IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D5 of 2013

BETWEEN:

ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY
First Appellant

THE NORTHERN TERRITORY OF AUSTRALIA
Second Appellant

REGINALD WILLIAM EMMERSON
First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS
Second Respondent

APPELLANTS' REPLY

Part I:

1. These submissions are in a form suitable for publication on the internet.

Part II:

First respondent's statement of material facts

2. The appellants do not concede the relevance of the additional facts listed in the First Respondent's Submissions dated 6 December 2013 (**RS**) at pars [4.1] to [4.5], or of the material referenced in the footnotes to those paragraphs. In addition, the facts referenced in footnotes 3, 4, 8, 10, 50, 71 and 72 were not the subject of findings in either of the proceedings below.

Proper construction of CPFA, s 44(1)(a)

3. Section 44(1)(a) of the *Criminal Property Forfeiture Act* (NT) (**CPFA**) confers a discretion as to the making of a restraining order.[1] There is nothing in the CPFA to suggest that the Court is required upon an application under s 44(1)(a) to order restraint of all property identified in the application.[2] On the ordinary meaning of the words used in s 44(2)(a), the Court has a discretion to make a restraining order in relation to "all or any" property owned or controlled by the person named in the application. Accepting that the power to make a restraining order under s 44(1)(a) must be exercised having regard to the purpose and objects of the statutory scheme, and that

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1 Cf RS [18]. There is nothing in the section, or the CPFA generally, to support the conclusion that "may" means "must" in this context: *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at [24] per Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ.

2 Even assuming all such property is otherwise amenable to restraint under CPFA, s 44(2).

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the scheme as it relates to drug traffickers does not require a demonstrated connection between offending and property to be restrained, it may be considered likely in most cases that the exercise of the discretion will lead to a restraining order in respect of most, if not all, property amenable to restraint.

4. The circumstances in which the discretion may be exercised against the making of a restraining order, or an order extending to all property the subject of an application, are nevertheless not closed. Those circumstances would extend, for example, to cases where the making of such an order was apt to lead to an abuse of process,[3] or where the court considers, having regard to the circumstances of the case, that to restrain (and therefore expose to forfeiture) all property the subject of an application would be inconsistent with the scheme created by the relevant provisions of the CPFA and the *Misuse of Drugs Act* (NT) (**MDA**).

Kable *and public perception*

5. In making his *Kable* argument, the first respondent places emphasis upon public perception and confidence in the Court.[4] Public confidence is not a criterion of invalidity, merely an indication of it,[5] even where it may be difficult to view separately the way a court is perceived from its institutional integrity.[6] It is because of the connection between the Court's institutional integrity and the way it is generally perceived that observations about the impact of a law upon public confidence in the court are conclusory[7] and indicative rather than a distinct criterion for determining whether a law is invalid.

6. The first respondent's submissions illustrate that there is a level of speculation in identifying the "right-minded person"; and whether the knowledge to be attributed to that person extends to the operation of the statutory definition. Whatever knowledge is to be imputed, however, the Court's function in determining whether there is the relevant number and configuration of prescribed offences, and in making a declaration based upon that finding, could not reasonably be perceived as undermining its "decisional independence and impartiality".[8]

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3 As, for example, where the order would deprive a respondent of the means to meet the cost of legal representation: see *Burnett v Director of Public Prosecutions* (2007) 21 NTLR 39.

4 RS [8.1], [15] and [16].

5 See *Baker* at [6] per Gleeson CJ, at [79]-[80] per Kirby J; *Fardon* at [23] per Gleeson CJ, at [102] per Gummow J, at [144](3) per Kirby J; *Forge* at [194] per Kirby J, at [274] per Callinan J; *Totani* at [73] per French CJ, at [206] per Hayne J, at [245] per Heydon J; *Wainohu* at [173]-[177] per Heydon J; *Momcilovic* at [175] per Gummow J; *Public Service Association* at fn 107 per Heydon J. The retreat from the emphasis placed upon public perception in the majority judgments in *Kable* (which might have suggested that damage to public confidence in the courts was a criterion of invalidity) is founded upon the difficulty inherent in identifying "the public" and attributing to the public the relevant knowledge and understanding of the proceedings in issue.

6 See *Momcilovic* at [598]-[600] per Crennan and Kiefel JJ.

7 See *Forge* at [194] per Kirby J.

8 Cf [RS] 16.

Executive discretion – Notice of Contention, proposed par 1B

7. In *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, the Court was addressing a submission by the Commonwealth that it would be open to the Parliament to confer on the Minister, *inter alia*, the power to exercise a "totally open-ended discretion" to decide what aliens could, and what aliens could not, come to and stay in Australia, subject only to the High Court deciding any dispute as to the constitutional fact of alien status. Their Honours held (at [102]) that such a discretion "might well be ineffective" because, *inter alia*, such legislation would lack a hallmark of the exercise of legislative power, namely the determination of the content of a law as a rule of conduct or a declaration as to power, right or duty.

8. Section 36A of the MDA does not answer the question "which people will have their property forfeited under s 94(1) of the CPFA?" by saying "let the DPP decide". The legislature has specified, by s 36A, the persons to whom its provisions will apply. The DPP's discretion in the MDA is no more open-ended, unconstrained and unreviewable than the ordinary prosecutorial discretion.[9] That is: a potential offender comes to the DPP's attention; the DPP considers whether the person's circumstances fall within s 36A(3) of the MDA; if the DPP determines a court is likely to conclude they do, the DPP considers whether proceeding further in respect of the person is in the public interest; and, if so, the DPP commences an application under s 36A.[10]

9. The authorities relied upon by the first respondent[11] to assert that the DPP's discretion is "impermissibly arbitrary in the constitutional sense" involved the question whether a law imposed a tax (a compulsory and not an arbitrary exaction of money) and was therefore a law with respect to taxation.[12]

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9 Cf RS [20.1].

10 In many cases involving the ordinary exercise of prosecutorial discretion, the likelihood of success will be a virtual certainty. In some cases, notwithstanding good prospects of success, it is not in the public interest to prosecute. That does not make the prosecutorial discretion "totally open-ended" and the legislative conferral of it ineffective. Further, there is no warrant for presuming that the DPP will "select" only some from a broader class of persons whose conduct falls within s 36A in respect of whom to make an application. There is no reason to conclude other than that the DPP will make an application under s 36A in respect of all such persons who come to his knowledge and in respect of whom it is in the public interest to proceed.

11 See RS [29] and fn 97.

12 *Vestey v Inland Revenue Commissioners* [1980] AC 1148 at 1172F, 1174G, 1176C, in which it was held that the purported exercise by the executive of a discretion as to whether and if so how much a citizen was to be taxed was unconstitutional; *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 382-383, in which it was held that a law providing that unless the Commissioner is of the opinion that it would be unreasonable that the section should apply, tax should be payable, was a law with respect to taxation and valid; *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 640-641, in which it was held that a liability to pay recoupment tax was not an "incontestable impost" and hence not a law with respect to taxation (ie a liability to taxation upon certain criteria but which purported to deny the taxpayer all right to resist the liability by proving in court that the criteria were not satisfied in his case); *Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678, in which it was held that a provision was not invalid because it did not produce the result as alleged, namely that liability to

10. The "rule" against double punishment, even if it be a rule of law rather than good sentencing practice,[13] will yield to a contrary legislative provision.[14] To impose forfeiture of restrained property upon a person who has been found guilty of multiple specified offences may be to impose an "additional fine" upon them,[15] but it operates upon the accumulation of the multiple offences such that its "addition" is related to that accumulation, and is separate from, and not potentially overwhelming of, the functions of the courts in sentencing for the commission of the offences.

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Acquisition of property– Notice of Contention, par 2

11. Forfeiture laws are excluded from the guarantee of just terms contained in s 51(xxxi) of the *Constitution* and s 50(1) of the *Northern Territory (Self-Government) Act 1978* (Cth), because by their nature and objects concepts of compensation are irrelevant or incongruous.[16] In the application of that principle, forfeiture laws are not laws "with respect to the acquisition of property" for the purpose of either provision, with the consequence that there is no infringement of the constitutional limitation and no consequential
20 "proportionality" enquiry into the necessity for that infringement.[17]

12. The Legislative Assembly of the Northern Territory has a plenary power to legislate on all subject matters, subject to certain qualifications which are not relevant for these purposes.[18] Given the plenary nature of the grant, there can be no enquiry whether the scheme in this case falls within a head of legislative power (or any ancillary enquiry as to the appropriateness or adaptation of the law to achieving an object or purpose of that power);[19] and

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pay the tax arose for no other reason than that the Commissioner was of the opinion it would be unreasonable for the liable company to pay it.

13 See *Pearce v The Queen* (1998) 194 CLR 610 at [40] per McHugh, Hayne and Callinan JJ.

14 Ibid.

15 RS [30].

16 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 (***Lawler***) at 278, 279-80 per Brennan J, 285 per Deane and Gaudron JJ (Mason CJ agreeing), 290-1 per Dawson J, 292 per Toohey J, 292-293, 295 per McHugh J; *Burton v Honan* (1952) 86 CLR 169 (***Burton v Honan***) at 180 per Dixon CJ. The Full Court of the Federal Court has accepted the application of this principle in the Territory context in *Australian Capital Territory v Pinter* (2002) 121 FCR 509 at [93]-[94] per Black CJ (Spender J agreeing), [201] per Higgins J, [250] per Finn J, [269] per Dowsett J.

17 See *JT International SA v Commonwealth* (2012) 86 ALJR 1297 at [232]-[233] per Heydon J, [333]-[341] per Kiefel J.

18 *Northern Territory (Self-Government) Act 1978* (Cth), s6. *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 270 per Wilson J; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 281-282 per Brennan, Deane and Toohey JJ; *Svikart v Stewart* (1993-94) 181 CLR 548 at 573-4 per Toohey J; *Wake v Northern Territory* (1996) 5 NTLR 170 at 177-178 per Martin CJ and Mildren J.

19 As is necessary for validity in the exercise of the Commonwealth's legislative power: see *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at [98]-[99] per Gleeson CJ and Kirby J, [148]-[149], [157]-[158] per Gaudron J, [342]-[345], [347] per McHugh J, [487]-[490] per Gummow J; *Lawler* at 285-286 per Deane and Gaudron JJ.

nor can there be any examination whether the means chosen by the legislature are ill-adapted, inappropriate or disproportionate, or otherwise go further than is necessary or desirable.[20] Even leaving aside differences between the Commonwealth and Territory constitutional structures, "reasonable proportionality" has no established application to the characterisation of laws providing for forfeiture in the context of a constitutional guarantee of just terms.[21]

13. It is only necessary that the law be capable of characterisation as for the exaction of forfeiture referable to the breach of a rule of conduct. The common aims of forfeiture legislation include deterrence, retribution, penalty and incapacitation, often without regard to the degree of fault attributable to affected persons or parity between the objective seriousness of the breach and the value of the property forfeited.[22]

14. The first respondent's attempt to characterise forfeiture of property resulting from the combined operation of s 36A of the MDA and s 94(1) of the CPFA as merely a revenue raising device is misconceived. The legislature has determined, in legislation directed to preventing misuse of drugs, that a person who is proven to have committed three qualifying drug offences is liable to have his or her property confiscated. A requirement for the provision of just terms in respect of such an exaction would clearly be "incompatible with the very nature of the exaction".[23]

15. It is well established that a legislature may not, simply by using the label "forfeiture" or a cognate expression to describe the circumstances in which a person's property is divested, escape a conclusion that a law operates so as to bring about an acquisition to which the requirement of just terms applies. The question whether a legislature has attempted "by circuitous means" to do so is not, however, to be answered by speculation as to the subjective motives of the legislature in enacting a law; rather, it involves a conventional process of construction of the law in question.

16. The first respondent's submissions artificially approach the characterisation of this forfeiture in the context only of the statutory scheme established by the CPFA, and its stated objects in ss 3 and 10 of targeting the proceeds of crime, preventing the unjust enrichment of criminals and compensating the Territory community for the cost to it of criminal activity. The criteria for

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20 *Burton v Honan* at 179 per Dixon CJ; *Leask v The Commonwealth* (1996) 187 CLR 578 (***Leask***) at 593-4 per Brennan CJ, at 601 per Dawson J; *Cunliffe* (1994) 182 CLR 272 at 351-352 per Dawson J; *Lawler* at 290-1 per Dawson J.

21 *Theophanous v Commonwealth* (2006) 225 CLR 101 (***Theophanous***) at 127 [69]-[71] per Gummow, Kirby, Hayne, Heydon and Crennan JJ; *Lawler* at 290-1 per Dawson J; 291 per Toohey J. Cf *Lawler* at 294 per McHugh J.

22 *Lawler* at 290-1 per Dawson J, at 294 per McHugh J; *Burton v Honan* at 180-1 per Dixon CJ; *Forbes v Traders' Finance Corporation Ltd* (1971) 126 CLR 429; *Cheatley v The Queen* (1972) 127 CLR 291.

23 *Theophanous* at 126 [60] per Gummow, Kirby, Hayne, Heydon and Crennan JJ.

forfeiture are found not in the CPFA but in the MDA, a criminal statute whose objects include making "provision for the prevention of the misuse of drugs".

17. The difference in focus is reflected in important qualitative differences between forfeiture of this kind and other types of property forfeiture (and analogous relief) under the CPFA. By virtue of s 36A of the MDA a person who has committed three qualifying drug offences is liable to have their property forfeited. In contrast, liability to other forms of relief under the CPFA results from a connection, direct or otherwise, between the property and criminal activity – namely that the property was used in, or derived from, such activity.

18. Property liable to forfeiture under s 94(1) of the CPFA upon a declaration under s 36A of the MDA *may* as a matter of fact have been used in or derived from one or more of the proven qualifying offences, but proof of the connection is not necessary and is likely, having regard to the timeframe within which qualifying offences may have been committed, to be impracticable. In the case of the other forms of relief under the CPFA, proof of the connection *is* required, whereas proof of the commission of an offence is not.[24]

19. In the context of the MDA, the sanction of forfeiture, which is deployed against those who repeatedly commit drug offences with some commercial element, is to be seen foremost as a penalty and deterrent in the pursuit of the object of preventing misuse of drugs. That the scheme for drug trafficker forfeiture does not differentiate according to the legitimacy of the means by which forfeited property is acquired merely emphasises that the sanction is intended to be drastic and the weapon blunt.[25]

20. Referring to observations by the plurality in *Theophanous*,[26] the first respondent submits (at RS [36]) that there will "necessarily" be a point at which the relationship between the operation of a law and the scale of benefits derived by the Crown from that operation is such that the law is "no longer" inconsistent or incongruous with the requirement for just terms. It is unnecessary for the purposes of this appeal to decide whether the quoted observations in fact stand for such a proposition.[27] It is sufficient to observe that the scheme for forfeiture is not one where "the disproportion of a law to an end asserted to be within power may suggest that the law is actually a means of achieving another end which is beyond power".[28]

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[24] In the case of unexplained wealth, the connection is presumed, subject to proof that the property was legitimately derived.

[25] A similar observation may be made about the matters identified by the first respondent at RS [38.3]. Viewed in context, the undeniably onerous procedural aspects of the scheme (including the limitations upon the discretions of the Court) underline its normative character.

[26] At 126 [60] per Gummow, Kirby, Hayne, Heydon and Crennan JJ.

[27] Particularly having regard to other observations later in the plurality reasons: see *Theophanous* at 127-128, [68] – [71] per Gummow, Kirby, Hayne, Heydon and Crennan JJ, referring to *Lawler* and *Leask*.

[28] *Leask* at 605 per Dawson J.

Construction of CPFA, s 52(3) – Notice of Contention, par 3

21. The construction of s 52(3)(a) upon which the first respondent relies[29] involves reading into that section a temporal limitation in respect of a declaration under s 36A of the MDA – specifically, a requirement that a declaration must be made contemporaneously with (and the application made prior to) the final determination of the charges that create "eligibility" for the making of a declaration.[30]

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22. A restraining order will cease if two conditions are met: final determination of the charge; and, a declaration is not made. The expression "but ... is not declared [a drug trafficker]" merely directs attention to the *outcome* of an application for a drug trafficker declaration.[31] In effect, the first respondent asks the Court to read s 52(3)(a) as if it instead provided: "if *at the time* the charge is finally determined the person *has not been declared* under section 36A of the *Misuse of Drugs Act* to be a drug trafficker".

23. Self-evidently, an application under s 36A of the MDA[32] cannot lead to a drug
20 trafficker declaration until it is possible to demonstrate that the criteria in s 36A(3) are met; nevertheless, the first respondent's submission requires that the application must be dealt with *before* the third qualifying charge is "finally determined". The first respondent attempts to deal with the absurdity inherent in that construction by reference to the fact that the s 36A(3) has application to a person "found guilty" of three qualifying offences, thus admitting the possibility that a s 36A declaration might be made between the time of a finding of guilt and the final determination of charges based upon that finding. That submission is no answer to the question why, having regard to the possibility of appeal, an application for a declaration – with the
30 consequences for which the CPFA provides – must be determined

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29 The first respondent contends that the restraining order made against his property on 11 April 2011 ceased to have effect on 22 September 2011, when he was convicted and sentenced in respect of the criminal charges. He says that s 52(3)(a) of the CPFA produced that consequence because 22 September 2011 was the date on which the charges that had led to the making of the restraining order under s 44(1)(a) were "finally determined" within the meaning of s 52(3)(a) and because he was not *at that time* declared a drug trafficker under s 36A of the MDA.

30 That construction was rejected in the decision below and in the decision at first instance: see *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1 at 19-21 [45]-[54] per Riley CJ, at 22 [57] per Kelly J, at 35 [99] per Barr J; *Director of Public Prosecutions v Emmerson & Anor* (2012) 32 NTLR 180 at 223-225 [109]-[114] per Southwood J.

31 Noting that the making of a declaration will lead to forfeiture of the restrained property under s 94(1) of the CPFA and that such forfeiture causes a cessation of the restraining order under s 52(8). The effect of s 52(3) – and the only relevant effect – is that it "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 [sic] where a declaration that the person is a drug trafficker is not made by the Court": *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1 at 28 [53] per Riley CJ, at 22 [57] per Kelly J, at 35 [99] per Barr J.

32 It is noted that an application "may be made at the time of a hearing for an offence or at any other time" – MDA, s 36A(2).

contemporaneously with a finding of guilt and before any disposition following that finding.[33] Similarly, the construction propounded is inconsistent with the fact that the CPFA contains detailed provisions – in which the court has a central role – relating to the setting aside, duration and extension of restraining orders.[34]

24. There is no "constructional choice" as urged by the first respondent and therefore no occasion for resort to the principles affecting such a choice where a legislative scheme interferes with property rights.[35] Even if those principles were engaged, the interference with property rights on the first respondent's construction is no less extensive than if s 52(3)(a) is read without a temporal limitation, and would (in the event of a successful appeal) additionally suffer from the vice of proving premature and completely unnecessary.

25. Finally, reading s 52(3)(a) without a temporal limitation does not mean that a restraining order has a potentially open-ended operation. In the (practically unlikely[36]) event that an application under s 36A was not pursued following final determination of a third qualifying charge, the Court would have the power to set aside a restraining order as an abuse of process.

Dated: 23 December 2013

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[33] *A fortiori* the need to complete the procedures by which objections may be taken to a restraining order, which can involve prolonged hearings on disputed facts. Note also the impracticalities identified by the Court below: *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1 at 27 – 28 [49]-[50] per Riley CJ, at 22 [57] per Kelly J, at 35 [99] per Barr J.

[34] CPFA, ss 50 and 51. As was recognised by the court below: see *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1 at 27 [48] and 29 [54] per Riley CJ, at 22 [57] per Kelly J, at 35 [99] per Barr J.

[35] RS [43.1].

[36] Given that the restraining order will have been obtained under s 44(1)(a) and therefore on the basis that a drug trafficker declaration may subsequently be sought.