of the Northern Territory such independence and impartiality as is compatible with its constitutional role as a repository of federal jurisdiction. Further, the

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139 *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1 at 21 [53] per Riley CJ, 22 [57] per Kelly J, 35 [99] per Barr J.

140 *Misuse of Drugs Act*, s 36A(2).

provisions do not effect an acquisition of property within the contemplation of the *Northern Territory (Self-Government) Act*[141].

Orders

90 For the reasons given the following orders should be made:

1. Appeal allowed.

2. Set aside the order of the Court of Appeal of the Northern Territory made on 28 March 2013 and paragraphs 1, 2 and 4 (first appearing) of the order of the Court of Appeal made on 13 May 2013 and, in their place, order that the appeal to that Court be otherwise dismissed with costs.

3. The second appellant pay the first respondent's costs in this Court.

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141 *Northern Territory (Self-Government) Act*, s 50(1).

GAGELER J.

Introduction

91 Section 6 of the *Northern Territory (Self-Government) Act* 1978 (Cth) ("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". The power is subject to the express limitation in s 50(1) of the Self-Government Act that it "does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms".

92 Section 36A of the *Misuse of Drugs Act* (NT) ("the Misuse Act") and ss 44(1)(a) and 94 of the *Criminal Property Forfeiture Act* (NT) ("the Forfeiture Act") contravene that express limitation on the power of the Legislative Assembly. They are laws with respect to the acquisition of property otherwise than on just terms.

93 To explain why, it is necessary to start with an identification of the critical features of their legal operation.

Legislative scheme

94 The Supreme Court of the Northern Territory is established by the Legislative Assembly under the *Supreme Court Act* (NT). It is a court which the Commonwealth Parliament can invest, under s 122 of the Constitution, with jurisdiction in respect of matters arising under Commonwealth laws applicable throughout Australia, which is properly described as "federal jurisdiction". Together with other Territory courts, and with State courts which the Commonwealth Parliament can invest with federal jurisdiction under s 77(iii) of the Constitution, the Supreme Court is therefore a court in which the "judicial power of the Commonwealth" can be vested within the meaning of s 71 of the Constitution[142]. Together with other State and Territory courts, it is a Ch III court.

95 The Director of Public Prosecutions ("the DPP") is a statutory officer appointed under the *Director of Public Prosecutions Act* (NT). The DPP exercises functions on behalf of the "Crown", meaning the executive government which is the repository of the executive power formally vested in the

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142 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 162-163 [27]-[28]; [2004] HCA 31.

Administrator of the Territory[143]. The DPP's functions include functions conferred by the Misuse Act and the Forfeiture Act.

96 Section 36A of the Misuse Act allows the DPP to apply to the Supreme Court for a declaration that a person is a "drug trafficker"[144]. The Supreme Court, on hearing the DPP's application, must declare the person to be a drug trafficker if satisfied of two conditions[145]. One is that the person has been found guilty by the Supreme Court of a drug offence[146] of a kind specified in the section[147]. The other is that the person has been found guilty of two or more corresponding drug offences in the 10 years prior to committing that offence[148].

97 A declaration under s 36A of the Misuse Act that a person is a drug trafficker has no substantive legal effect other than that given to it by s 94 of the Forfeiture Act. By force of that section, the declaration has the effect that there is "forfeited to the Territory": "all property subject to a restraining order that is owned or effectively controlled by the person", and "all property that was given away by the person". The statutorily declared purpose of that forfeiture is "to compensate the Territory community for the costs of deterring, detecting and dealing with the [person's] criminal activities"[149].

98 Difficult issues might arise as to the effect of forfeiture on interests of other persons. Those issues can be put to one side. For present purposes, it is sufficient to focus on the most straightforward operation of the provisions: to forfeit property wholly owned by the person who is declared to be a drug trafficker. Property of that nature extends to "all or any property" owned by the person[150], including all or any legal or equitable interests of the person in "real or personal property of any description, wherever situated and whether tangible or

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143 Section 31 of the Self-Government Act; s 11(1)(a) of the *Director of Public Prosecutions Act* (NT).

144 Section 36A(1).

145 Section 36A(3).

146 Section 36A(3)(a).

147 Section 36A(6).

148 Section 36A(3)(b).

149 Section 10(2).

150 Section 44(2)(a).

intangible"[151]. The necessary and sufficient condition of the forfeiture of property owned by a person who is declared to be a drug trafficker is that the property is subject to a restraining order at the time of the declaration.

99 The Supreme Court can make a restraining order under s 44(1)(a) of the Forfeiture Act in relation to all or any property of a person, on the application of the DPP, in any case where the person is charged (or is intended within 21 days to be charged) with an offence that could lead to the person being declared to be a drug trafficker. The Supreme Court has discretion as to the making of a restraining order. Plainly, however, it is no part of the Supreme Court's discretion to limit the property restrained having regard to the penal consequences (for the person) or to the compensatory consequences (for the Territory) of the forfeiture which would follow should the person be found guilty of the offence charged and should the DPP then make a separate application for a declaration that the person is a drug trafficker. A restraining order can be set aside on specified grounds, which relevantly include that the person charged does not own the property restrained[152], but otherwise the restraining order remains in force until the charge is finally determined[153]. If the person is found guilty of the offence charged, the Supreme Court is specifically prohibited from making any allowance in sentencing the person for the fact or prospect of the person's property being forfeited as a result of the person being declared to be a drug trafficker[154].

100 Proceedings on an application under the Forfeiture Act, including an application for a restraining order under s 44(1)(a), are taken to be civil proceedings for all purposes[155]. Proceedings on an application under s 36A of the Misuse Act partake of the same civil character. The Supreme Court's adjudication of criminal guilt is a precondition to the Supreme Court making a declaration. But the making of the declaration is the culmination of a civil process which operates separately from the criminal process. The forfeiture which results under s 94 of the Forfeiture Act is independent of and cumulative upon the punishment for criminal guilt.

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151 Section 5, "property". Cf *White v Director of Public Prosecutions (WA)* (2011) 243 CLR 478 at 483 [5], 485-486 [10]-[12], 489 [28]-[29]; [2011] HCA 20.

152 Section 65(1).

153 Section 52(3)(a).

154 Section 5(4)(c) of the *Sentencing Act* (NT).

155 Section 136(1).

101 The legislative scheme therefore operates at its core to effect a civil forfeiture under s 94 of the Forfeiture Act, on declaration of a person to be a drug trafficker under s 36A of the Misuse Act, of all or any of the property owned by that person provided only that the property is subject to a restraining order under s 44(1)(a) of the Forfeiture Act at the time of the declaration. Two features of that core operation of the scheme will be seen to have a critical bearing on the characterisation of those sections as laws with respect to the acquisition of property otherwise than on just terms.

102 First, the forfeiture of property takes effect only on the Supreme Court making a declaration that a person is a drug trafficker. The Supreme Court must make the declaration if the DPP applies for the declaration. The Supreme Court cannot make the declaration if the DPP does not apply. The declaration if made does not declare a previously existing status; the declaration is itself the "factum" by reference to which the legislative scheme operates to effect forfeiture[156].

103 That first feature of the scheme distinguishes the statutory forfeiture which results from the making of a declaration that a person is a drug trafficker from felony forfeiture which existed at common law and which was abolished by statute late in the nineteenth century[157]. The common law rule applied to every felon (*fee* – landholding; *lon* – price[158]) on conviction by a court[159]. The conviction resulted in an "attainder or corruption of blood" which operated automatically to escheat the felon's real property and to forfeit the felon's personal property[160]. The common law rule was for a time overlaid by a legislative practice of enacting bills "of attainder" or of "pains and penalties", by

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156 Cf *Baker v The Queen* (2004) 223 CLR 513 at 532 [43]; [2004] HCA 45.

157 *Forfeiture Act* 1870 (UK) (33 & 34 Vict c 23), s 1; *Imperial Act Adopting Act* 1873 (WA) (37 Vict No 8); *Treason and Felony Forfeiture Act* 1874 (SA) (37 & 38 Vict No 25), s 1; *Forfeitures for Treason and Felony Abolition Act* 1878 (Vic) (42 Vict No 627), s 1; *Criminal Law Procedure Act* 1881 (Tas) (45 Vict No 14), s 13; *Criminal Law Amendment Act* 1883 (NSW) (46 Vict No 17), s 416; *Escheat (Procedure and Amendment) Act* 1891 (Q) (55 Vict No 12), s 12.

158 According, at least, to Blackstone: *Commentaries on the Laws of England*, (1769), bk 4 at 95-96. But see Pollock and Maitland, *The History of English Law*, 2nd ed (1898), vol 2 at 464-465.

159 *Mitchell, Taylor & Talbot on Confiscation and the Proceeds of Crime*, 2nd ed (1997) at 1.

160 Explained in *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 588-589, 592, 602, 609-610; [1978] HCA 54. See also Kesselring, "Felony Forfeiture in England, c 1170-1870", (2009) 30 *Journal of Legal History* 201.

force of which forfeiture of property might be inflicted on identified or identifiable individuals, for a breach of the criminal law, without judicial trial[161]. That legislative practice "disappeared from the English scene" before colonial settlement in Australia[162]. The Constitution of the United States prohibits it, expressly and comprehensively[163]. Chapter III of the Constitution has repeatedly been held to stand in the way of its reintroduction by Commonwealth legislation enacted in reliance on s 51 of the Constitution[164]. Whether Ch III would stand in the way of its reintroduction by or under Commonwealth legislation enacted in reliance on s 122 of the Constitution need not now be determined.

104 Second, although s 3 of the Forfeiture Act states that the objective of that Act is 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", that statement cannot be taken to be comprehensive and does not describe the operation of the scheme constituted by ss 44(1)(a) and 94 of the Forfeiture Act operating in combination with s 36A of the Misuse Act. The DPP can apply for and, subject to the limited discretion of the Supreme Court, obtain a restraining order in respect of all or any of the property of a person shown by later conviction to have been involved in criminal activities. The property subject to a restraining order then forfeited on declaration need have no connection with those or any other criminal activities.

105 That feature of the scheme distinguishes it from most other schemes of criminal forfeiture which now exist under Commonwealth, State and Territory statutes, including under the Forfeiture Act itself, for the forfeiture of "crime-used property"[165] or "crime-derived property"[166] and for payment of amounts

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161 Plucknett, *A Concise History of the Common Law*, 5th ed (1956) at 205. See also Lehmann, "The Bill of Attainder Doctrine: A Survey of the Decisional Law", (1978) 5 *Hastings Constitutional Law Quarterly* 767 at 768-770.

162 Mann, "Outlines of a History of Expropriation", (1959) 75 *Law Quarterly Review* 188 at 211. See also *Halsbury's Laws of England*, 5th ed, vol 24, par 643.

163 Article I, s 9, cl 3; Art I, s 10, cl 1.

164 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 535-536, 539, 607, 646-649, 686, 704, 719-721; [1991] HCA 32; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27, 69-70; [1992] HCA 64; *Haskins v The Commonwealth* (2011) 244 CLR 22 at 37 [25]; [2011] HCA 28.

165 Eg ss 11, 44(1)(b), 81-86, 95, 96 and 101.

166 Eg ss 12, 95 and 97.

assessed to be "unexplained wealth"[167] or "criminal benefits"[168]. That feature also distinguishes the scheme from multifarious statutory schemes for the forfeiture of property used in the commission of particular crimes, for which there is long historical precedent. It distinguishes the scheme as well from the common law of "deodand" (*Deo* – to God; *dandam* – to be given)[169], forfeiting property in things causing death, which was abolished by statute in the middle of the nineteenth century[170].

106 The scheme was introduced in the Territory in 2002[171]. It was modelled in part on a scheme which had been introduced in Western Australia in 2000[172]. The Western Australian scheme was itself without precedent in Australia at the time of its introduction. If precedent existed elsewhere, no mention was made of it at that time and no mention of it was made in argument in this case.

Acquisition of property

107 Section 50(1) of the Self-Government Act invokes the language of s 51(xxxi) of the Constitution. It has a corresponding operation. Section 50(1) is to s 6 of the Self-Government Act as s 51(xxxi) is to the other paragraphs of s 51 of the Constitution. Section 50(1) carves out from the legislative power conferred on the Legislative Assembly by s 6 of the Self-Government Act a specific prohibited area of legislative power ascertained by reference to that which s 51(xxxi) carves out (or "abstracts"[173]) from other legislative powers

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167 Eg ss 67-72 and 100.

168 Eg ss 73-80 and 99.

169 Explained: *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 314-316 [549]-[550]; [1999] HCA 62.

170 *Abolition of Deodands Act* 1846 (UK) (9 & 10 Vict c 62); *Imperial Acts Adopting Ordinance* 1849 (WA) (12 Vict No 21); *Deodands Abolition Act* 1849 (NSW) (13 Vict No 18).

171 *Criminal Property Forfeiture Act* 2002 (NT).

172 Sections 8 and 159 of the *Criminal Property Confiscation Act* 2000 (WA) and s 32A of the *Misuse of Drugs Act* 1981 (WA) (as amended by the *Criminal Property Confiscation (Consequential Provisions) Act* 2000 (WA)).

173 Eg *JT International SA v The Commonwealth* (2012) 86 ALJR 1297 at 1333 [167]; 291 ALR 669 at 710; [2012] HCA 43.

conferred on the Commonwealth Parliament by s 51 of the Constitution[174]. No question arises as to the relationship between s 51(xxxi) and s 122 of the Constitution[175].

108 Analysis under s 50(1) of the Self-Government Act therefore conveniently proceeds by hypothesising a Territory law to be a Commonwealth law sought to be made under a paragraph of s 51 of the Constitution and asking whether power to make that law is abstracted by s 51(xxxi).

109 The settled understanding is that s 51(xxxi)'s abstraction from other legislative powers in s 51 of the Constitution arises by implication from the condition it attaches to the particular legislative power it confers[176]. The particular legislative power – to make laws "with respect to ... the acquisition of property" – "was introduced … not … for the purpose of protecting the subject or citizen, but primarily to make certain that the Commonwealth possessed a power compulsorily to acquire property"[177]. The condition – "on just terms" – was "included to prevent arbitrary exercises of the power at the expense of a State or the subject"[178]. The condition operates to prevent an "acquisition of property" within the meaning of the power from occurring otherwise than "on terms" which are provided by law and which can be characterised as "just"[179]. The "standard of justice" is one of "fair dealing" considered in accordance with "the life and experience" of the Australian community[180]. That condition of just terms would be a hollow thing were laws with respect to the acquisition of property within the

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174 *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 659 [3]-[4]; [2007] HCA 34.

175 Cf *Wurridjal v The Commonwealth* (2009) 237 CLR 309; [2009] HCA 2.

176 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160; [1994] HCA 27.

177 *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290-291; [1946] HCA 11.

178 *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 291.

179 *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 291; *Smith v ANL Ltd* (2000) 204 CLR 493 at 512-513 [48]; [2000] HCA 58.

180 *Nelungaloo Pty Ltd v The Commonwealth* (1952) 85 CLR 545 at 600; [1952] HCA 11; *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 291; [1983] HCA 21. See also *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 300; [1948] HCA 7; *Poulton v The Commonwealth* (1953) 89 CLR 540 at 574; [1953] HCA 101.

meaning and scope of s 51(xxxi) to fall also within the scope of other legislative powers to which the same condition does not attach.

110 Equally settled is the understanding that not all laws which acquire property are laws with respect to the acquisition of property within the meaning of s 51(xxxi) so as to attract the condition of just terms. There are some laws acquiring property, it has long been understood, which must be able to be enacted under other legislative powers conferred by s 51 of the Constitution and in respect of which the condition of just terms would be "inconsistent", "irrelevant" or "incongruous"[181]. Laws imposing fines or forfeitures as penalties or punishments for breaches of norms of conduct have long been held to be amongst them.

111 So it has been explained[182]:

> "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."

112 To similar effect[183]:

> "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

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181 Eg *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 251 [342]; *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 115 [11], 125-126 [57]-[60]; [2006] HCA 18.

182 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 187; [1994] HCA 9. See also *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 274-275, 284-285; [1994] HCA 10.

183 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 278.

rule of conduct. The irrelevance of s 51(xxxi) to the imposition of fines and forfeitures is trite law."

113 The Solicitor-General of the Commonwealth, with the support of the Solicitor-General for the Northern Territory, advanced the proposition that it is always necessary to ask whether an impugned law is with respect to the acquisition of property within the meaning of s 51(xxxi) before asking whether that law can be supported by another legislative power.

114 The proposition has some judicial support[184], but it runs counter to the settled understanding reflected in the passages already quoted. A law acquiring property which escapes the just terms condition in s 51(xxxi) is first and foremost a law which is supported by another legislative power. As every legislative power conferred by s 51 is "subject to" the Constitution, a law imposing a penalty or sanction for breach of a provision prescribing a rule of conduct which is supported by another legislative power conferred by s 51 must comply with Ch III of the Constitution. The method of imposition could not involve the conferral of judicial power other than on a Ch III court and could not compromise the institutional integrity of a Ch III court.

115 The Solicitor-General of the Commonwealth, again with the support of the Solicitor-General for the Northern Territory, advanced the further proposition that a law forfeiting property can never be a law with respect to the acquisition of property within the meaning of s 51(xxxi) if the primary purpose of the law is to impose a penalty or sanction for breach of a norm of conduct. That must be so, he argued, because just terms would be inconsistent with fulfilment of that purpose; it would "annihilate" the penalty and "weaken" the norm. The "justice and wisdom" of such a legislative choice, he emphasised, "are matters entirely for the Legislature and not for the Judiciary"[185].

116 The proposition did not go so far as to suggest that consistency with legislative purpose is always the sole determinant of whether or not a law which acquires property and which is otherwise within legislative power is with respect to the acquisition of property within the meaning of s 51(xxxi). Were that so, a law which extinguished a liability for the purpose of reducing the cost of administering a statutory scheme would pass muster[186], as would a law which imposed liability on a named entity (say an interstate trader[187] or a foreign

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184 *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 250 [339].

185 *Burton v Honan* (1952) 86 CLR 169 at 179; [1952] HCA 30.

186 Cf *Smith v ANL Ltd* (2000) 204 CLR 493 at 500-501 [8]-[9].

187 Section 51(i).

corporation[188]) for the purpose of contributing to consolidated revenue[189]. For a law acquiring property to escape the just terms condition in s 51(xxxi), the law must at least have a purpose consonant with the constitutional purpose of that condition: to prevent arbitrary acquisition.

117 Nor did the proposition go so far as to suggest that the means adopted to achieve a permissible legislative purpose are irrelevant to determining whether a law which acquires property and which is otherwise within legislative power is with respect to the acquisition of property within the meaning of s 51(xxxi).

118 Yet the proposition is still too sweeping. A law which forfeits property for the primary purpose of imposing a penalty or sanction for breach of a norm of conduct and which escapes the just terms condition in s 51(xxxi) is an example of a law which has the general characteristics of a law which acquires property without attracting that condition: the objective of the law must be within power; the acquisition must be a necessary or characteristic feature of the means the law selects to achieve that objective; and the means must be appropriate and adapted to achieving that objective.

119 Those characteristics were identified by Brennan J in *Mutual Pools & Staff Pty Ltd v The Commonwealth*[190] and were embodied in the test adopted and applied by Gleeson CJ and Kirby J in *Airservices Australia v Canadian Airlines International Ltd*[191]. They are a reflection of the underlying purpose of the just terms condition to prevent arbitrary acquisitions. To conclude that a law which acquires property and which is otherwise within legislative power is one in respect of which the condition of just terms would be inconsistent, irrelevant or incongruous is necessarily to conclude that the dominant character of the law is informed by those characteristics.

120 A law forfeiting property which has as its primary purpose imposing a penalty or sanction for breach of a norm of conduct will ordinarily have the first of those characteristics: it will ordinarily have an objective that is within power. The law will not necessarily have the other characteristics. That will depend on whether the particular forfeiture is a necessary or characteristic feature of the means the law selects to achieve that objective and on whether those means are appropriate and adapted to achieving that objective.

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188 Section 51(xx).

189 Cf *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509-510; [1993] HCA 10.

190 (1994) 179 CLR 155 at 179-180.

191 (1999) 202 CLR 133 at 180 [98].

121 The applicable test is more stringent than that which will sometimes apply to determine whether the law is otherwise within power. As befits the application of a constitutional guarantee, the inquiry is not as to "whether the law is capable of being reasonably considered to be appropriate and adapted to the end sought to be achieved" but rather as to "whether the burden or restriction [that is to say, the acquisition of property] is reasonably appropriate and adapted, in the court's judgment, to the legitimate end in view"[192].

122 Analysis "must begin from an understanding of the practical and legal operation of the legislative provisions that are in issue"[193]. As ought go without saying, consideration of the merits of the law purporting to impose the taking (the "justice and wisdom" of its provisions[194]) forms no part of the analysis. "It is not the name, but the character of the taking, that controls the outcome of constitutional characterisation."[195]

Forfeiture laws in other cases

123 Unsurprisingly, given its almost unprecedented nature, none of the cases in which a law imposing a fine or forfeiture as a penalty or sanction for breach of a norm of conduct, which has been held or assumed not to be a law with respect to the acquisition of property within the meaning of s 51(xxxi), have concerned forfeiture under a legislative scheme like the present.

124 In *Burton v Honan*[196], one of the laws in question automatically forfeited crime-used property on the commission of an offence[197]; the other automatically condemned the forfeited property on conviction[198]. Both were enacted under ss 51(i) and 51(ii) of the Constitution.

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192 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300; [1994] HCA 44; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 87 ALJR 289 at 310-311 [62]; 295 ALR 197 at 219; [2013] HCA 3.

193 *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 232 [49]; [2008] HCA 7.

194 Cf *Burton v Honan* (1952) 86 CLR 169 at 179.

195 *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 181 [101].

196 (1952) 86 CLR 169.

197 Section 229 of the *Customs Act* 1901 (Cth).

198 Section 262 of the *Customs Act* 1901 (Cth).

125 In *Cheatley v The Queen*[199], the law in question authorised a court to order forfeiture of crime-used property as punishment on conviction of an offence[200]. So also did the law in question[201] in *Re Director of Public Prosecutions; Ex parte Lawler*[202]. Both were laws enacted under s 51(x) of the Constitution.

126 In *R v Smithers; Ex parte McMillan*[203], the law in question authorised a court in civil proceedings to order a person to pay a pecuniary penalty calculated by reference to the court's assessment of benefits derived by the person from criminal activity[204]. The law was enacted under s 51(i) of the Constitution.

127 In *Della Patrona v Director of Public Prosecutions (Cth) [No 2]*[205], the law in question forfeited automatically on conviction property owned by the convicted person, previously restrained by a court on application of the Commonwealth Director of Public Prosecutions, not shown by that person to have been lawfully acquired and not used in, or in connection with, the commission of the relevant offence[206]. The law was, again, enacted under s 51(i) of the Constitution[207].

128 *Theophanous v The Commonwealth*[208], on which the Solicitor-General of the Commonwealth and the Solicitor-General for the Northern Territory placed particular reliance, concerned forfeiture under a law enacted under s 51(xxxvi) of the Constitution of parliamentary pension entitlements themselves conferred under a law enacted under s 51(xxxvi) of the Constitution. The means by which that forfeiture was imposed certainly bear some similarity to the present scheme. Forfeiture occurred on the making of a forfeiture order, which a court was

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199 (1972) 127 CLR 291; [1972] HCA 63.

200 Section 13AA of the *Fisheries Act* 1952 (Cth).

201 Section 106(1)(a) of the *Fisheries Management Act* 1991 (Cth).

202 (1994) 179 CLR 270.

203 (1982) 152 CLR 477; [1982] HCA 76.

204 Section 243B of the *Customs Act* 1901 (Cth).

205 (1995) 38 NSWLR 257. See also *Webb v The Commonwealth* (1999) 73 ALJR 1079.

206 Sections 30, 43 and 48(4) of the *Proceeds of Crime Act* 1987 (Cth).

207 See also *Director of Public Prosecutions v Toro-Martinez* (1993) 33 NSWLR 82.

208 (2006) 225 CLR 101.

required to make, on application by the Commonwealth Director of Public Prosecutions (acting on the authority of a Commonwealth Minister), if the court was satisfied that the holder of the pension entitlements to be made the subject of the order had been convicted of a corruption offence relevantly involving abuse of his or her parliamentary office[209]. Forfeiture of that property by those means was held to be justified, consistently with s 51(xxxi), not as punishment for a corruption offence, but as an incident of the statutory scheme under which the pension entitlements were provided[210]. The forfeiture was a "qualification" to those entitlements "by way of a sanction for corrupt abuse of office"[211]. It was a vindication of "the public interest in denying to those who succumbed to ... temptation" entitlements provided "to encourage probity in legislators"[212].

129 Laws imposing sanctions by way of forfeiture, as was said in *Theophanous*, "are, and long before the Commonwealth were, regular features of the law in England, the Australian colonies and now of the Commonwealth"[213]. This forfeiture law is different.

This forfeiture law

130 The two distinguishing features of the Territory legislative scheme have already been identified. Forfeiture occurs under s 94 of the Forfeiture Act only if the Supreme Court, on the application of the DPP, makes a declaration under s 36A of the Misuse Act that a person is a drug trafficker. Forfeiture extends to all or any of the property owned by the person irrespective of any connection with criminal activity provided only that the property is the subject of a restraining order earlier made by the Supreme Court, on the application of the DPP, under s 44(1)(a) of the Forfeiture Act.

131 Would a law imposing forfeiture on those terms sought to be made under s 51 of the Constitution escape characterisation as a law with respect to the acquisition of property within the meaning of s 51(xxxi)?

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209 Sections 16, 19 and 21 of the *Crimes (Superannuation Benefits) Act* 1989 (Cth).

210 Cf *Kariapper v Wijesinha* [1968] AC 717 at 737, quoted in *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 at 358-359 [17]; [2007] HCA 23.

211 (2006) 225 CLR 101 at 115 [10], 116 [14].

212 (2006) 225 CLR 101 at 127 [63].

213 (2006) 225 CLR 101 at 126 [60].

132 The sole legislatively declared purpose of the forfeiture, it will be recalled, is "to compensate the Territory community for the costs of deterring, detecting and dealing with the [person's] criminal activities". That legislative purpose cannot explain the extent of the forfeiture consonantly with the constitutional purpose of the just terms condition to prevent arbitrary acquisition. That is because the means chosen by the law are not appropriate and adapted to achieve it. No attempt has been made in the legislative scheme to link the value of the property forfeited to the amount of the costs identified.

133 The Solicitor-General of the Commonwealth and the Solicitor-General for the Northern Territory sought to supplement that legislatively declared purpose by arguing that the forfeiture has the additional purpose (they went so far as to say the primary purpose) of imposing a penalty or sanction for breach of a norm of conduct. Forfeiture is a deterrent, they argued, to a person who has been found guilty of two or more corresponding drug offences in 10 years going on to commit another offence.

134 No doubt forfeiture under the legislative scheme does act as a deterrent to the commission of another offence, but how? The penalty or sanction it imposes for breach of the identified norm of conduct is not imposed as part of the process of the adjudication and punishment of the offence by a court. The penalty or sanction does not, like felony forfeiture at common law, result automatically by operation of law on commission or conviction of the offence. The character of the penalty or sanction is, rather, as captured in the submission of the Solicitor-General for the Northern Territory that "[t]he legislature has determined that a person who is proven to have committed three qualifying drug offences *is liable* to have his or her property *confiscated*". The words are his; the emphasis is mine.

135 The penalty or sanction imposed by the legislative scheme, such as it is, lies in the threat of statutorily sanctioned executive expropriation: the forfeiture (or not) of all (or any) property at the discretion of the DPP.

136 The Solicitor-General for the Northern Territory, with the support of the Solicitor-General for South Australia, argued that the DPP could be expected to exercise discretion in administering the legislative scheme of civil forfeiture in a manner no different from "ordinary prosecutorial discretion": considering whether the Supreme Court would be likely to make the order sought; if so, considering whether seeking the order is in "the public interest"; and, if so, making the relevant application. Be that so. Be it also accepted that the DPP will exercise the discretion with the utmost propriety. It serves simply to highlight that a person who is proven to have committed three qualifying drug offences is, under the legislative scheme, made liable to the confiscation of such of his or her property as the DPP considers in the public interest.

137 The discretion of the DPP is not relevantly akin to the prosecutorial discretion considered in *Palling v Corfield*[214]. That discretion was enlivened by conviction of a person of an offence of failing to attend a medical examination the purpose of which was to determine whether the person was fit for compulsory military service. The discretion was to request the person to enter into a recognisance to attend and submit to a subsequent medical examination and to sentence the person to imprisonment if the person refused[215]. The discretion was plainly appropriate and adapted to the defence of the Commonwealth. It was supported by s 51(vi). Its exercise did not result in forfeiture of property so as potentially to engage s 51(xxxi).

138 There is a serious question as to whether, if sought to be made under s 51 of the Constitution, the conferral of an executive discretion to obtain civil forfeiture as a means of punishment for criminal guilt would contravene Ch III of the Constitution by purporting to confer on the DPP part of an exclusively judicial function[216]. That question was not specifically addressed in argument and is for that reason best left to one side.

139 It is sufficient to observe that conferral of executive discretion of that nature is not a necessary or characteristic feature of penal forfeiture, and to conclude that forfeiture by means which involve the conferral of such an executive discretion is not appropriate and adapted to achieving an objective of imposing a penalty or sanction for breach of the identified criminal norm.

140 Sections 44(1)(a) and 94 of the Forfeiture Act and s 36A of the Misuse Act, in imposing forfeiture on those terms, do not have the characteristic of laws which acquire property for a purpose and by means consistent with the underlying purpose of the just terms condition to prevent arbitrary acquisitions. Their dominant character is that of laws with respect to the acquisition of property within the meaning of s 51(xxxi). Within the meaning of s 50(1) of the Self-Government Act, they are laws with respect to the acquisition of property otherwise than on just terms.

Conclusion

141 The Court of Appeal of the Northern Territory by majority set aside an earlier declaration that the first respondent is a drug trafficker and with it an earlier restraining order. The appeal from that judgment to this Court should be

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214 (1970) 123 CLR 52; [1970] HCA 53.

215 Section 49 of the *National Service Act* 1951 (Cth).

216 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

dismissed for the reason that ss 44(1)(a) and 94 of the Forfeiture Act and s 36A of the Misuse Act are beyond the power of the Legislative Assembly by operation of s 50(1) of the Self-Government Act. It is unnecessary and inappropriate to address the distinct issue (which divided the Court of Appeal) of whether s 36A of the Misuse Act if otherwise valid would compromise the institutional integrity of the Supreme Court as a Ch III court.