Emmerson v The Director of Public Prosecutions & Ors [2013] NTCA 4

PARTIES:	**EMMERSON, Reginald William** v **THE DIRECTOR OF PUBLIC PROSECUTIONS** and **NORTHERN TERRITORY OF AUSTRALIA** and **ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY**
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 9 of 2012 (21107399)
DELIVERED:	28 MARCH 2013
HEARING DATES:	8 & 9 NOVEMBER 2012
JUDGMENT OF:	RILEY CJ, KELLY & BARR JJ
APPEALED FROM:	SOUTHWOOD J No 20 of 2011 (21107399)

CATCHWORDS: CONSTITUTIONAL LAW —Acquisition of property — Criminal property forfeiture — Whether forfeiture of property that is not 'crime-used' or 'crime-derived' is acquisition of property without just terms — Whether sufficient connection between crime and property — *Northern Territory (Self-Government) Act 1978* (Cth) s 50(1) —*Constitution*

s 51(xxxi) — *Misuse of Drugs Act 1990* (NT) s 36A — *Criminal Property Forfeiture Act 2002* (NT) s 94(1).

CONSTITUTIONAL LAW — Judicial power — *Kable* principle — Institutional integrity of courts — Defining characteristics of courts — Whether declaration that a person is a "drug trafficker" impedes institutional integrity — Whether judges have "decisional independence" when making a declaration — Whether declaration involves a justiciable controversy — *Misuse of Drugs Act 1990* (NT) s 36A.

CRIMINAL LAW — Criminal property forfeiture — Application for declaration that respondent is a drug trafficker — Whether declaration is a pronouncement of fact or form of declaratory relief — Whether civil or criminal proceedings — *Misuse of Drugs Act 1990* (NT) s 36A.

CRIMINAL LAW — Criminal property forfeiture — Forfeiture application — Quantum of forfeiture — Whether value of property forfeited must be proportionate to cost of deterring, detecting and prosecuting criminal activities of offender — *Criminal Property Forfeiture Act 2002* (NT) s 10(2).

CRIMINAL LAW — Criminal property forfeiture — Forfeiture application — Whether criminal proceedings against respondent had been "finally determined" — Whether restraining order ceased to have effect — *Criminal Property Forfeiture Act 2002* (NT) s 52(3).

REPRESENTATION:

Counsel:

Appellant:	A Wyvill SC with N Aughterson
First and Second Respondents:	R Jobson
Attorney-General for the Northern Territory:	M Grant QC (Solicitor-General) with R Bruxner

Solicitors:

Appellant:	Ward Keller
Respondents:	Solicitor for the Northern Territory

Judgment category classification:	A
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Emmerson v The Director of Public Prosecutions & Ors [2013] NTCA 4
No. AP 9 of 2012

BETWEEN:

REGINALD WILLIAM EMMERSON
Appellant

AND:

THE DIRECTOR OF PUBLIC PROSECUTIONS
First Respondent

AND:

NORTHERN TERRITORY OF AUSTRALIA
Second Respondent

AND:

ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY
Intervener

CORAM: RILEY CJ, KELLY & BARR JJ

REASONS FOR JUDGMENT

(Delivered 28 March 2013)

Riley CJ:

Introduction

[1] On 15 August 2011 the appellant was declared to be a "drug trafficker" pursuant to s 36A(3) of the *Misuse of Drugs Act*. By virtue of that

declaration the property of the appellant, which had previously been made the subject of a restraining order, was forfeited to the Northern Territory pursuant to the provisions of the *Criminal Property Forfeiture Act*.[1]

[2] The appellant appeals against the decision on four grounds, two of which challenge the validity of the legislative scheme contained in the *Misuse of Drugs Act* and the *Criminal Property Forfeiture Act*. The first of those grounds is that the forfeiture of property effected by the legislative scheme created by s 36A of the *Misuse of Drugs Act* and s 94(1) of the *Criminal Property Forfeiture Act* is a law with respect to the acquisition of property otherwise than on just terms contrary to s 50(1) of the *Northern Territory (Self Government) Act 1978* (Cth). The second is that those provisions confer powers and functions on the Supreme Court which substantially impair and distort the institutional integrity of the Court and, further, are inconsistent with the defining characteristics of a court including the reality and appearance of independence and impartiality. The remaining grounds of appeal were, first, that the learned Judge erred in failing to construe s 52(3) of the *Criminal Property Forfeiture Act* such that the subject restraining order must cease to have effect if the relevant charge is finally determined without the defendant being declared a drug trafficker. The final ground of appeal was that his Honour erred in concluding that a restraining order may be confined to property of a value that is proportional to the likely cost of

[1] *Criminal Property Forfeiture Act* s 94(1).

deterring, detecting and dealing with the criminal activities of the particular offender.

The history of the proceedings[2]

[3] At the relevant time the appellant was aged 55 years. He had for many years unlawfully used different drugs. He had been convicted of various drug-related offences in the Northern Territory and interstate. He became addicted to crystal methamphetamine which is also known as "ice". The convictions of particular relevance to the present proceedings were as follows:

(a) convictions in the Court of Summary Jurisdiction on 17 August 2007 for the following offences which were committed on 28 February 2007: possession of 5.9g of MDMA; possession of methylamphetamine; possession of lysergic acid; possession of cannabis plant material; and administering MDMA, methylamphetamine and cannabis to himself;

(b) convictions in the Court of Summary Jurisdiction on 12 March 2010 for the following offences which were committed on 17 October 2008: possession of 20.8g of cannabis oil; and possession of 64.1g of cannabis plant material; and

(c) convictions in the Supreme Court on 22 September 2011 for the following offences which were committed on 18 February 2011: supplying 18.6646kg of cannabis; and possessing $70,050 which the

[2] The history is taken from the judgment of the Supreme Court and is unchallenged. See *DPP (NT) v Emmerson* [2012] NTSC 60.

appellant obtained directly from the commission of offences against the *Misuse of Drugs Act*.

[4] On 21 February 2011 the appellant was charged with the drug offences committed on 18 February 2011. On 28 February 2011 the Director of Public Prosecutions filed an application for a restraining order under the *Criminal Property Forfeiture Act* on the basis that, if the appellant was found guilty of the offence of supplying 18.6646kg of cannabis, his history of offending over 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* with the consequence that his property would be forfeited to the Northern Territory under s 94(1) of the *Criminal Property Forfeiture Act*. On 2 March 2011 an interim restraining order over some of the appellant's property was made in the Supreme Court. On 11 April 2011, with the consent of the appellant, a further restraining order was made over all of the real and personal property owned or effectively controlled by the appellant.[3] Thereafter the appellant lodged objections under the provisions of the *Criminal Property Forfeiture Act*.

[5] At the hearing of the objections in the Supreme Court it was common ground that, apart from the $70,050 seized from the appellant (which was crime-derived property), the balance of the property restrained was neither crime-derived nor crime-used property.[4] Nor was it unexplained wealth.[5]

[3] Pursuant to s 44 of the *Criminal Property Forfeiture Act*.
[4] See *Criminal Property Forfeiture Act* ss 10–11.

The property was valued in excess of $850,000 and had been acquired by the appellant through legitimate means. It was acknowledged to have no connection with any criminal offences whatsoever.

The legislative scheme — drug traffickers

[6] Section 36A of the *Misuse of Drugs Act* permits the DPP to apply to the Supreme Court for a declaration that a person is a drug trafficker. The application may be made at the time of a hearing for an offence "or at any other time". The section then provides that upon the hearing of an application the court "must" declare a person to be a drug trafficker if certain criteria are satisfied.[6] There is no dispute that as a result of the above-mentioned convictions the appellant satisfied the criteria.

[7] Although the *Misuse of Drugs Act* provides for the declaration of a person as a "drug trafficker", the Act does not attach any consequence to such a declaration. The consequences of the declaration are to be found in the *Criminal Property Forfeiture Act.* The two Acts comprise an interlocking legislative scheme.

[8] The *Criminal Property Forfeiture Act* has the expressed object of providing for the forfeiture in certain circumstances of property acquired as a result of criminal activity, property used for criminal activity, and for related purposes.[7] The objective of the Act is said to be to "target the proceeds of crime in general and drug-related crime in particular in order to prevent the

[5] See *Criminal Property Forfeiture Act* Pt 6 Div 1.
[6] *Criminal Property Forfeiture Act* s 36A(3).
[7] *Criminal Property Forfeiture Act* Preamble.

unjust enrichment of persons involved in criminal activities."[8] Section 10(2) of the Act provides:

> The property (real or personal) of a person who is involved or taken to be involved in criminal activities is forfeit to the Territory to the extent provided in this Act to compensate the Territory community for the costs of deterring, detecting and dealing with the criminal activities.

[9] The *Criminal Property Forfeiture Act* applies to: (a) property owned or effectively controlled or previously owned by persons who are involved in criminal activities; (b) property that is crime-used; and (c) property that is crime-derived.[9] By operation of s 10(5) of the Act property is liable to forfeiture under the Act if the property is, inter alia, owned or effectively controlled, or has at any time been given away, by a declared drug trafficker.

[10] The forfeiture provisions of the scheme, relevant for present purposes, are to be found in s 94(1) of the *Criminal Property Forfeiture Act* which provides:

> If a person is declared to be a drug trafficker:
>
> (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 by the person, whether before or after commencement of this Act,
>
> is forfeited to the Territory.

[8] *Criminal Property Forfeiture Act* s 3.
[9] *Criminal Property Forfeiture Act* s 10(1).

[11] What is available to be forfeited from a person declared to be a drug trafficker is restricted to "property subject to a restraining order" and property that has been given away. Section 44 of the Act provides for the making of restraining orders in the following terms:

> (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:
>
> (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
>
> (b) an application has been made, or it is intended that within 21 days after the application for the restraining order an application will be made, for one or more of the following in relation to the person:
>
> (i) a production order;
>
> (ii) an unexplained wealth declaration;
>
> (iii) a criminal benefit declaration;
>
> (iv) a crime-used property substitution declaration; or
>
> (c) an order or declaration mentioned in paragraph (b) has been made in relation to the person.
>
> (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.

(3) The court must not refuse to make a restraining order under subsection (1)(b)(ii), (iii) or (iv) only because the value of the property subject to the restraining order exceeds, or could exceed, the amount that the person could be liable to pay to the Territory if the relevant declaration is made.

[12] The use of the word "may" in subsection 44(1) of the Act preserves the discretion available to the Court to refuse to make the restraining order. However, that discretion must be exercised judicially and consistently with the fact that the Court is a court of equity. The Court may decline to make an order where, inter alia, there is an absence of jurisdiction or there exists material non-disclosure or the proceedings constitute an abuse of process. Considerations of laches may culminate in a refusal to make an order. The content of the discretion is to be determined in the circumstances of particular cases.

Cost recovery

[13] In the course of his reasons for judgment the learned trial Judge expressed the view that the scope of any restraining order granted pursuant to s 44 of the *Criminal Property Forfeiture Act* may be validly confined to property of a value that is proportional to the likely cost of deterring, detecting and

dealing with the criminal activities of the particular offender who is the respondent to the application for the restraining order. His Honour acknowledged that the point had not been argued before him but relied upon s 10(2) of the *Criminal Property Forfeiture Act.*[10]

[14] In my opinion his Honour fell into error in so concluding. The parties in the appeal conceded this to be so. The section simply provides a general expression of the objective that forfeiture will help defray the cost to the Territory community of activities of the type falling under the Act. Nowhere in the legislative scheme is there any reference to how the cost of deterring, detecting and dealing with the criminal activities is to be determined. If actual cost recovery was intended some guidance in this regard would be required.

[15] Further, the property liable to forfeiture under the *Criminal Property Forfeiture Act* is not expressed to be constrained. The section does not make any allowance for "equivalency" but, rather, refers to forfeiture to "the extent provided in this Act". The reference to compensation in s 10(2) of the Act is a reference to the purpose of the forfeiture not the extent of the forfeiture.

[16] Section 10(5)(a)(i) of the Act makes it clear that the property liable to forfeiture is the property owned or effectively controlled by a declared "drug trafficker" and s 94(1) of the Act goes on to provide, in relation to a

[10] See above at [8].

declared drug trafficker, that "*all* property subject to a restraining order that is owned or effectively controlled by the person" (emphasis added) is forfeited to the Territory. For present purposes that is the "extent" of the forfeiture "provided in this Act".[11] There is no power in the Court to limit the restraining order to an amount which reflects the cost of deterring, detecting and dealing with the criminal activities as suggested.

Acquisition of property

[17] The appellant submitted that the legislative scheme created by s 36A of the *Misuse of Drugs Act* and s 94(1) of the *Criminal Property Forfeiture Act* created a law with respect to the acquisition of property otherwise than on just terms and, as such, was contrary to s 50(1) of the *Northern Territory (Self Government) Act*.

[18] The operation of s 50(1) of the *Northern Territory (Self Government) Act* in relation to some parts of the *Criminal Property Forfeiture Act* was recently addressed by this Court in *Dickfoss v Director of Public Prosecutions (NT)*.[12] Generally speaking, the provision is to be construed and applied in the same way as s 51(xxxi) of the *Constitution*.[13] It was observed in *Dickfoss* that in circumstances where the subject matter of a law is such that the notion of fair compensation for the taking of property effected by the

[11] *Criminal Property Forfeiture Act* s 10(2).
[12] (2012) 31 NTLR 16 at 31–4 [52]–[65].
[13] *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 659 [3]–[4] per Gleeson CJ, Gummow, Hayne and Crennan JJ; *Dickfoss* (2012) 31 NTLR 16 at 34 [62].

law would be irrelevant or incongruous,[14] the guarantee of just terms provided by s 50(1) of the *Self Government Act* will have no application.

[19] It is well-established that not every acquisition of property effected by legislation falls within the scope of the guarantee.[15] For example, laws providing for the forfeiture of property in the context of criminal activity fall outside the scope of the guarantee.[16] In relation to those provisions of the *Criminal Property Forfeiture Act* which provide for the forfeiture of crime-used and crime-derived property it was said in *Dickfoss*:[17]

> The *Criminal Property Forfeiture Act* is not by its nature and object a law to which the guarantee of just terms applies. It is an Act providing for the forfeiture of property used in or derived from unlawful activity. Its purpose includes punishing and deterring criminal activity by preventing the illicit use of property by imposing an economic penalty and, in respect of "innocent parties", by enlisting the owner's participation in ensuring the observance of the law and precluding future use of the thing forfeited in the commission of crime.

[20] The appellant did not challenge those conclusions but rather sought to distinguish the present case from the circumstances that prevailed in *Dickfoss*. In the present case the property sought to be forfeited was neither crime-used nor crime-derived. Reliance was placed by the appellant upon some *obiter dicta* of Mildren J at first instance in *Dickfoss* where his Honour, without reference to authority, observed:[18]

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[14] *Dickfoss* (2012) 31 NTLR 16 at 38 [58].
[15] *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 177–8 per Brennan J.
[16] *Re Director of Public Prosecution; Ex parte Lawler* (1994) 179 CLR 270 at 285 per Deane and Gaudron JJ.
[17] *Dickfoss* (2012) 31 NTLR 16 at 34 [63].
[18] *Dickfoss v DPP (NT)* (2011) 28 NTLR 71 at 105-6 [103].

> That is not to say the Legislative Assembly could itself validly pass a law to acquire property without just terms by declaring it a forfeiture law without any connection between the property acquired and proof of either a breach of the criminal law or of unlawful conduct. In this case ... there must be proof of both a forfeiture offence and a connection with the property. Clearly the definition of "crime-used property" provides the necessary connection between the forfeiture offence and the property so as to enable it to be characterised as a forfeiture law which falls outside the requirements of just terms.

[21] Read in the context of the matter then before the Court it is apparent that his Honour sought a connection between the property to be forfeited and the unlawful conduct because in that case it was necessary to show that the property was either crime-used or crime-derived.

[22] It was submitted on behalf of the appellant that in the present case there was no connection between the offence and the property to be acquired. However, this case is quite different from *Dickfoss* in that it does not involve forfeiture based upon the relevant property being either crime-used or crime-derived.

[23] As the High Court observed in *Theophanous v The Commonwealth*[19] the taking of property is not removed from the just terms guarantee simply because the process is described as a "forfeiture" in the relevant legislation. There must be a boundary to the forfeiture law exception. It is the "character of the taking" that controls the outcome.[20] In *Theophanous*[21] it was said of s 51(xxxi) of the *Constitution* that:

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[19] (2005) 225 CLR 101 at [60].
[20] *Air Services Australia v Canadian Airlines* [1999] 202 CLR 133 at 181.
[21] *Theophanous v The Commonwealth* (2005) 225 CLR 101 at [60].

> It may be complained that the boundary marked to the "just terms" requirement of s 51(xxxi) by reference to its application being "inconsistent" or "incongruous" states a criterion that may require difficult questions of judgment. But to mark the boundary to the application of the "just terms" requirement in this way is 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. Such exactions are, and long before the Commonwealth were, regular features of the law in England, the Australian colonies and now of the Commonwealth. It cannot therefore have been the purpose of s 51(xxxi) to apply to such exactions an obligation to provide "just terms". There may, in some cases, be room for difference about the characterisation of the exaction and the application of considerations of inconsistency or incongruity. The present is not such a borderline case.

[24] In *International Finance Trust Company Ltd v New South Wales Crime Commission*[22] French CJ traced the history and prevalence of the concept of civil forfeiture of assets by reason of criminal conduct, describing it as a "global phenomenon". His Honour observed there is "widespread acceptance ... of the utility of civil assets forfeiture laws as a means of deterring serious criminal activity which may result in the derivation of large profits and the accumulation of significant assets".

[25] The *Criminal Property Forfeiture Act* is such a law. In the case of this legislative scheme a person is subject to the consequence of exposure to forfeiture of property where that person has undertaken particular conduct, namely suffered a third finding of guilt for an offence described in s 36A of the *Misuse of Drugs Act*. In those circumstances, where the Court has previously made a restraining order, and then the Court makes a declaration

[22] (2009) 240 CLR 319 at 344-5 [25]-[29].

under s 94(1) of the *Criminal Property Forfeiture Act*, forfeiture of all property the subject of the restraining order will follow. The scheme may be characterised as a civil action for penalties in the nature of forfeiture. It provides for the forfeiture of property in the context of criminal activity but is in the nature of a civil penalty. The forfeiture is not part of the penalty for any criminal offence. I note that in *R v Smithers; Ex parte McMillan* the Court said:[23]

> It has never been considered that a civil action for penalties involves an acquisition of property by the Commonwealth, let alone an acquisition of property otherwise than on just terms. Just as the imposition of a penalty or fine by way of punishment for a criminal offence involves no acquisition of property, so also with the imposition of a civil liability for pecuniary penalties.

[26] In my opinion there is a nexus between the defined criminal conduct and the forfeiture. As was submitted by the Solicitor-General, the scheme provides that a particular consequence (exposure to the risk of confiscation of property) results from particular conduct (commission of three qualifying offences). If the scheme also provided a right of compensation in respect of confiscated property, the conduct could not have that consequence. The scheme of civil forfeiture created by the *Misuse of Drugs Act* read with the *Criminal Property Forfeiture Act* is not by its nature and object a scheme to which the guarantee of just terms applies. The provision of just terms is inconsistent and incongruous with a law providing for forfeiture.[24]

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[23] (1982) 152 CLR 477 at 487.

[24] *Re Director of Public Prosecutions: Ex parte Lawler* (1994) 179 CLR 270 at 285 per Deane and Gaudron JJ.

[27] The expressed objective of the *Criminal Property Forfeiture 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.[25] The purpose of the scheme is to compensate the Territory community for the costs of deterring, detecting and dealing with criminal activities. Whether the scheme is reasonably adapted or proportionate to the purpose for which it has been created is not a matter for the courts but is a matter for the Legislative Assembly.[26] In my view the scheme creates a forfeiture law which falls outside the operation of s 50(1) of the *Self-Government Act*.

The Kable ground[27]

[28] The appellant submitted that s 36A of the *Misuse of Drugs Act* was, on its own, invalid and, further, was invalid when read with s 94(1) of the *Criminal Property Forfeiture Act* on the grounds that it confers powers and functions on the Court which substantially impair and distort its institutional integrity and, in addition, are inconsistent with the defining characteristics of a court.[28] The foundation for the submission was the contention that the scheme: (a) forced the Court to declare facts which may not be true; and (b) forced the Court to impose double punishment on offenders selected by the Executive in the exercise of a discretion.

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[25] *Criminal Property Forfeiture Act* s 10(2).
[26] *Burton v Honan* (1952) 86 CLR 169 at 179 per Dixon CJ.
[27] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[28] *Forge v Australian Security and Investments Commission* (2006) 228 CLR 45 at 76 [63] per Gummow, Hayne and Crennan JJ.

[29] The legislative scheme involves the courts in three separate areas. The first is in determining the guilt or otherwise of the person of offences referred to in s 36A(6) of the *Misuse of Drugs Act*. The second is, on the application of the DPP, to determine whether to make a restraining order in relation to the property of the person as permitted under s 44 of the *Criminal Property Forfeiture Act*. The third is, on the application of the DPP, to determine whether the person fulfils the criteria provided in s 36A(3) of the *Misuse of Drugs Act* and, if that be so, to declare the person to be a "drug trafficker". The Court is not called upon to make any orders for forfeiture of property. Forfeiture occurs by operation of s 94 of the *Criminal Property Forfeiture Act* and without further involvement of the Court.

(a) Declaration of facts which may not be true.

[30] Subsections 36A(1) to (3) of the *Misuse of Drugs Act* are in the following terms:

> 36A Declared drug trafficker
>
> (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 correspond to an offence or offences referred to in subsection (6).

[31] The declaration of a person as a "drug trafficker" pursuant to this section does not necessarily mean that the person is, in fact, a drug trafficker as that expression is widely understood. For example, it would be sufficient if the person had been convicted on three separate occasions, over a ten-year period, of possessing 50g of cannabis on each occasion without there being any suggestion of the person actually trafficking in drugs. The Court does not consider whether the person in fact trades in illegal drugs or buys and sells illegal drugs or is commercially involved in illegal drugs. However, in most cases, the declaration that a person is a drug trafficker will be made in relation to a person who fits the description in common parlance.

[32] It is the submission of the appellant that the declaration of a person as "a drug trafficker" is both stigmatic and a significant act of legal and social censure. It is a mark of disapproval by society. The appellant submitted that the requirement imposed upon the Court to make a declaration of fact

(ie the offender is a drug trafficker) without proof of the fact to be declared and where there is likelihood that the fact may be false is "inconsistent with the subsistence of judicial decisional independence"[29] as "[d]ecisional independence is a necessary condition of impartiality".[30] The appellant submitted that the appearance created by the scheme is that the forfeiture of the property arises from the exercise by the Court of its judicial function in making a declaration that a respondent is a drug trafficker. It was submitted that the legislation clothed a statutory forfeiture scheme with the appearance of judicial process. It was further argued that the effect of this section is to subject the Court to direction by the Executive in the performance of the uniquely judicial function of quelling controversies by the ascertainment of facts.

[33] Insofar as the appellant's submissions rested upon a suggestion that the legislative scheme created a perception that there was a lack of decisional independence it is necessary to consider the reality of the situation. As Gummow J observed in *Fardon v Attorney-General (Qld)*:[31]

> Perception as to the undermining of public confidence is an indicator, but not the touchstone, of invalidity; the touchstone concerns institutional integrity.

[34] Section 36A of the *Misuse of Drugs Act* is a provision of a familiar kind. It requires the Court to make a declaration if identified criteria are established. It confers upon the Court a power with a duty to exercise it if the Court

[29] *South Australia v Totani* (2010) 242 CLR 1 at [70] per French CJ (citation omitted).
[30] *South Australia v Totani* (2010) 242 CLR 1 at [62] per French CJ.
[31] (2004) 223 CLR 575 at 618 [102].

decides the conditions attached to the power are satisfied. In *International Finance Trust Company Ltd v New South Wales Crime Commission*[32] Gummow and Bell JJ observed, in relation to a similar provision, that it is not to be "stigmatised on that ground alone as an attempt to direct the Supreme Court as to the outcome of the exercise of its jurisdiction."

[35] It was submitted on behalf of the Attorney-General, and it is the case, that the term "drug trafficker" is the expression chosen by the Legislature in respect of a person who is found by the Court, by application of the adjudicative process, to meet the criteria of s 36A of the *Misuse of Drugs Act*. Such a declaration is a declaration that the person meets those criteria.

[36] Contrary to the submission of the appellant that the effect of the section is that the Court is subject to direction by the Executive in the performance of its judicial function of quelling controversies by the ascertainment of facts, the arrangements do not subject the Court in reality or appearance to direction from the Executive as to the content of the relevant judicial decision. The Court is required to make the declaration if the DPP proves the respondent meets the specified criteria. The controversy to be resolved by the Court is whether a declaration is to be made in respect of the person the subject of the application. That controversy is to be resolved by the Court acting judicially to determine whether the factual basis for the declaration has been established. It is only if the facts as found by the Court satisfy the terms of the legislation that a declaration is required to be made.

[32] (2009) 240 CLR 319 at 360 [77] (citation omitted).

[37] It may be that in many cases the proof of the criteria necessary to establish the basis for the declaration will not be difficult. The scope to contest the making of the order sought by the DPP may be limited but, nevertheless, issues requiring adjudication will arise.[33] There is a real justiciable controversy.

[38] In my opinion the legislative scheme is not invalid for this reason.

(b) Punishment at the discretion of the executive.

[39] The appellant submitted that the making of the declaration of a person as a drug trafficker and the resultant forfeiture amounted to a significant punishment additional to the punishments that a court had already imposed when sentencing for the earlier findings of guilt. It was submitted that Parliament does not have the power to authorise a body other than a court to punish for the commission of a criminal offence and then to have that punishment enforced by the Court as if the product of the exercise of judicial power. Reference was made to the observations of Gaudron J in *Kable*[34] that one of the central purposes of the judicial process is:

> … to protect "the individual from arbitrary punishment and the arbitrary abrogation of rights by ensuring that punishment is not inflicted and rights are not interfered with other than in consequence of the fair and impartial application of the relevant law to facts which have been properly ascertained."

[33] Eg *DPP (NT) v Hennig* (2005) 154 A Crim R 550.
[34] *Kable v DPP (NSW)* (1996) 189 CLR 51 at 106–7, quoting *Re Nolan; Ex parte Young* (1995) 172 CLR 460 at 497 per Gaudron J.

[40] The learned trial Judge gave consideration to whether the scheme created for the forfeiture of property in the present circumstances was a civil proceeding or a criminal proceeding.[35] His Honour concluded that the scheme was a civil proceeding and expressed detailed reasons for so doing. With respect I agree.[36]

[41] The proceedings with which we are concerned are not criminal proceedings. They relate to civil assets forfeiture and, as I have observed above, the forfeiture is imposed by the legislation and not by the Court. The legislation provides that where a person conducts himself in the manner referred to in s 36A of the *Misuse of Drugs Act* he is to be deprived of his assets in order to compensate the Territory community for the costs of deterring, detecting and dealing with criminal activities. The proceedings are not criminal proceedings and the person is not being punished twice for the individual offences committed by him. The legislation operates by reference to his status deriving from the fact that he has been convicted on the necessary number of occasions of offences of a certain kind. The legislation sets up its own normative structure[37] in relation to such circumstances. Whilst the person would no doubt regard the forfeiture as being punitive it is not to be characterised as punitive, rather, its purpose is as set out in the relevant provisions of the *Criminal Property Forfeiture Act.*

[35] *DPP (NT) v Emmerson* [2012] NTSC 60 at [68]–[78].
[36] See also *Trajkoski v DPP (WA)* (2010) 41 WAR 105; *Donohoe v DPP (WA)*(2011) 215 A Crim R 1.
[37] *Fardon v Attorney General (Queensland)* (2004) 223 CLR 575 at 610 [75] per Gummow J.

[42] It was submitted by the appellant that the legislative scheme enabled the DPP to select a person who has the three requisite findings of guilt to be subjected to the double punishment which the legislative scheme imposes. The thrust of the submission was that the legislative scheme authorised the DPP to punish a respondent for the commission of a criminal offence and then have the punishment enforced by the Court as if the product of the exercise of judicial power. It is to be noted that the Court does not impose any consequence upon the respondent but, rather, makes a declaration which has consequences which are imposed by the legislature pursuant to s 94(1) of the *Criminal Property Forfeiture Act*. Further, whilst it is a matter for the DPP to decide whether to pursue forfeiture under the statutory scheme, that decision must be informed by the same considerations as apply to the commencement of any civil proceedings. There is nothing unusual in this arrangement.

[43] In *Dickfoss*[38] this Court adopted the following observations of Doyle CJ in *Director of Public Prosecutions v George*:[39]

> It is not uncommon for legislation to provide that, if in proceedings before a court specified matters are established, a particular consequence will follow or a particular order must be made. This feature of s 95 is of no particular significance. The failure to interpose a judicial discretion, or a judicial decision, between the establishment of the criteria and the making of the order is not problematic.

[38] (2012) 31 NTLR 16 at 36 at [72].
[39] (2008) 102 SASR 246 at 270 [112]–[113].

> Nor has Parliament "clothed" a forfeiture with the appearance of a judicial process. The judicial process is a reality. The Court does not act at the dictation of the DPP. The DPP must satisfy the requirements of s 95(1). It is the decision of the Court on those matters that determines whether or not a PPO is to be made. There is no merit in the suggestion that the process under s 95 is not a "real judicial process", involving the exercise of a "real judicial discretion". That submission merely treats the absence of a judicial decision or discretion as inconsistent with the exercise of a judicial power. There is no basis for doing so.

[44] The appellant referred to the recent decision of Kourakis CJ in *Bell v Police*[40] as providing support for the argument of the appellant in this regard. However, reference to the scheme established under the legislation considered in those proceedings reveals a materially different statutory scheme from that now under consideration.[41]

Was the restraining order in effect at the time of the declaration?

[45] It was submitted on behalf of the appellant that, as a result of the operation of s 52(3) of the *Criminal Property Forfeiture Act*, the restraining order imposed in this matter ceased to have effect on 22 September 2011 when the criminal proceedings relied on to support the restraining order were "finally determined". It was submitted that, in the present case at the time of the declaration of the appellant as a drug trafficker, there was no property subject to a restraining order within the meaning of s 94(1) of the *Criminal Property Forfeiture Act* and therefore no property which could be the subject of forfeiture. The relevant subsection is as follows:

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[40] [2012] SASC 188.

[41] A detailed analysis of the South Australian scheme is to be found at paragraphs [15]–[57] of the judgment.

(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.

[46] It was submitted that this provision imports a temporal limitation and to determine otherwise would be to create uncertainty in relation to property rights. It was argued that, in the absence of such a limitation, people wishing to deal with the property would have no way of knowing whether or not, at some future time, an application for a declaration under s 36A might be made or when the restraining order might expire.[42]

[47] A range of arguments was pressed in support of the submission. The same submissions were also pressed before the learned trial Judge and were rejected. His Honour concluded that there was no temporal limitation attached to the subsection and there is nothing in the wording of the subsection to require that the declaration must be sought and made contemporaneously with the final disposition of the relevant charge under the *Misuse of Drugs Act*. His Honour observed that the subsection caters for situations where, notwithstanding the determination of the charge, a declaration that a person is a drug trafficker is not made. This would arise where there was a finding of not guilty, a failure by the DPP to prove other

[42] See *DPP (ACT) v Hiep Huu Le* (1998) 86 FCR 33 at 42.

relevant criteria or a discontinuance or withdrawal or dismissal of the application. In those circumstances the restraining order would cease to have effect without the need for further order of the Court. A consideration of the legislative scheme lends support to the conclusions of his Honour.

[48] The legislative scheme allows the DPP to seek a restraining order at a time prior to the criteria for a declaration of a person as a drug trafficker becoming available. At the time of the application the person may not have been charged with the final offence or the charge may not have been finalised. The purpose of the restraining order is to preserve the property. The duration of the order is for the period set by the Court and the Court may extend the period on as many occasions as it sees fit.[43]

[49] The only relief available to those who oppose forfeiture is to be found in the objection process which permits an application to the Court to set aside the restraining order.[44] Under the scheme the objection proceedings must be heard prior to the making of the forfeiture order or the declaration that the offender is a 'drug trafficker' as the making of that order or declaration puts an end to the possibility of any successful objection because the restraining order will no longer exist.

[50] It would be inconsistent with the legislative scheme, and in particular the objection process, if the DPP was required to seek the s 36A declaration contemporaneously with the final charge being determined. Indeed the

[43] *Criminal Property Forfeiture Act* s 51.
[44] *Criminal Property Forfeiture Act* Div 3 Pt 5.

section expressly allows for the application to be made at the time of a hearing for an offence "or at any other time". On the appellant's argument any objection which had not been resolved at that stage would immediately become redundant. In my opinion the legislature cannot have intended this outcome.

[51] Further, it may be far from clear when a charge is "finally determined" for the purposes of the provision. A charge may not be finally determined upon the entry of a conviction because the person may exercise a right of appeal. The appellant submitted that the correct interpretation of s 52(3) of the Act is that the restraining order ceases to have effect at the time of conviction where there is no s 36A declaration. What then is to happen in the event of a successful appeal?

[52] The recording of the third conviction is a necessary prerequisite to the making of a s 36A declaration. That is the earliest time at which the Court can entertain an application for a declaration. There must necessarily be a time-lapse between the recording of the conviction and the making of the declaration. They must proceed sequentially. On the argument of the appellant the restraining order would cease to have effect the moment the conviction was recorded and necessarily before the declaration could be made. I do not accept this interpretation.

[53] I agree with the trial Judge that the subsection provides for the cessation of the effect of the restraining order without the need for a further order where

the charge is finally determined and the person has not been declared to be a drug trafficker ie where a declaration that the person is a drug trafficker is not made by the Court. The cessation will also occur if the charge is disposed of without being determined.

[54] The submission that those wishing to deal with the property would have no way of knowing whether or not an application for a declaration might be made, or when the restraining order might expire, is met by the automatic cessation provisions set out in s 52 of the Act and the ability of the parties to bring the order to an end as provided for in s 50 of the Act. Further, there is the power of the Court to determine the duration of any order pursuant to the provisions of s 51 of the Act.

[55] I see no error on the part of his Honour.

[56] In my opinion the appeal should be dismissed.

Kelly J:

[57] I have read the reasons for decision of the Chief Justice and I agree with those reasons with the exception of his decision in relation to the challenge to the legislation on the basis of the *Kable* principle.

[58] In the proceedings below, and on this appeal, the appellant has challenged the validity of the legislative scheme for forfeiture of property contained in

s 94 of the *Criminal Property Forfeiture Act 2002* (NT) and s 36A of the *Misuse of Drugs Act 1990* (NT) on the basis of the *Kable* principle.[45]

> "The principle for which that case stands as authority is that, since the Constitution established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid."[46]

> "The question indicated by the use of the term "integrity" is whether the court is required or empowered by the impugned legislation to do something which is substantially inconsistent or incompatible with the continuing subsistence, in every aspect of its judicial role, of its defining characteristics as a court. So much is implicit in the constitutional mandate of continuing institutional integrity. By way of example, a law which requires that a court give effect to a decision of an executive authority, as if it were a judicial decision of the court, would be inconsistent with the subsistence of judicial decisional independence."[47]

[59] These general statements of principle refer to "State Supreme Courts" and "State legislatures", but the same principles apply to limit the power of Territory legislatures with respect to Territory Supreme Courts.[48]

[60] The most recent general statement[49] of what that means in practical terms was by French CJ in a decision handed down in December 2012:

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[45] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51
[46] *Baker v The Queen* (2004) 223 CLR 513 per Gleeson CJ at p 519 para [5]
[47] *South Australia v Totani* (2010) 242 CLR 1; [2010] HCA 39 per French CJ at para [70]; *Re: Macks; Ex parte Saint* [2000] HCA 62; (2000) 204 CLR 158 at 232-233 [208] per Gummow J; [2000] HCA 62
[48] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 per Gaudron J at 363 [81]; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ at 163 [29]; *State of South Australia v Totani* (2010) 242 CLR 1, per French CJ at para [72]
[49] The more recent decision of *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 (14 March 2013) concerned potential procedural unfairness which the High Court

"There are, however, as this Court has held in a number of decisions, limits upon the powers of State legislatures to make laws imposing on State courts functions which are incompatible with their institutional integrity as courts. A State legislature cannot subject State courts to direction by the executive government of the State,

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found did not substantially impair the essential characteristics of the Supreme Court of Queensland. (Under the legislation in question the Court can be required to act on evidence which must not be shown to the defence if the Court declares it to be "criminal intelligence"; a decision as to whether evidence is to be declared "criminal intelligence" must be heard in the absence of the respondent; and the respondent is excluded from those parts of the substantive hearing at which "criminal intelligence" is received in evidence.) The only paragraphs of the judgment in *Pompano* which mention the issue which arises in this proceeding are paragraphs [67], [71], [78], [88], [125] and [133] all of which directly or indirectly affirm the proposition that the legislature cannot subject State or Territory courts to direction by the executive.

"[67] ……. **The defining characteristics of courts include:** ... **the reality and appearance of decisional independence and impartiality**; … *(per French CJ)*

"[71] Where a statute mandates that certain evidence used in a judicial proceeding will not be made available to one of the parties and procedural fairness is thereby qualified, the cautionary observation in *Gypsy Jokers* is applicable:

> "**As a general proposition, it may be accepted that legislation which purported to direct the courts as to the** manner and **outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals.**" … *(per French CJ)*

"[78] The effect of Pt 6 of the COA upon the normal protections of procedural fairness is significant. **On the other hand, the Supreme Court performs a recognisably judicial function in determining an application under that Part. It is not able to be directed as to the outcome.** …*(per French CJ)*

"[88] …… **The Supreme Court, however, retains its decisional independence** and the powers necessary to mitigate the extent of the unfairness to the respondent in the circumstances of the particular case. "*(per French CJ)*

"[125] …….. **In particular, the courts cannot be required to act at the dictation of the Executive**." (*per Hayne, Crennan, Kiefel and Bell JJ)*

"[133] By majority, this Court *[in Totani]* held s 14(1) invalid because it authorised the Executive to enlist the Magistrates Court to implement the decisions of the Executive in a manner repugnant to or inconsistent with its continued institutional integrity. Whether and why an organisation should be declared was a matter for the Executive; the only question to be determined by the Magistrates Court was whether a person was a member of a declared organisation. As Crennan and Bell JJ put it the SOC Act, and s 14(1) in particular, **had "the effect of rendering the [Magistrates] Court an instrument of the Executive"".**(*per Hayne, Crennan, Kiefel and Bell JJ)*

[emphasis by bolding added; footnotes and citations omitted]

nor enlist a court of the State to implement decisions of the executive in a way that is incompatible with the court's institutional integrity.[50]

[61] The appellant contends that the combined effect of s 94 of the *Criminal Property Forfeiture Act* and s 36A of the *Misuse of Drugs Act* is to compel this Court to declare facts which may not be true and to impose substantial double punishment on offenders selected at the discretion of the executive. This, it is said, offends against the *Kable* principle.

[62] The trial judge rejected the contention of the appellant that these provisions offend against the *Kable* principle. He found that the legislative scheme:

(a) does not impermissibly change the relationship between the judicial and non-judicial arms of government;

(b) does not render the Court actually or apparently subject to direction by the executive in the exercise of its decision-making role;

(c) does involve the Court in the making of a judicial determination as to whether the criteria in s 36A of the *Misuse of Drugs Act* (which the Court assessed as substantive criteria), are made out, notwithstanding the relative ease of proof of those matters by the Director of Public Prosecutions;

(d) is not rendered invalid by the fact that, upon proof of those matters, a court has no discretion as to the making of a declared drug trafficker declaration;

(e) is not rendered invalid by the fact that the choice whether to seek a declaration under s 36A rests with the Director of Public

[50] *The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* [2012] HCA 58 per French CJ at para [35]. His Honour cited as authority for these propositions: *International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319; [2009] HCA 49;South Australia v Totani (2010) 242 CLR 1 at 52 [82] per French CJ, 67 [149] per Gummow J, 160 [436] per Crennan and Bell JJ, 173 [481] per Kiefel J, see also at 92-93 [236] per Hayne J; [2010] HCA 39.*

Prosecutions and may be affected by whether a respondent has sufficient assets to make proceedings worthwhile (that being a routine consideration in the decision to commence civil proceedings);

(f) involves, at the restraining order stage, a wide discretion on the part of the Court as to whether such an order should be made and as to the property that may be the subject of restraint;

(g) does not derogate from the previous convictions of an offender (which is understood to mean that the statutory scheme does not operate so as to retroactively alter the consequences of earlier offending);

(h) does not, by imposing an additional civil penalty upon commission of the offence that leads to a s 36A declaration, infringe the rule against double punishment; and

(i) is not, insofar as the process under s 36A is concerned, substantially repugnant to the judicial process as understood and conducted throughout Australia.[51]

[63] I do not agree that the legislation has all of these characteristics. First, I do not agree that the Court has a wide discretion to grant or refuse to grant a restraining order, and, in particular, I do not think the Court has a discretion to limit the property over which a restraining order is to be made.[52]

[64] It has been suggested that the court has an "unfettered discretion" to refuse to grant a restraining order over the property of a person who is liable to be declared a drug trafficker under s 44, and that this interposes the exercise of a genuine judicial function between the making of the declaration under s 36A at the instance of the DPP, and the draconian consequence of

[51] *DPP (NT) v Emmerson* [2012] NTSC 60 at [106]
[52] Both the appellant and the respondent agreed that this aspect of the appeal should succeed.

forfeiture of potentially all a person's property under s 94. However, the "discretion" in relation to the grant of a restraining order (which comes from the use of the word "may" in s 44) must be exercised judicially. That means that in considering whether to make a restraining order, the Court must take into account relevant considerations and exclude from account irrelevant considerations.

[65] Section 10(1) of the *Criminal Property Forfeiture Act* provides:

> (1) This Act applies:
>
> (a) to property:
>
> (i) owned or effectively controlled; or
>
> (ii) previously owned;
>
> by persons who are involved in or taken to be involved in criminal activities;

[66] Section 10(4)(a) provides:

> (4) For this Act, a person is taken to be involved in criminal activities if:
>
> (a) the person is declared under section 36A of the *Misuse of Drugs Act* to be a drug trafficker

[67] Section 10(5)(a)(i) provides:

> (5) Property is liable to forfeiture under this Act:
>
> (a) if the property is:

(i) owned or effectively controlled, or has at any time been given away, by a declared drug trafficker;

[68] These provisions make it clear that the Act contemplates that the Act (including the forfeiture provision in s 94) is intended to apply to all of the property of a declared drug trafficker. While normal equitable principles would apply, for example empowering the Court to stay an application for abuse of process, the Court does not have a "discretion" to defeat the purposes of the Act, for example by refusing to make a restraining order over some or all of the property the subject of an application because in the Court's opinion forfeiture of the whole of the property would be unjust or unfair or disproportional to the degree of moral culpability involved in the defendant's offending.

[69] The learned trial judge suggested that it is arguable that in a case where a restraining order is sought on the ground that the offender is likely to be declared a drug trafficker under s 36A, the scope of the restraining order may be confined to the cost of deterring, detecting and dealing with the criminal activities of the particular offender whose property is sought to be restrained. That view was based on the fact that s 10(2) provides:

(2) The property (real or personal) of a person who is involved or taken to be involved in criminal activities is forfeit to the Territory to the extent provided in this Act to compensate the Territory community for the costs of deterring, detecting and dealing with the criminal activities.

[70] Although the trial judge acknowledged that s 10(2) does not represent the sole object of forfeiture of the property of a person who is taken to be involved in criminal activities, his Honour expressed the view that one could discern in s 10(2) some limit on the extent of forfeiture, namely to the cost to the Territory of deterring, detecting and dealing with the criminal activities of the particular offender whose property is sought to be restrained. I do not agree, for the reasons set out above. It seems clear from s 10(1) and s 10(5) that the Act is intended to apply to all of the property of a person who is liable to be declared to be a drug trafficker and that, therefore, if the DPP makes an application under s 44 for a restraining order over property belonging to such a person, this Court has no discretion to refuse to make such an order over some of that property on the ground that the value of the property may exceed the cost to the Territory of the activities referred to in s 10(2).

[71] For the reasons which follow, I also do **not** agree that the process under s 36A (and the combined effect of s 36A and s 94) does not render the Court subject to direction by the executive in the exercise of its decision-making role and that this process is not substantially repugnant to the judicial process as understood and conducted throughout Australia.

[72] The Solicitor-General, Mr Grant QC, who appeared for the Attorney-General as intervener, submitted that his Honour was correct to make the above

findings.[53] He pointed out that even in the Federal context, where the doctrine of the separation of powers has its most rigid application, a law is not rendered invalid by the application of the *Kable* principle merely because it requires the court to make a particular order if certain conditions are met.[54] Importantly for present purposes, if satisfaction of the conditions which give rise to a duty to make a particular order depends upon a decision made by a member of the executive branch of government, such as the DPP, that in itself does not necessarily render the legislation invalid on the ground that the legislature has impermissibly infringed upon the judicial power.[55]

[73] The Solicitor-General also pointed to the fact that the legislative regime does include a genuine fact finding role for the Court to perform. The Court is only bound to make the declaration that a person is a drug dealer, on the application of the DPP, if satisfied that that person satisfies the criteria set out in s 36A(6) – that is that he or she has in fact been convicted of three relevant offences within the specified time frame.

[74] While the Solicitor-General's submission that the mere fact that the legislation has the characteristics mentioned above does not necessarily

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[53] The Solicitor-General made this submission with one caveat. Although describing it in written submissions as an "unfettered discretion" he agreed with the proposition that the Court's discretion on an application under s 44 for a restraining order was limited to the power to restrain an abuse of its processes, and not to limit the amount of property to be restrained for other reasons.

[54] *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 per Gummow and Bell JJ at p 360 para [77]. An example in the legislation under consideration is the duty imposed on the Court by s 96 of the *Criminal Property Forfeiture Act* to make an order forfeiting property if satisfied that it is more likely than not that the property is crime-used.

[55] *ibid* per French CJ at p 352 para [49]; *South Australia v Totani* (2010) 242 CLR 1 per French CJ at p 48-49 para [71]

render it invalid is undoubtedly correct, the corollary of that submission is also correct: if the substantive nature or effect of the legislation is (for example) to enlist a court to implement decisions of the executive in a way that is incompatible with the court's institutional integrity, it will not be saved from invalidity merely because it happens to contain the characteristic highlighted by the Solicitor-General, namely a genuine judiciable question to be determined by the Court.

[75] This point is well illustrated by *Totani*. In *Totani*, the High Court considered a challenge to s 14(1) of the *Serious and Organised Crime (Control) Act 2008* (SA). Section 10(1) of that Act permitted the Attorney-General to make a declaration in respect of an organisation, if satisfied that its members associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, and the organisation represents a risk to public safety and order. Once such a declaration had been made, s 14(1) provided that, on application by the Commissioner of Police, the Magistrates Court **must** make a control order imposing restrictions on the freedom of association of the defendant if satisfied that the defendant was a member of such a declared organisation. Contravention of a control order was a crime under the Act.

[76] The legislation under consideration in *Totani* made provision for the exercise of some genuine judicial functions in the process. First, the court needed to be satisfied that the defendant was a member of a declared organisation. If denied, that would be a fact finding exercise involving

consideration of evidence and making a determination. Further, the legislation contained provision for the Court to modify the effect of a control order. Those genuine judicial functions did not save the legislation from being held to be invalid.

[77] French CJ concluded: (at [82] and [83])

> "Section 14(1) represents a substantial recruitment of the judicial function of the Magistrates Court to an essentially executive process. It gives the neutral colour of a judicial decision to what will be, for the most part in most cases, the result of executive action. That executive action involves findings about a number of factual matters including the commission of criminal offences. None of those matters is required by the SOCC Act to be disclosed to the Court, nor is the evidence upon which such findings were based. In some cases the evidence, if properly classified as "criminal intelligence", would not be disclosable. Section 14(1) impairs the decisional independence of the Magistrates Court from the executive in substance and in appearance in areas going to personal liberty and the liability to criminal sanctions which lie at the heart of the judicial function. I agree with the conclusion of Gummow J[56], Crennan and Bell JJ[57] and Kiefel J[58] that s 14(1) authorises the executive to enlist the Magistrates Court to implement decisions of the executive in a manner incompatible with that Court's institutional integrity. I agree also with the conclusion reached by Hayne J about the operation of s 14(1) in permitting the executive to enlist the Magistrates Court for the purpose of applying special restraints to particular individuals identified by the executive as meriting application for a control order[59] and the repugnancy of that function to the institutional integrity of the Court.
>
> In the exercise of the function conferred on it by s 14(1), the Magistrates Court loses one of its essential characteristics as a court, namely, the appearance of independence and impartiality. In my opinion, s 14(1) is invalid."

[56] at paragraph [149]
[57] at paragraph [436]
[58] at paragraph [481]
[59] at paragraph [236]

[78] Similarly in *Bell v Police*,[60] Kourakis CJ held s 12(1)(a)(iii) of the *Forfeiture Act* (SA) to be invalid. That legislation provided that the court that records a conviction for certain prescribed (traffic) offences must, on the application of the prosecution, order that the motor vehicle specified in the application is forfeited to the Crown if the offence was a forfeiture offence or the person had been found guilty of or expiated at least one other prescribed offence committed, or allegedly committed, within 12 months of the date of the offence or at least two other prescribed offences committed, or allegedly committed, within 10 years of the date of the offence. The legislation contained a genuine fact finding role for the Court – namely to determine that the defendant had been found guilty of or expiated the relevant offences within the relevant time frames. It also conferred on the court a discretion to refuse to make an order if satisfied of certain matters. However, that was not sufficient to save the legislation from invalidity.[61] In the summary of his reasons for decision Kourakis CJ said of that legislation:

> "The *Forfeiture Act* requires the courts of this State, on an application made by the prosecution, to impose, as a substantial additional criminal penalty, forfeiture of the motor vehicle specified in the prosecution's application after they have finally sentenced a defendant convicted of a confiscation offence. The forfeiture order substantially increases the effective penalty above that fixed by the Court for the confiscation offence in the exercise of its sentencing discretion and after balancing the competing considerations applicable to that offence. In imposing that additional penalty the Court acts ministerially, in the sense that it acts as an instrument of the executive government, to make an order which is dictated by the very terms of the prosecution's application. The application, which

[60] [2012] SASC 188

[61] As at the time of handing down this judgment, the decision in *Bell* was under appeal. My reasoning in this case does not depend upon an acceptance that *Bell* was correctly decided.

> may be made many years after the offender has been finally sentenced for the confiscation offence in accordance with the ordinary criminal process, is made in the unfettered discretion of the prosecution. The motor vehicle selected for forfeiture may be either the vehicle used in the commission of the offence or any other vehicle of which the offender is the registered proprietor. The prosecution may make the application in circumstances in which the making of an order could only be regarded as capricious, yet the Court is impotent to restrain the use of its process to achieve that result. The forfeiture jurisdiction conferred on the courts of this State is incompatible with their constitutional status as courts which must be fit for investiture with federal judicial power."[62]

[79] It does not seem to me to be necessarily very helpful to simply list all of the features of the legislation which make it similar (or dissimilar) to other legislation which has been found to be valid (or invalid). In my view, where possible, the preferable approach is to look at the substantive effect of the legislative scheme – what the legislature has apparently sought to achieve by the legislation so far as that can be ascertained from the words used and the context in which they are used – and the mechanism adopted to achieve that substantive purpose, and to determine whether or not that legislative scheme is incompatible with the institutional integrity of the court in the requisite sense.[63]

[80] The two sections which between them constitute the legislative scheme at issue in this case are as follows.

[81] Section 94 of the *Criminal Property Forfeiture Act* provides:

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[62] *Bell* at para [10]

[63] For the same reason, I do not consider it particularly helpful to indulge in the process of "what if" reasoning which speculates whether the legislation would be valid or invalid if some aspect of it were changed or differently expressed. It seems to me that the correct approach is to focus on the effect of the legislation as it is.

Forfeiture of declared drug trafficker's property

(1) 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 by the person, whether before or after the commencement of this Act;

is forfeited to the Territory.

(2) Subsection (1) applies also to a person who is taken under section 8 to be a declared drug trafficker.[64]

[82] Section 36A of the *Misuse of Drugs Act* provides:

Declared drug trafficker

(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

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[64] Section 8 provides that the DPP may apply to the Supreme Court for a declaration that a deceased person is taken to be a declared drug trafficker, and the court must make a declaration to that effect if the court is satisfied that it is more likely than not that the deceased person, had he or she not died, would have been declared to be a drug trafficker under s 36A of the *Misuse of Drugs Act.*

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

(4) An offence referred to in subsection (3)(b):

(a) may have been committed either before or after the commencement of this section; and

(b) may have been tried either summarily or on indictment.

(5) If, during the period of 10 years referred to in subsection (3), the person served a term (or more than one term) of imprisonment for an offence corresponding to an offence referred to in subsection (6), the 10 year period is extended by the total length of time the person served in imprisonment.

(6) The following are offences relevant for the purposes of subsection (3):

(a) an offence under section 5;

(b) an offence under section 7 that is punishable under section 7(2)(a) or (b);

(c) an offence under section 8;

(d) an offence under section 9 that is punishable under section 9(2)(a), (b), (d) or (e);

(e) conspiring with another person to commit an offence mentioned in paragraphs (a) to (d) inclusive;

(f) an offence against a law of a State or another Territory corresponding to an offence mentioned in paragraphs (a) to (e) inclusive;

(g) an offence against section 233B of the *Customs Act 1901* (Cth);

(h) an offence against Division 307 of the *Criminal Code* (Cth).

[83] The offences set out in s 36A(6) cover a very wide range of behaviours many of which would not be apt to render the description "drug trafficker" an accurate description of the offender.

(a) The offence defined by s 5 is unlawfully suppling, or taking part in the supply of, a dangerous drug to another person. Section 3 gives a very wide definition of "supply". A person may be convicted of an offence under this section by offering to pass a joint to a friend at a party (whether or not the offer is accepted).

(b) An offence under s 7 that is punishable under s 7(2)(a) or (b) is the cultivation of either a trafficable number (five or more) or a commercial number (19 or more) of prohibited plants.[65] A person may be convicted of an offence under this section by cultivating five cannabis plants and there may be a finding of fact by the Court for the purpose of sentencing that they were cultivated for the offender's own

[65] *Misuse of Drugs Act* s 3 and Schedule 2

personal use, rebutting the presumption in s 37(6) that the plants were intended for supply.

(c) The offence under s 8 is unlawfully manufacturing or producing or taking part in the manufacture or production of a dangerous drug. Again, it is not unknown for offenders to produce small quantities for their own use – though this is less common than with offences under ss 5, 7 or 9.

(d) The offences under s 9 that are punishable under s 9(2)(a), (b), (d) or (e) consist of possession of a trafficable or commercial quantity of a dangerous drug. This could include possession of a commercial or trafficable quantity of a drug for a person's own use where the Court has found for sentencing purposes that the presumption in s 37(6) has been rebutted. Given that the weight of the medium (cardboard or what have you) is included in the weight of LSD for the purposes of determining whether an accused was in possession of a trafficable or commercial quantity of that particular drug, this could (and frequently does) include people who have been convicted of possessing quite small quantities of LSD for personal use. A trafficable amount of cannabis plant material is 50g, and a commercial quantity is 500g. Since all of the plant material in the person's possession is counted in the weight, people have been convicted of possession of a trafficable amount when they have possessed quite a small quantity of "usable" plant material –

especially when what is in their possession is home grown “bush” cannabis.

(g) Section 233B of the *Customs Act 1901* (Cth) has been repealed.

(h) Division 307 of the Commonwealth *Criminal Code* contains provisions relating to the import and export of border controlled drugs, plants and precursers intended to be used in the manufacture of drugs. The offences contained in that Division include importing or exporting border controlled substances and possession of drugs, plants or precursors reasonably suspected of having been unlawfully imported. These offences range in seriousness. In some, it is a defence if the person proves that he or she neither intended, nor believed that another person intended to sell any of the border controlled drug or any of the border controlled plant or its products. Other sections contain no defence relating to lack of commercial intent, so a person may be convicted of offences within this Division in which there is no element of drug trafficking.

[84] In my opinion, what the legislature has tried to achieve via this legislative scheme is:

(a) to provide that the property of “drug traffickers” is to be forfeited;

(b) to leave it to the discretion of the DPP to determine which members of a very wide class (many of whom are not in fact drug traffickers)

deserve to be labelled as drug traffickers and thus to have their assets forfeited; and

(c) to give the decision of the DPP the imprimatur of the Court by providing that if the DPP makes application for a declaration that a person from that very wide eligible class is a drug trafficker, the Court must declare that that person **is** a drug trafficker.

[85] The term "drug trafficker" in s 36A is not defined. On the face of it, it refers to a declaration of fact: "The Director of Public Prosecutions may apply to the Supreme Court for **a declaration that a person is a drug trafficker**." (emphasis added)

[86] The Solicitor-General, on behalf of the Attorney-General, submitted that there was no difference between the discretion given to the DPP under s 36A, to decide whether to make application for a declaration that a person is a drug trafficker, and the usual discretion which the DPP has to decide whether or not to institute a prosecution for a particular offence in particular circumstances. I do not agree that the two discretions are the same.

[87] In the ordinary case, the statute applies the same consequences to all members of the class of people defined by the statute (eg people who have unlawfully assaulted someone) and the DPP makes an administrative decision whether to prosecute based on whether there is sufficient evidence and other well known considerations. The decision of the DPP under the statutory regime for the forfeiture of the property of drug traffickers would

be a decision of this normal or usual kind **if** the legislation had provided (for example) that the property of **all** people who had three or more relevant convictions was forfeited to the Territory, and gave the DPP the power to apply to the Court for a forfeiture order in respect of such people's property. (If such were the case, a legitimate discretionary consideration might be, for example, that the person has insufficient assets to make the exercise worthwhile.)[66]

[88] However, ss 94 and 36A do **not** apply the same consequences to all members of the class defined by the statute.[67] The class is defined by s 36A(3) of the *Misuse of Drugs Act*: namely those who have committed three or more relevant offences in the prescribed time. The consequences (forfeiture of all property subject to a restraining order or given away by the person) are set out in s 94 of the *Criminal Property Forfeiture Act*; but s 94 applies those consequences only to a person who is "declared to be a drug trafficker". Section 36A(1) of the *Misuse of Drugs Act* leaves it to the DPP to determine those people to whom the consequences set out in s 94 of the *Criminal Property Forfeiture Act* shall apply (ie those in respect of whom such a declaration is to be sought), and s 36A(3) provides that that decision (to apply for a declaration in relation to a member of the eligible class) **must** be

[66] I should not be taken as expressing a view that legislation framed this way would (or would not) be valid; simply illustrating the nature of the usual kind of discretion vested in the DPP, and how it differs from the discretion in the instant legislative scheme.

[67] In this respect, the regime in the two Acts for forfeiture of the assets of drug traffickers is substantially different from the provisions in the *Criminal Property Forfeiture Act* for the forfeiture of crime-used or crime-derived property. Those provisions define "crime-used" and "crime-derived" property and apply the same regime to all property which falls within the statutory definitions.

enshrined by the Court in a declaration of the Court that the nominated person **is** a drug trafficker.

[89] One can see the reason behind the need for such a discretion to be given to the DPP, given the way the legislation has been framed. It can hardly have been intended that every person who has been convicted (for example) of cultivating, say, five cannabis plants for home use, possession of 50g of harvested plant material and "supply" by offering to share some of the harvested material with a friend (perhaps all on the one occasion) - people who had never "trafficked" in drugs in their lives - would be declared to be drug traffickers, and as a consequence, forfeit all of their assets: and the legislation does not provide for this to occur. Section 94, which provides for the automatic forfeiture of all of a person's assets, specifically visits that consequence upon "drug traffickers" only – that is to say, people who have been declared to **be** drug traffickers. There is therefore a need for some method of discriminating among those people who meet the criterion in s 36A(3) – to select those who are in fact drug traffickers. (The appellant in this case may well be one such.)

[90] The difficulty with the method adopted by this legislative scheme for selecting those who are drug traffickers and are to have their assets forfeited, is that the legislation provides no criteria for application by the DPP in determining which members of the eligible class are to be the subject

of an application for a declaration that they are drug traffickers,[68] and, more importantly for present purposes, the decision of the DPP once made, is clothed with the appearance of a decision of the Supreme Court: a declaration of the Supreme Court that the nominated person **is** a drug trafficker.

[91] Although a more recently evolved remedy than the prerogative writs (or orders in the nature of prerogative writs) considered in *Kirk v Industrial Relations Commission*, [69] making a declaration is still a core function of the Supreme Court. The legislative scheme under which the Court must make a declaration of fact that a person is a drug trafficker on an application by the DPP, and applies the draconian consequences of total forfeiture of all assets to that declaration, when that person may or may not be a drug trafficker, is, in my view, inconsistent with the institutional integrity of the Court.

[92] This legislation seems to me to be functionally equivalent to the legislation under consideration in *Totani* – not because it shares a list of features, but because its substantive effect can be accurately described in the same terms used by the High Court in *Totani*. It represents a substantial recruitment of the judicial function of this Court to an essentially executive process: that

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[68] This has the practical effect of rendering a decision of the DPP to apply (or not to apply) for a declaration under s 36A that a person is a drug trafficker virtually immune from judicial review, unlike a decision of the DPP to prosecute (or not to prosecute) someone, where there are known relevant criteria to be applied. It is also one reason why I cannot agree with the following conclusion of Riley CJ at para [42] above:

> "[W]hilst it is a matter for the DPP to decide whether to pursue forfeiture under the statutory scheme, that decision must be informed by the same considerations as apply to the commencement of any civil proceedings. There is nothing unusual in this arrangement."

[69] (2010) 239 CLR 531

process being one in which the DPP decides which people, chosen from a very wide class of people many of whom are not drug traffickers, should be declared to be drug traffickers. It gives the neutral colour of a judicial decision to that executive decision by the DPP. In doing so, it authorises the executive to enlist this Court to implement decisions of the executive (the DPP) in a manner incompatible with the Court's institutional integrity.

[93] Those provisions, it seems to me, are also functionally equivalent to the impugned provisions in *Bell v Police*.[70] The terms used by Kourakis CJ (set out at paragraph [78] above) to describe the provision held to be invalid in that case seem to me to be equally applicable to the combined effect of s 94 and s 36A.

[94] The impugned sections require this Court, on an application made by the DPP, to impose, as a substantial additional penalty, [71] forfeiture of the whole of the assets of the person specified in the application. (The Court does not make the forfeiture order, but the making of the declaration that a person is a drug trafficker has that automatic effect.) This has the practical effect of substantially increasing the effective penalty above that fixed by the court sentencing the person for the individual offences after balancing the competing considerations applicable to those offences. In imposing that

[70] [2010] SASC 188

[71] While I agree with the opinion of the learned trial judge and of Riley CJ expressed at para [40] above that proceedings under the legislative scheme under consideration in this case are civil not criminal, I do not think that that is determinative of whether the scheme imposes what in practical terms amounts to "a substantial additional penalty". In this respect I respectfully agree with the analysis of Barr J in para [102] below.

additional penalty the Court acts ministerially, in the sense that it acts as an instrument of the executive government, to make an order which is dictated by the very terms of the DPP's application. That application may be made in circumstances in which the making of a declaration that a person is a drug trafficker could only be regarded as capricious: the person may on any view of the facts be no such thing, yet the Court is impotent to restrain the use of its process to achieve that result.

[95] In my view, therefore, the legislative scheme constituted by s 36A of the *Misuse of Drugs Act* and s 94 of the *Criminal Property Forfeiture Act* is invalid.

Barr J:

Introduction

[96] I have had the advantage of reading the judgments of Riley CJ and Kelly J in draft. I will draw upon their Honours' careful exposition of the relevant statutory provisions in the *Misuse of Drugs Act* and the *Criminal Property Forfeiture Act* which create the overlapping legislative scheme here under consideration.

[97] I agree with Riley CJ[72] and Kelly J[73] that, under that legislative scheme, in exercising the discretion whether to make a restraining order under s 44(1) *Criminal Property Forfeiture Act*, the Supreme Court is not entitled to take into account equivalency or proportionality between, on the one hand, the

[72] Judgment of Riley CJ at [13] – [14].
[73] Judgment of Kelly J at [64]; [68]-[70].

seriousness of the offending which led to a defendant's relevant three or more convictions, or the cost to the community of investigating, prosecuting or incarcerating the defendant, and, on the other hand, the nature and value of the property sought to be restrained. I interpret s 10(2) *Criminal Property Forfeiture Act* as a statement of the policy reasons for forfeiture under the Act. The sub-section is not a provision which sets a limit on the extent of forfeiture. As a consequence, the Supreme Court cannot moderate the extent of ultimate forfeiture under s 94(1)(a) *Criminal Property Forfeiture Act* by limiting the extent of property restrained under s 44(1) of the Act.

[98] The consequence of my interpretation of s 10(2) and s 44(1) *Criminal Property Forfeiture Act* is that, in my respectful opinion, the learned trial judge erred in concluding that a restraining order may be confined to property "of a value that is proportional to the likely cost of deterring, detecting and dealing with the criminal activities of the particular offender who is the respondent to the application for a restraining order."[74] I refer below, in [127] of my judgment, to the effect of there being no discretion in this respect on the part of the Supreme Court.

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[74] *DPP v Emmerson* [2012] NTSC 60 at [106]. Earlier, at [53] His Honour had said "…it is arguable that in a case where a restraining order is sought, on the ground that the offender is likely to be declared a drug trafficker, the scope of the restraining order may be confined to the cost of deterring, detecting and dealing with the criminal activities of the particular offender whose property is sought to be restrained." However, at [106], his Honour appeared to have accepted that the scope of the restraining order could be confined in that way.

[99] I also agree with Riley CJ, for the reasons he gives,[75] and with the learned trial judge, that no temporal limitation attaches to s 52(3) *Criminal Property Forfeiture Act*. In my view, there is nothing in the wording of the subsection to require that the declaration must be sought and made contemporaneously with the final disposition of the relevant charge under the *Misuse of Drugs Act*.

Acquisition of property

[100] I also agree with Riley CJ[76] that the overlapping legislative scheme here under consideration is not a law with respect to the acquisition of property which attracts the guarantee of just terms contained in s 50(1) of the *Northern Territory (Self Government) Act*. In some respects, however, my reasoning differs from that of the Chief Justice.

[101] Riley CJ characterizes the proceeding below as a civil action for penalties in the nature of forfeiture. Proceedings under s 36A *Misuse of Drugs Act* are said to be civil and not criminal proceedings. While that is no doubt correct, the civil/criminal distinction does not appear to be relevant in the present appeal, unlike other cases in which it was necessary to decide whether proceedings were civil or criminal in order to determine the standard of proof and/or the admissibility of documentary evidence.[77] Moreover, as Hayne J said in *Chief Executive Officer of Customs v Labrador*

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[75] Judgment of Riley CJ at [45] - [54].
[76] Judgment of Riley CJ at [17] - [27].
[77] *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd and others* (2003) 216 CLR 161 at [121]; *Donohoe v Director of Public Prosecutions (WA)* [2011] WASCA 239 at [60], [90].

Liquor Wholesale Pty Ltd,[78] the classification of proceedings into civil and criminal is an "unstable" one:

> [the classification] seeks to divide the litigious world into only two parts when, in truth, that world is more complex and varied than such a classification acknowledges. There are proceedings with both civil and criminal characteristics: for example, proceedings for a civil penalty under companies and trade practices legislation. The purposes of those proceedings include purposes of deterrence, and the consequences can be large and punishing.

[102] The overlapping legislative scheme under s 36A *Misuse of Drugs Act* read with s 44(1) and s 94(1) *Criminal Property Forfeiture Act* similarly provides deterrence and punishment. I agree with the learned trial judge that the fact that the forfeiture scheme is conviction-based suggests that the scheme has objects which include punishment; and that it seeks to impose an additional penalty on certain drug offenders.[79] Forfeiture of a 'third strike' offender's property, particularly in circumstances where the acquisition and use of that property is unrelated to any criminal activity, represents the partial abolition, or circumvention, of the sentencing principle that a person is not to be punished twice for his or her past offending. In brief, that principle is that the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but which cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence, since to do so would

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[78] *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd and others* (2003) 216 CLR 161 at [114], footnotes omitted.
[79] *DPP v Emmerson & Anor* [2012] NTSC 60 at [47].

be to impose a fresh penalty for past offences.[80] The forfeiture provided for under s 94(1) C*riminal Property Forfeiture Act* is, in both its intent and practical effect, additional punishment for the qualifying offence accumulated with relevant past offending.

[103] Although I disagree with Riley CJ that, under the overlapping legislative scheme, "forfeiture is not part of the penalty for any criminal offence",[81] I would agree that property forfeiture, as a civil penalty, is provided for under the legislative scheme here under consideration, in part at least, to deter particular types of offending and thereby secure compliance with the law. It is not directed at crime-used property or crime-derived property, but rather it is directed at the offender personally and his or her antecedents. To the extent that forfeiture under the overlapping scheme may in many cases be disproportionate, even grossly disproportionate, to the actual offending, it is not in the constitutional sense a disproportionate consequence of an offender's convictions. Indeed, High Court decisions in relation to forfeiture and s 51(xxxi) of the *Constitution* establish that reasonable proportionality is irrelevant.[82] I agree with Riley CJ that to require the provision of "just terms" in forfeiture legislation of the kind under consideration would be incongruous.

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[80] *Veen v The Queen* (No 2) (1988) 164 CLR 465 at 477.
[81] Judgment of Riley CJ at [25].
[82] *Theophanous v The Commonwealth* (2006) 225 CLR 101 per Gummow, Kirby, Hayne, Heydon and Crennan JJ at [69] - [71], and the cases there cited.

The *Kable* ground

[104] To "traffic" is to trade – to buy and sell, transport, distribute and supply. A drug trafficker is a person who trades in illicit drugs and thus profits from the misery of others. Members of the community feel strong antipathy towards drug traffickers. A Supreme Court declaration that a person is a drug trafficker would surely stigmatize that person. It is hard to imagine otherwise. The Court's declaration would designate the person as someone to be held in contempt, and perhaps to be feared as well.

[105] The Northern Territory's *Misuse of Drugs Act* does not define the term 'drug trafficker'. Further, there are no deeming provisions, that is, there are no provisions whereby, if someone does or has done something specified, that person will be deemed by the legislation to be a "drug trafficker".[83]

[106] I therefore conclude that a Supreme Court declaration that a person is a 'drug trafficker' is a declaration of a fact. In making the s 36A declaration on application by the Director of Public Prosecutions, the Court is not able to say to a defendant: "You are (or "You are deemed to be …") a 'drug trafficker' within the meaning of that term in the *Misuse of Drugs Act*." As mentioned above, the term is not defined, and there are no deeming provisions. If, however, contrary to my conclusion, the s 36A declaration is

[83] By way of contrast, now repealed provisions of the former *Police and Police Offences Ordinance* 1923 (as amended), provided that a person "who pretends to tell fortunes, or uses any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose upon any of His Majesty's subjects", or who committed any number of other offences which are now known as 'summary offences', was deemed "a rogue and vagabond within the meaning of this Ordinance" and was guilty of an offence. A repeat offender was deemed "an incorrigible rogue". The deeming was statutory, effected by the legislation which created the offences.

not a declaration of fact, it is nonetheless a declaration which, in the absence of a statutory definition or deeming provision, purports to be a declaration of fact.

[107] The conditions precedent which must be established by the Director of Public Prosecutions for a s 36A declaration are a finding of guilt by the Supreme Court of a qualifying offence, by which I mean an offence specified in s 36A(6) *Misuse of Drugs Act*, and findings of guilt, on two or more prior occasions in the 10 years prior to the date on which the qualifying offence was committed, of an offence corresponding to an offence referred to in s 36A(6).

[108] Although a particular respondent may be a 'drug trafficker' as that term is normally understood, the legislation permits some disturbingly anomalous outcomes. For example,

- A person with three convictions (including the qualifying offence) for cultivation of between five and nineteen cannabis plants; or

- A person with three convictions (including the qualifying offence) for possession of a "traffickable quantity" of any dangerous drug,

on being found guilty of the qualifying offence, could be made defendant to an application by the Director of Public Prosecutions under s 36A *Misuse of Drugs Act* and would have to be declared a 'drug trafficker', even though the person may have proven, on the balance of probabilities, that he or she

did not cultivate or possess (as the case may be) for the purpose of supply to another person or persons.[84] If s 36A *Misuse of Drugs Act* is a valid law, then, on application by the Director of Public Prosecutions, the Court would be obliged to make a declaration that each of the hypothetical persons was a 'drug trafficker', contrary to the known and proven facts.[85] The Court would have no discretion to refuse to make the declaration asked for, and could not take into account the relative seriousness of the final (qualifying) offence, nor of the earlier two offences.

[109] The potential untruth required to be pronounced by the Supreme Court has an arguably sinister significance when the full context of the overlapping legislative scheme under s 36A *Misuse of Drugs Act* read with s 44(1) and s 94(1) *Criminal Property Forfeiture Act* is considered. The Supreme Court's declaration under s 36A will most probably lead to a forfeiture of all of the person's property, notwithstanding that such property is not crime-used, crime-derived or even unexplained wealth. Property forfeited in the latter categories may be the fruits of many years of hard work, a lump sum retirement investment, a family home, or even an inheritance. The property is forfeited irrespective of its provenance.

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[84] The Act uses the term "traffickable quantity" in reference to dangerous drugs. If a person is in possession of an amount of a dangerous drug in excess of the specified "traffickable quantity" for that drug, then in sentencing the person a court must presume that the person intended to supply the dangerous drugs in his or her possession, unless the contrary is proved – see s 37(6)(a) *Misuse of Drugs Act*.

[85] Further examples of anomalous outcomes are referred to in the judgment of Kelly J at [83]. Riley CJ referred to the same issue at [31] of his judgment.

[110] Most people accept the idea that criminals should not be permitted to retain the proceeds of their criminal enterprises. Crime should not pay. If crime did pay, there would be no incentive for law-abiding members of the community not to commit crimes. However, the overlapping legislative scheme in question has travelled a very long way from the principle that crime should not pay.

[111] The overlapping legislative scheme operates in an indirect manner. The *Misuse of Drugs Act* does not provide, as a stated mandatory penalty for a 'third strike' offence, that all of the 'third strike' offender's property is forfeit. The forfeiture provided for under s 94(1) *Criminal Property Forfeiture Act* occurs without express court order for forfeiture, by operation of law from the combination of the Court's restraining order under s 44(1) *Criminal Property Forfeiture Act* and the Court's declaration under s 36A *Misuse of Drugs Act*. It is not a readily transparent process. There is no court judgment to explain publically why all of a person's property has been forfeited. It would be difficult for a member of the public to learn the facts in relation to the forfeiture of another person's property. Moreover, the fact (if it became publically known) that a declared drug trafficker had lost all his or her property may not cause great concern because once a person is branded a 'drug trafficker' in the way the Court is required to brand that person, a member of the public might not have much sympathy. I refer to my observations in [104] above. It may not excite public concern

that a person branded with the tainted label has lost his or her family home or life savings.

[112] By the same process of pejorative branding, in the 1930s, the general population was conditioned to overlook, or worse, participate in the forced starvation and dispossession of private rural landowners in the Soviet Ukraine. Writing of the persecution of those branded as 'kulaks', an undefined class of landowners whom Stalin perceived as obstructing the Communist Party's policies of farm collectivisation, historian Robert Conquest explains the potency of branding:

> The necessary hatreds were inflamed; the activists who helped the GPU in the arrests and deportations were all people who knew one another well, and knew their victims, but in carrying out this task they became dazed, stupefied … They would threaten people with guns, as if they were under a spell, calling small children 'kulak bastards', screaming 'bloodsuckers!'… They had sold themselves on the idea that the so-called 'kulaks' were pariahs, untouchables, vermin. They would not sit down at a 'parasite's' table; the 'kulak' child was loathsome, the young 'kulak' girl was lower than a louse. They looked on the so-called 'kulaks' as cattle, swine, loathsome, repulsive: they had no souls; they stank; they all had venereal diseases; they were enemies of the people and exploited the labour of others … And there was no pity for them. They were not human beings; one had a hard time making out what they were – vermin, evidently.' A woman activist explains, 'What I said to myself at the time was "they are not human beings, they are kulaks" …[86]

[113] The persecution of the kulaks is, I acknowledge, an extreme example. The events in the Ukraine in the 1930s took place under a system of government which was significantly different to that now existing in the Northern

[86] Robert Conquest "The Harvest of Sorrow - Soviet Collectivization and the Terror-Famine", Arrow Books Limited, London, 1988, Ch 6, p.129.

Territory, both in terms of political ideology and individual rights and freedoms. The branding was by Party apparatchiks and propagandists, not by courts of law. However, there is one disturbing parallel: the failure to define the term 'kulak', whether by reference to individual members of the persecuted class of persons, or of the class itself. Conquest writes:

> But who were the 'kulaks? … In fact it is clear that, however defined, the kulak was, as an economic class, no more than a Party construct. … Lenin had transferred a word from its original meeting to cover an alleged class in the villages. Bukharin, in a pamphlet published in 1925, distinguished between the better off inn-keeper, the village usurer, the kulak and the well-to-do farmer who employed several labourers – the latter not to be considered as a kulak. The Commissar for Agriculture, A. P. Smirnov, also tried to extricate the prosperous peasant from the semantic distortion Lenin had inflicted on him, pointing out that a kulak was, properly speaking, a pre-revolutionary exploiting type which had now virtually disappeared. Milyutin (Lenin's first Commissar for Agriculture) asked on the same occasion, 'What is a kulak? So far there has been no clear, concise definition of the kulak's role in the process of stratification.' Nor was one ever made. … [87]

[114] Riley CJ expresses the view[88] that "in most cases, the declaration that the person is a drug trafficker will be made in relation to a person who fits the description in common parlance", and that may prove to be correct. It remains to be seen. The appellant in the present case probably fits the description. However, because the discretion vested in the Director of Public Prosecutions is unfettered, there is no obvious reason why the discretion could not be exercised on the basis of the amount potentially recoverable from a defendant rather than on the basis of the nature and

[87] op cit, pp. 73-74.
[88] Judgment of Riley CJ at [31].

seriousness of the defendant's drug offending. Moreover, although it may be seen as a lesser injustice that the person whose property is forfeited is a 'drug trafficker' in common parlance, rather than a person who is not a 'drug trafficker' in common parlance, the injustice remains that forfeiture may take place of property which is unrelated to any criminal activity, in the ways described in [108].

[115] Although the potential for unjust outcomes is very great, the authorities make it clear that a court cannot refuse to apply and enforce a law on the basis that the court considers the law is unjust. The doctrine of parliamentary supremacy is deeply rooted in the common law. In the words of Lord Scarman in *Dupont Steels Ltd v Sirs*:

> … in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes, and un-makes, the law: the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires.[89]

[116] The decision of the High Court in *Kable*[90] established the principle that, since the *Constitution* established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, any State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid. The principle imposes (or at least recognizes) a restriction on the legislative

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[89] *Dupont Steels Ltd v Sirs* [1980] 1 WLR 142 at 168; [1980] 1 All ER 529 at 551.
[90] *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.

freedom of the States.[91] The principle applies also to Territory courts capable of exercising the judicial power of the Commonwealth.[92] Thus, the legislature of the Northern Territory may not impose on the Supreme Court of the Northern Territory jurisdiction which is incompatible with the exercise of Commonwealth judicial power.

[117] In *Kable*, the jurisdiction which the New South Wales legislation[93] imposed on the Supreme Court involved the power to make an order for the detention in prison of the "specified person" (Gregory Wayne Kable) for a specified period of up to six months if the Court were satisfied, on reasonable grounds, that Mr Kable was more likely than not to commit a serious act of violence; and that it was appropriate, for community protection, that he be held in custody. The legislation was extraordinary for the fact that it operated upon one named person only, who (if the Court ordered detention) would be detained in prison and subject to substantially the same regime as persons convicted of criminal offences.

[118] Each of the four Justices in the majority in *Kable* (Toohey, Gaudron, McHugh and Gummow JJ) formulated the impairing factor differently. Toohey J said:[94]

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91 *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 per Gaudron J at 103, McHugh J at 118; *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 87 ALJR 162 per Heydon J at [62].

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

93 *Community Protection Act* 1994 (NSW), s 5.

94 at 98.

> The Act answers that aspect of incompatibility which was identified in *Grollo v Palmer* … as "the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution … is diminished". …. The function offends that aspect because it requires the Supreme Court to participate in the making of a preventive detention order where no breach of the criminal law is alleged and where there has been no determination of guilt. On that ground I would hold the Act invalid.

[119] Gaudron J[95] held the legislation invalid because the process it set up was the "antithesis of the judicial process":

> The power purportedly conferred by s 5(1) of the Act requires the making of an order, if the conditions specified … are satisfied, depriving an individual of his liberty, not because he has breached any law, whether civil or criminal, but because an opinion is formed, on the basis of material which does not necessarily constitute evidence admissible in legal proceedings, that he "is more likely than not" to breach a law by committing a serious act of violence as defined in … the Act. That is the antithesis of the judicial process, one of the central purposes of which is, as I said in *Re Nolan; Ex parte Young*, to protect "the individual from arbitrary punishment and the arbitrary abrogation of rights by ensuring that punishment is not inflicted and rights are not interfered with other than in consequence of the fair and impartial application of the relevant law to facts which have been properly ascertained". It is not a power that is properly characterised as a judicial function, notwithstanding that it is purportedly conferred on a court and its exercise is conditioned in terms usually associated with the judicial process. … the effect of s 5(1) is, in my view, to compromise the integrity of the Supreme Court of New South Wales and, because that court is not simply a State court but a court which also exists to exercise the judicial power of the Commonwealth, it also has the effect of compromising the integrity of the judicial system brought into existence by Ch III of the Constitution.

and later:[96]

> In truth, the proceedings contemplated by s 5(1) are unique with unique procedures and with rules which apply only to the appellant. They are proceedings which the Act attempts to dress up as

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[95] at 106.8.
[96] at 108.2.

> proceedings involving the judicial process. In so doing, the Act makes a mockery of that process and, inevitably, weakens public confidence in it. And because the judicial process is a defining feature of the judicial power of the Commonwealth, the Act weakens confidence in the institutions which comprise the judicial system brought into existence by Ch III of the Constitution.

[120] McHugh J said:[97]

> It is not merely that the Act involves the Supreme Court in the exercise of non-judicial functions or that it provides for punishment by way of imprisonment for what the appellant is likely to do as opposed to what he has done. The Act seeks to ensure, so far as legislation can do it, that the appellant will be imprisoned by the Supreme Court when his sentence for manslaughter expires. It makes the Supreme Court the instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process that is far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person. …
>
> At the time of its enactment, ordinary reasonable members of the public might reasonably have seen the Act as making the Supreme Court a party to and responsible for implementing the political decision of the executive government that the appellant should be imprisoned without the benefit of the ordinary processes of law. Any person who reached that conclusion could justifiably draw the inference that the Supreme Court was an instrument of executive government policy. That being so, public confidence in the impartial administration of the judicial functions of the Supreme Court must inevitably be impaired … .

[121] Gummow J emphasized that the legal and practical effect of the Supreme Court orders was to penalise Mr Kable by imprisoning him for a period of six months, but not for any contravention of the criminal law; and under legislation directed solely at Mr Kable, which did not prescribe norms of

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[97] at 122-4.

behaviour to be observed by the community at large or any class or segment of the community. His Honour then added:[98]

> In the present case, the law speaks only ad hominem, applies proleptically the criminal law, determines the case by a civil standard, and provides directly for detention in prison. These are striking features of the legislation. There is, before imprisonment, no determination of guilt solely by application of the law to past events being the facts as found. The consequence is that the legislature employs the Supreme Court to execute, to carry into effect, the legislature's determination that the appellant be dealt with in a particular fashion, with deprivation of his liberty, if he answers specified criteria.

[122] *Kable* therefore expressly referred to the Court being required to perform non-judicial functions, to act as an instrument of the executive government, and to conduct proceedings in a way that did not conform with proper judicial process. The legislation was such as to weaken public confidence in the judicial process (per Gaudron J) and in the integrity of the judiciary as an institution (per Toohey J). In a subsequent discussion of *Kable* in *Fardon v Attorney-General (Qld)*,[99] Callinan and Heydon JJ explained that, despite the differing formulations of the Justices in the majority, the primary issue remained whether the process which the legislation required the Supreme Court of New South Wales to undertake was "so far removed from a truly judicial process that the Court, by undertaking it, would be so tainted or polluted that it would no longer be a suitable receptacle for the exercise of federal judicial power under Ch III of the *Constitution*."

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[98] at 131.2.
[99] (2004) 223 CLR 575 at [219] per Callinan and Heydon JJ.

[123] A recent example of the application of the *Kable* principle was *State of South Australia v Totani*.[100] Legislation in that State obliged magistrates, on application by the Commissioner of Police, to make a control order against a defendant if satisfied that the defendant was a member of a "declared organisation".[101] The object of the legislation was, inter alia, to disrupt and restrict the activities of organisations involved in serious crime, and the members and associates of such organisations. In brief, a control order could prohibit a defendant from associating with other persons who were members of declared organisations, and could also prohibit a defendant from associating or communicating with specified persons, or from entering specified premises or classes of premises. Depending on its terms, such an order could impose significant restrictions on a defendant's civil liberties. Contravention of a control order was made an offence punishable by a maximum penalty of imprisonment of five years. The legal flaw in the legislation, at which the *Kable* principle was successfully directed, was the anterior declaration by the Attorney-General in relation to the organisation, of which a defendant might later be alleged to be a member. The legislation gave the Attorney-General the power to make a declaration in respect of an organisation on the basis that its members were involved in "serious criminal activity" and that it represented a risk to public safety and order.

[124] French CJ decided that the legislation was invalid. He noted that the Attorney-General's declaration, which he found "largely pre-ordained" the

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[100] *State of South Australia v Totani* (2010) 242 CLR 1.
[101] *Serious and Organised Crime (Control) Act 2008* (SA), s 14(1).

magistrate's decision, was an executive declaration for which no reasons needed to be given, the merits of which could not be questioned in the Magistrates Court, and which was "based on executive determinations of criminal conduct committed by persons who may not be before the Court".[102] This led his Honour to conclude as follows:

> The … Act thereby requires the Magistrates Court to carry out a function which is inconsistent with fundamental assumptions, upon which Ch III of the *Constitution* is based, about the rule of law and the independence of courts and judges. In that sense it distorts that institutional integrity which is guaranteed for all State courts by Ch III of the *Constitution* so that they may take their place in the integrated national judicial system of which they are part.

[125] Gummow J held that the legislation was invalid because the practical operation of the Act was to enlist the Magistrates Court in the implementation of the legislative policy by an adjudicative process in which the magistrate was called upon "effectively to act at the behest of the Attorney-General to an impermissible degree", and thereby to act in a fashion incompatible with the proper discharge by the Magistrates Court of its federal judicial responsibilities and with its institutional integrity.[103]

[126] The present appellant refers to the limited nature of the adjudicative process in the hearing of a s 36A application, and argues that the legislation renders the Supreme Court a rubber stamp for the executive decision to impose forfeiture. It is true that, in most cases, certificates of conviction or certificates of court outcome, however described, would be tendered in

[102] *State of South Australia v Totani* (2010) 242 CLR 1, per French CJ at [4].
[103] *State of South Australia v Totani* (2010) 242 CLR 1, per Gummow J at [149].

evidence and would 'speak for themselves' as to the date of commission of any offence and the relevant finding(s) of guilt. However, an adjudication by the Supreme Court would be required if a defendant asserted that he or she was not the person named in the certificate, or that the certificate was wrong as to the date of commission of any offence (relative to the period of 10 years referred to in s 36A(3)(b)) in respect of which the defendant had been found guilty. An adjudication would also be required, for example, if there were an issue as to whether an interstate offence was one "corresponding to" one of the offences referred to in s 36A(6)(a) to (e). The fact that the legislation establishes some kind of adjudicative process may not be sufficient to avoid impairing the reality or appearance of judicial decisional independence, as French CJ explained in *Totani*;[104] however, I do not consider that the adjudicative process for determining the limited issues which might arise on a 36A application suffers the "judicial process" or procedural flaws identified in *Kable*, or in such cases as *International Finance Trust Co Ltd*[105] and *Totani*.

[127] In the present appeal, the following matters remain of particular concern in the overlapping legislative scheme:

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[104] at [78].

[105] *International Finance Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319. Legislation required the Supreme Court to hear and determine, ex parte, applications for asset freezing orders brought by the NSW Crime Commission. It was entirely within the discretion of the Commission as to whether notice was given to a respondent. French CJ held at [56]: "… the power conferred on the Commission to choose, in effect, whether to require the Supreme Court of New South Wales to hear and determine an application for a restraining order without notice to the party affected is incompatible with the judicial function of that Court. It deprives the Court of the power to determine whether procedural fairness … requires that notice be given to the party affected before an order is made. It deprives the Court of an essential incident of the judicial function. … It distorts the institutional integrity of the Court. …".

1. The absence of any discretion on the part of the Court as to the extent of the restraining order, on the hearing of an application under s 44(1) *Criminal Property Forfeiture Act*: the Supreme Court cannot moderate the extent of ultimate forfeiture under s 94(1)(a) *Criminal Property Forfeiture Act.* I refer to my observations at [97] above.

2. The absence of statutory criteria for the exercise of the discretion by the Director of Public Prosecutions to make the application to the Supreme Court under s 36A *Misuse of Drugs Act*.

3. Selective engagement of the Supreme Court's jurisdiction: the Director of Public Prosecutions selects those against whom the overlapping legislative scheme is to be invoked.

4. The real possibility that the Supreme Court may be bound by the legislation to make a declaration contrary to the actual facts (if not a declaration of fact, a declaration which, in the absence of a statutory definition or deeming provision, purports to be a declaration of fact).

5. The status of the declaration made by the Supreme Court under the *Misuse of Drugs Act*, that a person is a 'drug trafficker', may be such as to obscure or conceal the true facts which satisfied the legal requirements for forfeiture.

[128] The question which this Court must determine is whether any one or more of these matters is sufficient to properly engage the *Kable* principle. I am mindful of the warning in relation to false triggers for the application of the *Kable* principle sounded by Heydon J in *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment*,[106] where his Honour said:

> No party to litigation has ever challenged the correctness of the relevant statements in *Kable's* case. The courts have had no alternative but to apply them whatever they think about their merits. But those statements raise questions. Has the basis of the decision changed over time? Does the case lack a ratio decidendi? Are the *Kable* statements, being "insusceptible of further definition in terms which necessarily dictate future outcomes", inconsistent with the rule of law because they are so uncertain that they make prediction impossible and give too much space within which the whims of the individual judge can take effect without constraint? "As law becomes more abstract and more generously endowed with doctrinal axioms and categories, the doctrines themselves seem to become emptied of real significance; they become compatible with more or less any conclusion in concrete cases." …

[129] I am also mindful of the observations of McHugh J in *Fardon v Attorney-General (Qld)* as to what is meant by the compromise of a court's institutional integrity:[107]

> State legislation may require State courts to exercise powers and take away substantive rights on grounds that judges think are foolish, unwise or even patently unjust. Nevertheless, it does not follow that, because State legislation requires State courts to make orders that could not be countenanced in a society with a Bill of Rights, the institutional integrity of those courts is compromised.

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[106] [2012] HCA 58; (2012) 87 ALJR 162 at [62], citations omitted.
[107] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at [41] and [42] per McHugh J.

> … That which judges regard as repugnant to the judicial process may be no more than a reflection of their personal dislike of legislation that they think unjustifiably affects long recognised rights, freedoms and judicial procedures. …

[130] The legislature may, to a certain extent, validly control the exercise of judicial power, and it has been held that a law, which has the effect of requiring a court exercising federal jurisdiction to make specified orders if certain conditions are met, is not invalid.[108] Mandatory sentencing laws are an example. However, there is a competing principle, which I consider applies in the present appeal, that the legislature cannot direct courts exercising federal jurisdiction as to the manner and outcome of the exercise of that jurisdiction. Speaking of the determination of facts as made by a jury, on which the criminal liability of an alleged offender depended, Brennan CJ made the following statement in *Nicholas v The Queen*:[109]

> Some characteristics of a court flow from a consideration of this function including the duty to act and to be seen to be acting impartially. … We are not concerned with these characteristics in the present case, except in so far as **the duty to act impartially is inconsistent with the acceptance of instructions from the legislature to find or not to find a fact or otherwise to exercise judicial power in a particular way**. A law that purports to direct the manner in which judicial power should be exercised is constitutionally invalid. … However, a law which merely prescribes a court's practice or procedure does not direct the exercise of the judicial power in finding facts, applying law or exercising an available discretion. … [emphasis added]

[131] Of all the matters of concern listed in [127] above, the fact that the Supreme Court may be required under s 36A *Misuse of Drugs Act* to make a

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[108] *Palling v Corfield* (1970) 123 CLR 52 at 58.9, 64.9.
[109] (1998) 193 CLR 173 at 188 [20], cited by French CJ in *International Finance Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 352 [50].

declaration that a person is a 'drug trafficker', contrary to the evidence, is the most telling point against the validity of the overlapping legislative scheme. The 'drug trafficker' declaration is integral to the forfeiture process established under the scheme. Legally, the Court's declaration enables the forfeiture to take place. As a matter of public perception, the Court's declaration provides justification for the forfeiture, and the fact that the declaration has been made by the Court serves to alleviate public concern as to the rightfulness of such a drastic interference with recognized property rights.

[132] This is a case in which it may properly be said that the reputation of the judicial branch may not be borrowed by the legislative and executive branches "to cloak their work in the neutral colors of judicial action".[110]

[133] In my opinion the overlapping legislative scheme involves the enlistment of the Supreme Court, to an impermissible extent, to give effect to legislative policy and executive decision-making. It impinges upon the independence of the Supreme Court and thereby undermines its institutional integrity. The scheme is invalid, to the extent it depends upon the Supreme Court's declaration under s 36A *Misuse of Drugs Act*.

Conclusion

[134] The appeal should be allowed. The declaration made by Southwood J on 15 August 2012 that the appellant is a drug trafficker should be set aside and

[110] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, per Gummow J at 615 [91], citing *Mistretta v United States* (1989) 488 US 361 at 407; cited in *State of South Australia v Totani* (2010) 242 CLR 1, per Kiefel J at [479].

the respondent's application for a declaration under s 36A *Misuse of Drugs Act* (NT) should be dismissed.
