IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D5 of 2013

BETWEEN:

ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY
First Appellant

and

THE NORTHERN TERRITORY OF AUSTRALIA
Second Appellant

and

REGINALD WILLIAM EMMERSON
First Respondent

and

THE DIRECTOR OF PUBLIC PROSECUTIONS
Second Respondent

APPELLANTS' SUBMISSIONS

Part I:

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

Part II:

2. Under s 36A of the *Misuse of Drugs Act* (NT) (**MDA**) the Director of Public Prosecutions may apply to the Supreme Court of the Northern Territory for a declaration that a person is a drug trafficker. The Court must make a declaration if statutory criteria relating to the person's criminal history are satisfied. By s 94(1) of the *Criminal Property Forfeiture Act* (NT) (**CPFA**), certain property owned or controlled by a person declared a drug trafficker is forfeited to the Territory. The issue on appeal is whether the scheme comprised by the two provisions is invalid on *Kable* grounds.[1]

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[1] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. It is not disputed that the Supreme Court of the Northern Territory exercises the judicial power of the Commonwealth as one of the "other courts [the Parliament] invests with federal jurisdiction" within s 71 of the *Constitution* and hence the principle in *Kable* applies to the Supreme Court of the Northern Territory: see *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [28]-[29] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

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Part III:

3. The appellants have given notice to the Attorneys-General in compliance with s 78B of the *Judiciary Act 1903* (Cth).

Part IV:

4. The judgment appealed from is reported in *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1 (**the decision below**) and the judgment at first instance in *Director of Public Prosecutions v Emmerson* (2012) 32 NTLR 180 (**the decision at first instance**).

Part V:

5. The relevant facts, which are set out at pages 193 to 198 (pars [7] to [40]) of the decision at first instance and at pages 8 to 9 (pars [3] to [5]) of the reasons of Riley CJ in the decision below, are as follows.

6. On 17 August 2007, the first respondent was convicted of the following offences which he committed on 28 February 2007:

   (a) unlawful possession of 5.9 grams of MDMA (commonly known as ecstasy) which is a trafficable quantity of the dangerous drug, contrary to ss 9(1) and (2)(e) of the MDA;

   (b) unlawful possession of methyl amphetamine (commonly known as ice or crystal meth) contrary to s 9(1) of the MDA;

   (c) unlawful possession of lysergic acid (commonly known as LSD) contrary to s 9(1) and s (2)(c)(i) of the MDA;

   (d) unlawful possession of cannabis plant material contrary to ss 9(1) and (2)(f)(ii) of the MDA; and

   (e) administering MDMA, methyl amphetamine and cannabis to himself contrary to s 13 of the MDA.

7. On 12 March 2010, the first respondent was convicted of the following offences which he committed on 17 October 2008:

   (a) unlawful possession of 20.8 grams of cannabis oil which is a trafficable quantity of the dangerous drug, contrary to ss 9(1) and (2)(e) of the MDA; and

   (b) unlawful possession of 64.1 grams of cannabis plant material which is a trafficable quantity of the dangerous drug, contrary to ss 9(1) and (2)(e) of the MDA.

8. On 21 February 2011, the first respondent was charged with drug offences allegedly committed on 18 February 2011.

9. On 28 February 2011, the second respondent (**DPP**) filed an application for a restraining order under ss 41(2), 44(1)(a) and 44(2) of the CPFA. The basis of the application was that if the first respondent was convicted of the supply on 17 February 2011 of 18.6640 kilograms of cannabis it could lead to him being declared to be a drug trafficker under s 36A(3) of the MDA.

10. On 11 April 2011, the Supreme Court made a restraining order until further order in relation to the following real and personal property owned and/or effectively controlled by the first respondent:

    (a) a 10 acre freehold estate being Section 4188 Hundred of Strangways;

    (b) 12 motor vehicles, comprising a ute, a van, a boat and trailer, and 9 motorcycles;

    (c) approximately $27,000 in a savings account;

    (d) approximately $90,000 in a term deposit;

    (e) cash in the sum of $70,050;

    (f) approximately $11,000 in a cheque account; and

    (g) all other property owned or effectively controlled by the first respondent at the time of the order, or acquired by him after the time of the order with the exception of lawfully derived income or benefits payable under statute.

11. On 22 September 2011, the first respondent was convicted of the following offences which he committed on 18 February 2011:

    (a) unlawfully supplying 18.6646 kilograms of cannabis which is a commercial quantity of the dangerous drug, contrary to ss 5(1) and (2)(b)(iii) of the MDA; and

    (b) possessing $70,050 which the respondent obtained directly from the commission of offences against s 5 of the MDA, contrary to s 6(1)(a) of the MDA.

12. On 13 February 2012, the DPP filed an application in the Supreme Court seeking that the first respondent be declared a drug trafficker under s 36A(3) of the MDA.

13. On 15 August 2012, as part of the decision at first instance, the Supreme Court:

(a) found that the first respondent had been convicted of the offences referred to in pars 6, 7 and 11 above;

(b) found that the first respondent's convictions for the first offence referred to in par 6 above, the two offences referred to in par 7 above, and the first offence referred to in par 11 above made him liable to a declaration under s 36A of the MDA; and

(c) declared the first respondent a drug trafficker in accordance with s 36A(3) of the MDA.

14. It was common ground between the parties that apart from $70,050 in cash seized at the first respondent's property, the restrained property was not crime-derived property, crime-used property or unexplained wealth within the meaning of the CPFA.

Part VI:

15. The members of the majority in the Court of Appeal followed different reasoning in finding the legislative scheme invalid.

16. Kelly J fell into error by characterising the DPP's decision whether to apply to the Supreme Court for a declaration under s 36A of the MDA[2] was in effect determinative of the fact that such a declaration would be made, with the consequences provided for in s 94 of the CPFA.[3] It was primarily on that basis that her Honour concluded erroneously at [92] that the statutory scheme was "functionally equivalent" to the scheme struck down in *Totani*[4] because its effect was substantially a "recruitment of the judicial function of [the] Court to an essentially executive process" that gave "the neutral colour of a judicial decision" to the executive decision of the DPP and thereby impaired the Court's institutional integrity in such a way as to infringe the *Kable* principle.

17. Barr J fell into error by characterising the process as one in which the Supreme Court may be bound "to make a declaration contrary to actual facts"; such that a declaration by the Court that a person is a "drug trafficker" may "obscure or conceal the true facts which satisfied the legal requirements for forfeiture" (at 45 [127]). On that basis, his Honour concluded erroneously that the effect of the statutory scheme was to cloak the work of the legislative and executive branches "in the neutral colours of judicial action" in such a way as to infringe the *Kable* principle.[5]

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2 Which decision, according to her Honour, was relevantly distinguishable from a decision of the DPP whether to prosecute for a criminal offence or a decision to commence ordinary civil proceedings. (at [86], [90]).

3 So much is plain from her Honour's observations at 33 NTLR 31 [84(c)], 32 [88], 33 [90]-[91] and 34 [92] and [94].

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

5 At 33 NTLR 47 [132], citing *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, per Gummow J at 615 [91].

The legislative scheme

18. The express objective of the CPFA 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".[6]

19. In pursuit of that objective, the CPFA is given application to property owned or effectively controlled, or previously owned, by persons "involved in or taken to be involved in criminal activities"; to property that is "crime used"; and to property that is "crime-derived".[7] Each of those categories of property is subject to its own particular regime under the CPFA. It is the first category of property with which this appeal is concerned.

20. The property of a person who is "involved or taken to be involved in criminal activities" is forfeit to the Territory to the extent provided in the CPFA. The reason given by the statute for that operation is "to compensate the Territory community for the costs of deterring, detecting and dealing with the criminal activities".[8]

21. For those purposes, one of the qualifications by which a person is "taken to be involved in criminal activities" is where that person "is declared under section 36A of the *Misuse of Drugs Act* to be a drug trafficker".[9] That provision is complemented by a statutory definition of "declared drug trafficker",[10] and the extension of the term to a person who absconds or dies before a charge, a conviction on which would qualify that person to be declared a drug trafficker, has been disposed of or finally determined.[11]

22. In aid of that scheme, the Supreme Court may make a restraining order in relation to the property of a person named in the application if 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.[12]

23. Section 36A of the MDA permits the DPP to apply to the Supreme Court for a declaration that a person is a drug trafficker.[13] On the hearing of the application the Court must declare a person to be a drug trafficker if the

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6 CPFA, s 3.

7 CPFA, s 10(1).

8 CPFA, s 10(2).

9 CPFA, s 10(4)(a).

10 CPFA, s 8.

11 CPFA, ss 8(2), (3), 9.

12 CPFA, s 44(1)(a).

13 MDA, s 36A(1).

person has been found guilty of a prescribed offence[14] in circumstances where that person has previously been found guilty of two or more prescribed offences in the 10 years prior to the date on which the operative offence was committed.[15]

24. It may be noticed that the question whether there is the relevant number and configuration of prescribed offences is for the Supreme Court to determine; that the offences only qualify for that purpose where there has been a finding of guilt in the ordinary course by a court of competent jurisdiction; and that it is the decision of the Supreme Court concerning the satisfaction of the criteria in s 36A that ultimately determines whether or not a declaration is made.

25. In the course of determining those issues:

    (a) the onus of proof is on the DPP;

    (b) the rules of evidence apply;

    (c) the power to make a declaration is conditioned upon specified criteria;[16]

    (d) there is a right of appeal;[17]

    (e) hearings are conducted in public, and in accordance with the ordinary judicial process;

    (f) the outcome of each case is to be determined on its merits;[18] and

    (g) the Supreme Court retains its inherent powers to ensure fairness and prevent injustice in the conduct of its proceedings.[19]

26. If a person is declared to be a drug trafficker under s 36A of the MDA, s 94(1) of the CPFA operates to forfeit to the Territory all restrained property owned or effectively controlled by that person, or previously owned by that person and given away.

27. Forfeiture under s 94(1) of the CPFA occurs by operation of the legislation. The Court does not order forfeiture (although it may, in the event there is

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14 The offences are prescribed by MDA, s 36A(6). They may be broadly described as offences concerning the supply, cultivation in a commercial or traffickable quantity, manufacture or production, possession in a commercial or traffickable quantity, and the importation and exportation of dangerous drugs.

15 MDA, s 36A(3).

16 MDA, s 36A(3).

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

18 *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at 592 [19] per Gleeson CJ.

19 See, in respect of proceedings under the CPFA, *Burnett v Director of Public Prosecutions* (2007) 21 NTLR 39.

some subsequent contention in relation to the matter, declare that property has been forfeited by operation of the section).[20]

28. As is consistent with that operation, s 36A does not contemplate or authorise an application for a declaration in circumstances where there is not property potentially subject to forfeiture under s 94(1) of the CPFA. On proper construction, the jurisdiction only arises if: there is property that, upon the making of a declaration, would be forfeited under s 94(1); there is an application by the DPP; and there is proof of the commission of three qualifying offences. The following matters support that construction.

29. First, s 36A was inserted into the MDA by the *Criminal Property Forfeiture (Consequential Amendments) Act 2002.*

30. Secondly, s 94(1) of the CPFA operates such that forfeiture occurs upon the making of a declaration under s 36A of the MDA. The implication is that a restraining order will have been made, or property will have been given away, prior to the making of the declaration. The corollary is that a declaration made in circumstances where there is no property the subject of a restraining order, or that has been given away, will not operate so as to effect forfeiture of property that later acquires that character. Similarly, s 44(1)(a) of the CPFA contemplates the making of a restraining order in circumstances where a person is subject to charges or intended charges that "could lead" to a declaration under s 36A of the MDA.

31. Thirdly, there is no indication in the text of either the MDA or the CPFA that the legislature, in empowering the Court to make a drug trafficker declaration, intended that the Court would act otherwise than in accordance with the principles and procedures according to which it ordinarily exercises judicial power.[21] There is nothing in the statutory scheme to necessitate a conclusion that the Court might make a drug trafficker declaration in circumstances where to do so would not have legal consequences;[22] or, to approach the matter in a slightly different way, there is nothing to suggest that the Court would be precluded from staying an application for a drug

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20 CPFA, s 94(3), (4).

21 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 374 [127] and 377 [134] per Hayne, Crennan and Kiefel JJ, at 388 [165] per Heydon J; referring to *Electric Light and Power Supply Corporation Ltd v Electricity Commission (NSW)* (1956) 94 CLR 554.

22 Declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions, and relief will not be granted if the Court's declaration will produce no foreseeable consequences for the parties: see *Ainsworth v Criminal Justice Commission* (1991-92) 175 CLR 564 at 581-2 per Mason CJ, Dawson, Toohey and Gaudron JJ. Although there are limitations on the analogy between a procedure and order such as a drug trafficker declaration and the jurisdiction at general law to make a declaration of right, in the context of the constructional choice presented the legislature should in the absence of any manifest contrary intention be taken as limiting the availability of a process to circumstances where a declaration will have legal consequences. Contrast the scheme under consideration in *Momcilovic v R* (2011) 245 CLR 1 which specifically provided that the declaration of inconsistent interpretation was to have no effect (cf at 94 [178] per Gummow J).

trafficker declaration brought in circumstances where it would have no legal consequences.

The constitutional principle

32. This Court's decision in *Kable* and subsequent authorities explaining and refining its principal rationale establish that a State or Territory legislature cannot confer upon a State or Territory court a function which substantially impairs, or which is incompatible with or repugnant to, the institutional integrity of the court and its role under Ch III of the *Constitution* as a repository of federal jurisdiction and as part of the integrated Australian court system.[23]

33. A court's institutional integrity will be impaired in the relevant sense where:

    (a) the legislation in question directly enlists the court in the implementation of the legislative or executive policies of the State or Territory concerned;[24] or

    (b) the legislation in question requires the court to depart to a significant degree from the methods and standards which have historically characterised the exercise of judicial power.[25]

34. Whilst there is some variance in reasoning, the respective findings of the majority judges in the decision below are based essentially upon the proposition that the Supreme Court has been unlawfully enlisted or conscripted to the purpose of the Executive or Legislature.

35. The notion of conscription or "cloaking" is borrowed in part from *United States v Mistretta* 488 US 361 (1989). In *Mistretta* (at 407), the Supreme Court observed:

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

36. This observation has been cited with approval in decisions of this Court regarding the constitutional validity of conferring non-judicial functions upon

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23 See *Wainohu v New South Wales* (2011) 243 CLR 181 at 208-209 [44]-[45] per French CJ and Kiefel J; 228-229 [105] per Gummow, Hayne, Crennan and Bell JJ; *South Australia v Totani* (2010) 242 CLR 1 at 47 [69] per French CJ, 82 [205], 83 [212] per Hayne J, 157 [426] per Crennan and Bell JJ.

24 *South Australia v Totani* (2010) 242 CLR 1 at 52 [82] per French CJ, 67 [149] per Gummow J, 92 [236] per Hayne J, 173 [481] per Kiefel J.

25 *South Australia v Totani* (2010) 242 CLR 1 at 62-63 [131] per Gummow J, 157 [428] per Crennan and Bell JJ; *International Finance Trust Co v New South Wales Crime Commission* (2009) 240 CLR 319 at 353 [52] per French CJ; *Thomas* v *Mowbray* (2007) 233 CLR 307 at 355 [111] per Gummow and Crennan JJ; *Forge* v *Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63] per Gummow, Hayne and Crennan JJ.

Federal Court judges,[26] and has been held, in such cases, as being "equally relevant to the interpretation of Ch III of the *Constitution* of this country".[27] *Mistretta* was also cited with approval in *Kable*.[28] The proposition that it is impermissible for the legislative or executive branches of government to "cloak" their actions with the neutral colors of judicial action, or to "conscript" the courts to effect legislative or executive policy, has featured in this Court's applications of the principle since then.

37. The proscription is directed to:

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(a) some form of "covering" or "disguising" or "passing off";[29]
(b) of a legislative or executive decision or desire to bring about a particular outcome;
(c) as an exercise of the judicial power of a court;
(d) in a manner inconsistent with the proper relationship between the arms of government in which, so far as is relevant for these purposes, the courts independently and impartially interpret and apply statutes in the determination of controversies between parties.

20 *"Covering" or "disguising" or "passing off"*

38. A court invested or capable of being invested with federal jurisdiction must be, and appear to be, independent and impartial. What is proscribed is the attempt to utilise and give the appearance of the courts' independence and

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26 *Grollo v Palmer* (1995) 184 CLR 348 at 366 per Brennan CJ, Deane, Dawson and Toohey JJ, at 377 per McHugh J, at 392 per Gummow J; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 9 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ, at 44-45 per Kirby J.

27 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 9 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

28 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 96 per Toohey J, at 133 per Gummow J.

29 *Kable* at 121 (invoking the Supreme Court's authority), 122, 124 (making the Supreme Court the instrument of a legislative plan initiated by the Executive) per McHugh J; at 131 (employing the Supreme Court to carry into execute the legislature's plan), 133 (drawing the Supreme Court into a scheme), 134 (ratifying the political and policy decisions with the judiciary's reputation and authority) per Gummow J; at 96-97, 98 (requiring the Supreme Court to participate in a process to achieve the executive's object) per Toohey J; at 106, 108 (dressing up the process as a judicial process) per Gaudron J; *Fardon* at 596 [34] (the Court's jurisdiction was a disguised substitute for an ordinary legislative or executive function) per McHugh J; *Totani* at 52 [82] (a substantial recruitment of the judicial function of the Court to an essentially executive process) per French CJ; at 66 [142] (the conscription of the Court to effectuate a political function), 67 [149] (enlist a court in the implementation of legislative policy) per Gummow J; at 89 [229], 90 [230] (using the courts as the arm of the executive), 92 [236] (enlisting the court to create new norms of behaviour for persons identified by the executive) per Hayne J; at 160 [436] (rendering the Court the instrument of the Executive) per Crennan and Bell JJ; at 172 [480] (disguising the Executive's aims), 173 [481] (enlisting the court to give effect to legislative and executive policy) per Kiefel J; *Momcilovic v The Queen* (2011) 245 CLR 1 at 228 [602] per Crennan and Kiefel JJ (disguising a legislative or executive function by use of the court's process).

impartiality[30] for a purpose or function which is not, in truth, independent from, and impartial to, the will of the executive and legislative arms of government.

39. In order for there to be an impermissible "disguise" or "passing off" there must be some signal feature in the operation of the legislation such as the utilisation of confidence in the impartial, reasoned and public decision-making of judicial officers to support inscrutable decision-making;[31] or the incorporation at the behest of the Executive of unstated premises into a judicial determination.[32]

Legislative or executive decision to achieve a particular outcome

40. Nor is it sufficient to engage the *Kable* principle that the judiciary, in the declaration and enforcement of legislation, gives effect to government policy dictated by the Executive. All judicial enforcement of legislation enacted substantially in conformity with a Bill presented to the legislature by the Executive will have that operation.[33] In many cases, the legislation in question will be the outcome of political controversy, or reflect controversial political opinions; but administering and giving effect to such legislation does not compromise the integrity of a court simply by reason of the fact that the result is the outcome of political action or in conformance with a legislative or executive intention.[34].

41. When analysing for *Kable* purposes the manner in which the legislative or executive object is achieved, the more particular to an individual or to identified proceedings the outcome sought by engagement of the court process, the more likely the legislation is to have "cloaked" the work of the executive or "conscripted" the court to that work. Neither s 36A of the MDA nor s 94(1) of the CPFA has application limited to particular individuals[35] or proceedings[36], or to an identified but limited class thereof.[37] They are laws of general application.[38]

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30 See *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 496 [169] per Hayne, Crennan, Kiefel and Bell JJ.

31 See, for example, *Wainohu v New South Wales* (2011) 243 CLR 181 at 230 [109] per Gummow, Hayne, Crennan and Bell JJ.

32 See, for example, *South Australia v Totani* (2010) 242 CLR 1 at 173 [480] per Kiefel J.

33 *PSA (NSW) v Director of Public Employment* (2012) 87 ALJR 162 at 177 [69] per Heydon J.

34 *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at 592 [21] per Gleeson CJ.

35 Cf the impugned legislation in *Kable*, which was expressly directed to the continued detention of a named individual and no other person: *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98, 99 per Toohey J, at 104 per Gaudron J, at 121 per McHugh J, at 130, 133 per Gummow J.

36 See *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501 at 580 [258] per Kirby J; *PSA (NSW) v Director of Public Employment* (2012) 87 ALJR 162 at 178 [70] per Heydon J.

37 Even that characteristic did not deny the validity of the impugned legislation in *Baker v The Queen* (2004) 223 CLR 513, notwithstanding that in the Second Reading Speech, the Minister identified by name the 10 prisoners to whom the legislation was directed: see the text of the

42. Similarly, nothing in the Second Reading Speech to the Criminal Property Forfeiture Bill and the Criminal Property Forfeiture (Consequential Amendments) Bill suggests that the legislative object was confined to particular individuals or proceedings. The Minister stated that:

> This legislation is aimed at preventing the unjust enrichment of certain individuals as a result of criminal conduct. Criminals should not profit from their criminal activity or benefit from their ill-gotten gains. This legislation provides a mechanism outside the criminal jurisdiction for forfeiture of property used in, or in connection with, the commission of a criminal offence. In particular, the legislation makes provision for the forfeiture of property of a declared drug trafficker, a person convicted of three serious drug offences.
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> The proceeds of crime are derived at the expense of the rest of the community. They are earned through harm and suffering of others. They can be used to finance future criminal activity and they are tax free. Criminals have no legal or moral entitlement to the proceeds of their crimes and, where property is used to facilitate criminal activity, that property will be forfeited to the Territory.
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> The need for strong and effective laws for the forfeiture of proceeds of crime is self-evident. The objective of such laws is threefold:
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> (1) to deter those who may be contemplating criminal activity by reducing the possibility of gaining a profit from that activity;
> (2) to prevent crime by diminishing the capacity of offenders to finance future criminal activities; and
> (3) to remedy the unjust enrichment of criminals who profit at society's expense.
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> Since the 1980s, all Australian jurisdictions introduced laws enabling proceeds of crime to be confiscated after a conviction had been obtained - that is, conviction-based laws. These laws have not been fully effective. In particular, they have failed to have an impact upon those individuals involved at the more serious levels of criminal activity. Advancements in technology and the ease of national, even global, communication, allow individuals to be involved in sophisticated and large-scale criminal activity while being distanced from the actual criminal act. These individuals are able to evade conviction and, therefore, place their profits beyond the reach of conviction-based laws.
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> In its 1999 report, entitled *Confiscation That Counts*, the Australian Law Reform Commission concluded that conviction-based laws were inadequate. Several Australian jurisdictions have now enacted, or are in the process of enacting, more effective laws enabling proceeds of crime to be frozen and confiscated through civil proceedings, without the need to obtain a conviction.

Second Reading Speech at 569 [165] per Callinan J. The plurality in *Baker* (at 534 [50] per McHugh, Gummow, Hayne and Heydon JJ) noted that the application of the legislation to a small class of persons was answered by what was said in *Nicholas v The Queen* (1998) 193 CLR 173: at [50] per McHugh, Gummow, Hayne and Heydon JJ.

[38] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592 [19] per Gleeson CJ; at 658 [233] per Callinan and Heydon JJ.

> The Criminal Property Forfeiture Bill 2002 achieves a complete overhaul of our existing conviction-based system for confiscating proceeds of serious crime. It represents a concrete demonstration of this government's tough stance against crime...

43. That Speech makes explicit the intention and operation of the legislation, the criteria to be applied in the making of a declaration, and the forfeiting effect of the legislation in those circumstances. That explication is reflected in the legislation, under which appropriate provision is made for a judicial process by which the satisfaction of the relevant criteria is subject to impartial and authoritative determination, and by which the consequence of forfeiture is imposed on a judicial finding that those criteria are satisfied.[39] There is no suggestion in the Speech or the legislation that it is the Court which imposes that consequence in the purported exercise of judicial discretion based on its determination of whether or not the person the subject of the application "deserves" or "warrants" the forfeiture of their property.

44. By s 36A of the MDA, the DPP selects the individual in respect of whom an application to the Court will be brought. The same can be said of the exercise of prosecutorial discretion generally. Properly understood, the "choice" afforded to the prosecutor is as to whether an application will be made, not as to whether a declaration will be made.[40] The judicial process is a reality. The DPP must satisfy the requirements of s 36A. The person must be proven to be a convicted recidivist of a certain category before a declaration can be made that the person is a drug trafficker.[41] Whether or not the DPP will usually be able to establish that matter is not a criterion of constitutional validity. Nor is it sufficient to show that it will in the ordinary course be difficult for a respondent to resist an application for a declaration. For the DPP's decision to make application to be characterised as determinative it would be necessary to show that the judicial process is a charade in the sense that it is impossible for any respondent to resist an application.[42]

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39 The relationship between public confidence and institutional integrity is undoubtedly a real and substantial one: see, for example, *Momcilovic v R* (2011) 245 CLR 1 at 226 [598]-[599] per Crennan and Kiefel JJ. Nevertheless, a focus upon perceptions that may result from a law is not a substitute for analysis of the impact of the law upon the institutional integrity of a court. If an informed and objective analysis of the operation of the legislation reveals no sufficient impact on institutional integrity then consideration of its impact on public confidence is unnecessary: see *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 [102] per Gummow J; *Momcilovic v R* (2011) 245 CLR 1 at 93 [175] per Gummow J.

40 See, by analogy, *Magaming v The Queen* [2013] HCA 40 at [20]-[26] French CJ, Hayne, Crennan, Kiefel and Bell JJ (Keane J agreeing at [90]).

41 *Director of Public Prosecutions v Emmerson* (2012) 32 NTLR 180 at 206 [71] per Southwood J.

42 *Baker v The Queen* (2004) 223 CLR 513 at 525 [19] per Gleeson CJ, at 532 [41], [43] per McHugh, Gummow, Hayne and Heydon JJ, at 574 [177] per Callinan J; cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 121 per McHugh J. *Director of Public Prosecutions v Hennig* [2005] NTSC 41 is a case in which no declaration was made for failure of the DPP to establish the matters in s 36A(3) of the MDA.

45. The breadth of behaviours to which the offences identified by s 36A(6) may extend is irrelevant[43] because of the requirement in s 36A(3) that the person in respect of whom an application is brought must have been found guilty by a court of three such offences in a 10 year period. There is no warrant for the finding (in the absence of evidence) that the DPP selects the persons in respect of whom to make applications "from a very wide class".[44] Even if there was, this is a matter demonstrating the general operation of the legislation.

46. The DPP's discretion to make application to the Court in respect of a particular individual is undoubtedly executive in nature and exercised for what might be described broadly as "political" purposes.[45] Leaving aside the *ad hominem* scheme in *Kable*, the same can be said of the types of legislation under consideration in *Silbert*,[46] *Baker*, *Fardon* and *Totani*.

47. What was most significant in *Totani*, and is absent here, is that the court was required to proceed upon a vital circumstance and essential foundation of the Executive's making.[47] In that way, the Executive had "set up" or "pre-determined" the outcome of the court's processes.[48] Here, the vital circumstance and essential foundation of the Court's obligation to make the declaration is not one made by the Executive, but one which rests entirely upon findings of guilt for criminal behaviour made by courts according to the normal judicial processes. The consequence of the Court's determination to a person applies not merely because the Executive has chosen the person, but because of what they have done in the past.[49]

48. Nor does the legislative scheme under consideration here involve any element by which the Executive may direct the "manner" in which the Court deals with an application (as opposed to the "outcome"), so as to deprive it of "an essential incident of the judicial function".[50]

The use of judicial power to bring about a desired outcome

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43 *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1at 30 [83] per Kelly J.

44 Cf *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1 at 32 [84(b)] per Kelly J.

45 In much the same sense as the scheme described in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 596 [34] per McHugh J, 619 [107], 621 [116] per Gummow J (Hayne J agreeing), the latter citing *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17.

46 *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181.

47 *South Australia v Totani* (2010) 242 CLR 1 at 65 [139], 66 [142] per Gummow J, at 160 [435] per Crennan and Bell JJ.

48 See *Momcilovic v The Queen* ((2011) 245 CLR 1 at 225 [597] per Crennan and Kiefel JJ.

49 Cf *South Australia v Totani* (2010) 242 CLR 1 at 89 [229], 92 [236] per Hayne J (French CJ agreeing).

50 Cf *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 355 [56] per French CJ.

49. By s 36A(3) of the MDA, the Court must make a declaration if the matters set out in pars (a) and (b) are established. There is no impermissible interference with the judicial function by legislation obliging a court to make specified orders if certain conditions are met, even if the condition which enlivens the court's duty depends upon a decision made by a member of the Executive.[51]

50. In determining whether the matters in s 36A(3) of the MDA are established, the Court must apply subss (4), (5) and (6) and the other statutory provisions referred to therein. The task of determining whether the matters stipulated in s 36A(3) are made out involves the Supreme Court in the application of standards sufficiently precise to engage the exercise of judicial power.[52] That is a "real judicial process", involving the exercise of a "real judicial discretion".[53] Like the requirement for "special reasons" in *Baker*, the Court's determination is not a futility[54] or devoid of meaning.[55]

51. Unlike the legislation in *Totani*,[56] there is no fact finding exercise undertaken by the Executive (in this case, the DPP) with which to make a qualitative comparative assessment of the Court's fact finding function.[57] The Court's discrete task is to determine something about a person,[58], namely the matters in s 36A(3)(a) and (b), applying s 36A(4)-(6), and the DPP's considerations do not bear on the matters the Court must determine.

Consistency with the usual judicial process

52. The criterion of consistency with the usual judicial process is directed to two matters:

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51 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [49] per French CJ, citing *Palling v Corfield* (1970) 123 CLR 52 at 58-59 per Barwick CJ, at 62 per McTiernan J, at 64-65 per Menzies J, at 67 per Owen J, at 68 per Walsh J (Windeyer and Gibbs JJ agreeing), at 360 [77] per Gummow and Bell JJ, at 386 [157] per Heydon J; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 560 [39] per Gummow, Hayne, Heydon and Kiefel JJ.

52 *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at 596 [34] per McHugh J; at 655 [219] per Callinan and Heydon JJ; *Thomas v Mowbray* (2007) 233 CLR 307 at 327-8 [15]-[16] per Gleeson CJ.

53 See, in relation to a similar scheme, *DPP v George* (2008) 102 SASR 246 at [113] per Doyle CJ.

54 *Baker v The Queen* (2004) 223 CLR 513 at 574 [177] per Callinan J.

55 *Baker v The Queen* (2004) 223 CLR 513 at 532 [41] per McHugh, Gummow, Hayne and Heydon JJ.

56 *South Australia v Totani* (2010) 242 CLR 1 at 50 [75], 52 [82] per French CJ, at 66 [142] per Gummow J, 86 [222], 89 [229] per Hayne J, 159-60 [434]-[436] per Crennan and Bell JJ, at 168 [465], 169 [467]-[468] per Kiefel J.

57 *South Australia v Totani* (2010) 242 CLR 1 at 169 [467] per Kiefel J.

58 *South Australia v Totani* (2010) 242 CLR 1 at 169 [468] per Kiefel J.

(a) the extent of any departure from the fundamental notion that the imposition of sanctions or other restrictions upon freedoms is the province of the courts, which generally do so by applying a law creating an offence or a norm of behaviour to their own factual findings made on evidence; and

(b) the extent to which the impugned legislation requires a court to depart from its ordinary judicial processes, including its capacity to control its own proceedings and prevent procedural unfairness or abuses of process.

53. Neither s 36A(3) nor the other provisions of the MDA remove or affect any of the ordinary judicial processes by which the Court performs its judicial function.[59] It undertakes an orthodox and conventional judicial exercise:[60] the adjudication of rights and liabilities established by statute.[61] So far as the prosecution of qualifying offences is concerned, a greater protection is given in consequence of s 36A(3) in that the power to deal with offences summarily under the MDA is constrained if the offence in question is one giving rise to a potential declaration under s 36A(3) (s 22(2), MDA).

54. Unlike the Court's order in *Totani*, the declaration of a person as a drug trafficker under s 36A(3) is not only referable to past contraventions of an anterior legal norm,[62] but depends upon findings of guilt by courts in accordance with the usual judicial processes.[63] Section 36A(3) cannot be said to constitute a legislative determination of guilt for an offence or to effect a "legislative conviction" of a person accused of a crime.[64] Moreover, the combination of those past findings of guilt (for three offences in a 10 year period) does explain the order which results from the Court's process.[65]

55. In that regard, the declaration the Court makes is that the person is a drug trafficker under s 36A of the MDA, not that they are a drug trafficker according to ordinary parlance or common understandings of the term (of which there may be many variations).[66] Even allowing for those variations,

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59 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 232 [208] per McHugh J; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592 [19] per Gleeson CJ.

60 *Baker v The Queen* (2004) 223 CLR 513 at 574 [177] per Callinan J.

61 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 232 [207], [208] per McHugh J.

62 *South Australia v Totani* (2010) 242 CLR 1 at 58 [109]-[110], 65 [139] per Gummow J, at 84 [215], 85 [217], 88 [225] per Hayne J, at 169 [467] per Kiefel J, French CJ agreeing at 52 [82].

63 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98 per Toohey J, 106-107 per Gaudron J, 122, 124 per McHugh J, 130-131, 133-134 per Gummow J; *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at 619 [108] per Gummow J (Hayne J agreeing at 647 [196]).

64 *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at 187 [13] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

65 *South Australia v Totani* (2010) 242 CLR 1 at 169 [469]-[470] per Kiefel J.

66 Cf *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1at 33 [91], 34 [94] per Kelly J, at 47 [131] per Barr J.

the description "drug trafficker" will generally not be inapt having regard to the qualifying offences in s 36A(6) of the MDA.[67]

56. In any event, there is no occasion for consideration of the accuracy or appropriateness of the description. The scheme does not require the Supreme Court to find as a matter of fact that a respondent to an application is a drug trafficker. Like the deeming provision in *Silbert*, the term is a label chosen by the legislature, not a finding of fact contrary to the truth, or a fact invented by the legislature occasioning a travesty of the judicial process.[68] Nor is the power to make a drug trafficker declaration "to be exercised by the application of law to facts invented by Parliament or invented according to some statutory formula or prescription"; and nor does it involve the determination of "legal consequences on the basis that a person is who he is not or on the basis that he did what he did not".[69] On the contrary, the power to make the declaration "can be exercised only on the basis of the discovered facts and by the application of the law which determines the legal consequences attaching to those facts".[70]

57. The purpose of the declaration in that form is that the effect of s 94(1) operates upon the declaration that the person is a drug trafficker under s 36A of the MDA. It is the legislation, and not the order of the Court, which forfeits the person's property. The Court is not obliged, by s 36A, to achieve that which the Executive desires but cannot do.[71] It may be accepted that the Executive, by introducing the legislation into the legislature, desired the forfeiture of property belonging to persons who fall within the terms of s 36A(3), and it achieves that outcome by legislative means. There is nothing improper in that.[72]

58. The role of the Court in that outcome is to declare whether a person falls within the terms of s 36A(3). It may be readily concluded that the legislature invested the Supreme Court with this jurisdiction because that Court, rather than the Legislative Assembly, the Executive, or a tribunal, is the institution best fitted to exercise the jurisdiction.[73] That conclusion is more readily open than the conclusion that the Executive has engaged the Supreme Court in

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67 *Emmerson v Director of Public Prosecutions* (2013) 33 NTLR 1at 16 [31] per Riley CJ.

68 *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at 195 [43]-[44] per Kirby J.

69 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 704 per Gaudron J. It is unnecessary in the present context to consider whether her Honour's observations, which were concerned with Commonwealth legislative power, apply in the context of State legislative power.

70 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 704 per Gaudron J.

71 Cf *South Australia v Totani* (2010) 242 CLR 1 at 172 [480] per Kiefel J.

72 *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at 186-7 [12]-[13] per Gleeson CJ, McHugh, Hayne, Callinan and Heydon JJ, referring to *Burton v Honan* (1952) 86 CLR 169.

73 Adopting the words of McHugh J in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 602 [44].

the process to cloak its work with the Court's appearance of independence and impartiality.

Conclusion

59. The matters set out above, particularly that the Court's determination rests upon the circumstance of prior findings of guilt for criminal offences by courts, and not upon any fact finding or determination of the Executive, and that the forfeiture is effected by legislation not by the Court's order, lead to the conclusion that s 36A(3) of the MDA and s 94(1) of the CPFA, either independently or in their combined operation, do not cloak the work of the Executive in the neutral colours of judicial action or otherwise conscript the Court to the Executive's work.

Part VII:

60. The applicable statutory provisions as they existed at the relevant time are set out in the Appendix to these submissions.

61. Those provisions are still in force, in that form, at the date of these submissions.

Part VIII:

62. The appellants seek orders in the following terms:-

    1. Appeal allowed.

    2. Set aside orders 1, 2 and 3 of the Court of Appeal of the Northern Territory made on 28 March 2013 and orders 1, 2 and 4 (first appearing) of the Court of Appeal of the Northern Territory made on 13 May 2013 and, in their place, order:

        (a) that the appeal to that Court be dismissed with costs;
        (b) that the orders made by the Supreme Court of the Northern Territory on 11 April 2011 are restored, save in so far as those orders relate to the sum of $70,050 (and interest thereon) referred to in order 3 of the Court of Appeal of the Northern Territory made on 28 March 2013; and
        (c) that the orders and declaration made by the Supreme Court of the Northern Territory on 15 August 2012 are restored.

    3. Order that the second appellant pay the first respondent's costs of the appeal, including the application for special leave to appeal.

63. On the application for special leave to appeal, the first respondent submitted that any grant of special leave should be on the condition that the applicants undertake to pay the first respondent's costs of the appeal in any event. At the hearing of the application on 11 October 2013, the Court granted special leave subject to the condition that the appellant pay the first respondent's

costs of the appeal and of the special leave application (order authenticated 22 October 2013). The second appellant has provided a written undertaking dated 21 October 2013 in those terms. Proposed orders 2(a) and 3 reflect the operation of the condition and undertaking.

64. Proposed order 2(b) addresses consequential orders made by consent by the Court of Appeal in respect of the restraining order made by Mildren J on 11 April 2011 (including orders regarding dealings with property affected by the restraining order pending this appeal).

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Part IX:

65. It is estimated that the presentation of the appellants' oral argument concerning the issues traversed in these submissions will take 1.5 hours. That estimate will need to be revised should the first respondent pursue separate issues concerning acquisition or construction by way of contention.

Dated: 15 November 2013

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APPENDIX: APPLICABLE STATUTES AND REGULATIONS AS THEY EXISTED AT THE RELEVANT TIME

CRIMINAL PROPERTY FORFEITURE ACT (NT)

8 Declared drug trafficker

(1) In this Act:

declared drug trafficker means:

(a) a person who is declared to be a drug trafficker under section 36A of the *Misuse of Drugs Act*; or

(b) a person who is taken to be a declared drug trafficker under subsection (2) or (3).

(2) A person is taken to be a declared drug trafficker for this Act if:

(a) the person is charged with an offence specified in section 36A(6) of the *Misuse of Drugs Act*; and

(b) the person could be declared to be a drug trafficker under section 36A of that Act if he or she is convicted of the offence; and

(c) before the charge is disposed of or finally determined, the person absconds in connection with the offence.

(3) A person is taken to be a declared drug trafficker for this Act if a declaration is made under section 9 in respect of the person.

9 Court may declare deceased person to be drug trafficker

(1) The DPP may apply to the Supreme Court for a declaration under this section that a deceased person is taken to be a declared drug trafficker for this Act.

(2) An application under subsection (1) can only be made if:

(a) a person had been charged with an offence specified in section 36A(6) of the *Misuse of Drugs Act*; and

(b) the person could have been declared to be a drug trafficker under section 36A of that Act if he or she was convicted of the offence; and

(c) before the charge was disposed of or finally determined, the person died.

(3) On hearing an application under subsection (1), 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 under section 36A of the *Misuse of Drugs Act* to be a drug trafficker, the court must make a declaration to that effect.

10 Application

(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; and

(b) to property that is crime-used; and

(c) to property that is crime-derived.

(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.

(3) Crime-used or crime-derived property (real or personal) is forfeit to the Territory to deter criminal activity and prevent the unjust enrichment of persons involved in criminal activities.

(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; or

(b) an unexplained wealth declaration or a criminal benefit declaration is made in relation to the person; or

(c) the person is found guilty of a forfeiture offence.

(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; or

(ii) owned or effectively controlled, or has at any time been given away, by a person who has unexplained wealth; or

(iii) owned or effectively controlled, or has at any time been given away, by a person who has acquired a criminal benefit; or

(iv) crime-used property; or

(v) crime-derived property; and

(b) whether the relevant forfeiture offence was committed:

(i) in the Territory or elsewhere; and

(ii) before or after the commencement of this Act; and

(c) whether or not any person has been charged with, or found guilty of, the relevant forfeiture offence and, if a person has been found guilty of the offence, whether the finding of guilt was before or after the commencement of this Act; and

(d) whether the property is in the Territory or outside the Territory.

41 Applications for restraining orders

(1) A police officer or the DPP may apply to the Local Court for a restraining order under section 43(1).

(2) The DPP may apply to the Supreme Court for a restraining order under this Division.

(3) An application under subsection (1) or (2) may be made ex parte.

44 Restraining orders in relation to property of named persons

(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.

94 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.

(3) The DPP may apply to the Supreme Court for a declaration that property has been forfeited by operation of this section.

(4) If the court that is hearing an application under subsection (3) finds that property specified in the application has been forfeited to the Territory by operation of this section, the court must make a declaration to that effect.

MISUSE OF DRUGS ACT (NT)

5 Supplying dangerous drug

(1) A person who unlawfully supplies, or takes part in the supply of, a dangerous drug to another person, whether or not:

(a) that other person is in the Territory; and

(b) where the dangerous drug is supplied to a person at a place outside the Territory, the supply of that dangerous drug to the person constitutes an offence in that place,

is guilty of a crime.

(2) A person guilty of a crime under subsection (1) is, subject to section 22, punishable on being found guilty by a maximum penalty of:

(a) Where the amount of the dangerous drug supplied is not a commercial quantity:

(i) where the dangerous drug is a dangerous drug specified in Schedule 1, the offender is an adult and the person to whom it is supplied is a child – imprisonment for life;

(ii) where the dangerous drug is a dangerous drug specified in Schedule 1 and subparagraph (i) does not apply – imprisonment for 14 years;

(iii) where the dangerous drug is a dangerous drug specified in Schedule 2, the offender is an adult and the person to whom it is supplied is a child – imprisonment for 14 years; and

(iv) where the dangerous drug is a dangerous drug specified in Schedule 2 and subparagraph (iii) does not apply – 85 penalty units or imprisonment for 5 years, or if the drug is supplied to a person in an indigenous community, 9 years.

(b) Where the amount of the dangerous drug supplied is a commercial quantity:

(i) where the dangerous drug is a dangerous drug specified in Schedule 1, the offender is an adult and the person to whom it is supplied is a child – imprisonment for life;

(iA) where the dangerous drug is a dangerous drug specified in Schedule 1 and subparagraph (i) does not apply – imprisonment for 25 years;

(ii) where the dangerous drug is a dangerous drug specified in Schedule 2, the offender is an adult and the person to whom it is supplied is a child – imprisonment for 25 years; and

(iii) in any other case where the dangerous drug is a dangerous drug specified in Schedule 2 – imprisonment for 14 years.

(3) In a prosecution for an offence against subsection (2), a statement in the complaint or information that a person was in an indigenous community when the alleged offence was committed is evidence of the matters stated.

7 Cultivation

(1) A person who unlawfully cultivates, or takes part in the cultivation of, a prohibited plant is guilty of a crime.

(2) A person guilty of a crime under subsection (1) is, subject to section 22, punishable on being found guilty by a maximum penalty of:

(a) Where the number of prohibited plants in respect of which the person is found guilty is a commercial quantity of the plant – imprisonment for 25 years.

(b) Where the number of prohibited plants in respect of which the person is found guilty is a traffickable quantity of the plant – imprisonment for 7 years.

(c) In any other case – 40 penalty units or imprisonment for 2 years.

8 Manufacture and production

(1) A person who unlawfully manufactures or produces a dangerous drug or takes part in the manufacture or production of a dangerous drug is guilty of a crime.

(2) A person guilty of a crime under subsection (1) is, subject to section 22, punishable on being found guilty by a maximum penalty of:

(a) Where the dangerous drug is a dangerous drug specified in Schedule 1 and the amount of the dangerous drug is a commercial quantity – imprisonment for life.

(b) Where the dangerous drug is a dangerous drug specified in Schedule 1 and the amount of the dangerous drug is not a commercial quantity – imprisonment for 25 years.

(c) Where the dangerous drug is a dangerous drug specified in Schedule 2 and the amount of the dangerous drug is a commercial quantity – imprisonment for 25 years.

(d) Where the dangerous drug is a dangerous drug specified in Schedule 2 and the amount of the dangerous drug is not a commercial quantity – imprisonment for 7 years.

9 Possession

(1) A person who unlawfully possesses a dangerous drug is guilty of a crime.

(2) A person guilty of a crime under subsection (1) is, subject to section 22, punishable on being found guilty by a maximum penalty of:

(a) Where the dangerous drug is a dangerous drug specified in Schedule 1 and the amount of the dangerous drug is a commercial quantity – imprisonment for 25 years.

(b) Where the dangerous drug is a dangerous drug specified in Schedule 1 and the amount of the dangerous drug is not a commercial quantity but is a traffickable quantity:

(i) if the person is in possession of it in a public place – imprisonment for 14 years; and

(ii) in any other case – imprisonment for 7 years.

(c) Where the dangerous drug is a dangerous drug specified in Schedule 1 and the amount of the dangerous drug is neither a commercial quantity nor a traffickable quantity:

(i) if the person is in possession of it in a public place – 85 penalty units or imprisonment for 5 years; or

(ii) in any other case – 40 penalty units or imprisonment for 2 years.

(d) Where the dangerous drug is a dangerous drug specified in Schedule 2 and the amount of the dangerous drug is a commercial quantity – imprisonment for 14 years.

(e) Where the dangerous drug is a dangerous drug specified in Schedule 2 and the dangerous drug is not a commercial quantity but is a traffickable quantity – 85 penalty units or imprisonment for 5 years.

(f) Where the dangerous drug is a dangerous drug specified in Schedule 2 and the amount of the dangerous drug is neither a commercial quantity nor a traffickable quantity:

(i) if the person is in possession of it in a public place – 40 penalty units or imprisonment for 2 years; or

(ii) in any other case – 17 penalty units.

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).

(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).

CUSTOMS ACT 1901 (CTH)

Section 233B of the *Customs Act 1901* (Cth) was repealed by Act No. 129, 2005 (*Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth)). That Act also inserted Division 307 into the *Criminal Code* (Cth).

CRIMINAL CODE (CTH)

Division 307 -- Import-export offences

Subdivision A--Importing and exporting border controlled drugs or border controlled plants

307.1 Importing and exporting commercial quantities of border controlled drugs or border controlled plants

(1) A person commits an offence if:

(a) the person imports or exports a substance; and

(b) the substance is a border controlled drug or border controlled plant; and

(c) the quantity imported or exported is a commercial quantity.

Penalty: Imprisonment for life or 7,500 penalty units, or both.

(2) The fault element for paragraph (1)(b) is recklessness.

(3) Absolute liability applies to paragraph (1)(c).

307.2 Importing and exporting marketable quantities of border controlled drugs or border controlled plants

(1) A person commits an offence if:

(a) the person imports or exports a substance; and

(b) the substance is a border controlled drug or border controlled

plant; and

(c) the quantity imported or exported is a marketable quantity.

Penalty: Imprisonment for 25 years or 5,000 penalty units, or both.

(2) The fault element for paragraph (1)(b) is recklessness.

(3) Absolute liability applies to paragraph (1)(c).

(4) Subsection (1) does not apply 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.

Note: A defendant bears a legal burden in relation to the matters in subsection (4) (see section 13.4).

307.3 Importing and exporting border controlled drugs or border controlled plants

(1) A person commits an offence if:

(a) the person imports or exports a substance; and

(b) the substance is a border controlled drug or border controlled plant.

Penalty: Imprisonment for 10 years or 2,000 penalty units, or both.

(2) The fault element for paragraph (1)(b) is recklessness.

(3) Subsection (1) does not apply 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.

Note: A defendant bears a legal burden in relation to the matters in subsection (3) (see section 13.4).

307.4 Importing and exporting border controlled drugs or border controlled plants--no defence relating to lack of commercial intent

(1) A person commits an offence if:

(a) the person imports or exports a substance; and

(b) the substance is a border controlled drug or border controlled plant, other than a determined border controlled drug or a determined border controlled plant.

Penalty: Imprisonment for 2 years, or 400 penalty units, or both.

(2) The fault element for paragraph (1)(b) is recklessness.

Subdivision B--Possessing unlawfully imported border controlled drugs or border controlled plants

307.5 Possessing commercial quantities of unlawfully imported border controlled drugs or border controlled plants

(1) A person commits an offence if:

(a) the person possesses a substance; and

(b) the substance was unlawfully imported; and

(c) the substance is a border controlled drug or border controlled plant; and

(d) the quantity possessed is a commercial quantity.

Penalty: Imprisonment for life or 7,500 penalty units, or both.

(2) Absolute liability applies to paragraphs (1)(b) and (d).

(3) The fault element for paragraph (1)(c) is recklessness.

(4) Subsection (1) does not apply if the person proves that he or she did not know that the border controlled drug or border controlled plant was unlawfully imported.

Note: A defendant bears a legal burden in relation to the matter in subsection (4) (see section 13.4).

307.6 Possessing marketable quantities of unlawfully imported border controlled drugs or border controlled plants

(1) A person commits an offence if:

(a) the person possesses a substance; and

(b) the substance was unlawfully imported; and

(c) the substance is a border controlled drug or border controlled plant; and

(d) the quantity possessed is a marketable quantity.

Penalty: Imprisonment for 25 years or 5,000 penalty units, or both.

(2) Absolute liability applies to paragraphs (1)(b) and (d).

(3) The fault element for paragraph (1)(c) is recklessness.

(4) Subsection (1) does not apply 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.

(5) Subsection (1) does not apply if the person proves that he or she did not know that the border controlled drug or border controlled plant was unlawfully imported.

Note: A defendant bears a legal burden in relation to the matters in subsections (4) and (5) (see section 13.4).

307.7 Possessing unlawfully imported border controlled drugs or border controlled plants

(1) A person commits an offence if:

(a) the person possesses a substance; and

(b) the substance was unlawfully imported; and

(c) the substance is a border controlled drug or border controlled plant, other than a determined border controlled drug or a determined border controlled plant.

Penalty: Imprisonment for 2 years or 400 penalty units, or both.

(2) Absolute liability applies to paragraph (1)(b).

(3) The fault element for paragraph (1)(c) is recklessness.

(4) Subsection (1) does not apply if the person proves that he or she did not know that the border controlled drug or border controlled plant was unlawfully imported.

Note: A defendant bears a legal burden in relation to the matter in subsection (4) (see section 13.4).

Subdivision C--Possessing border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported

307.8 Possessing commercial quantities of border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported

(1) A person commits an offence if:

(a) the person possesses a substance; and

(b) the substance is reasonably suspected of having been unlawfully imported; and

(c) the substance is a border controlled drug or border controlled plant; and

(d) the quantity possessed is a commercial quantity.

Penalty: Imprisonment for life or 7,500 penalty units, or both.

(2) Absolute liability applies to paragraphs (1)(b) and (d).

(3) The fault element for paragraph (1)(c) is recklessness.

(4) Subsection (1) does not apply if the person proves that the border controlled drug or border controlled plant was not unlawfully imported.

Note: A defendant bears a legal burden in relation to the matter in subsection (4) (see section 13.4).

307.9 Possessing marketable quantities of border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported

(1) A person commits an offence if:

(a) the person possesses a substance; and

(b) the substance is reasonably suspected of having been unlawfully imported; and

(c) the substance is a border controlled drug or border controlled plant; and

(d) the quantity possessed is a marketable quantity.

Penalty: Imprisonment for 25 years or 5,000 penalty units, or both.

(2) Absolute liability applies to paragraphs (1)(b) and (d).

(3) The fault element for paragraph (1)(c) is recklessness.

(4) Subsection (1) does not apply 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.

(5) Subsection (1) does not apply if the person proves that the border controlled drug or border controlled plant was not unlawfully imported.

Note: A defendant bears a legal burden in relation to the matters in subsections (4) and (5) (see section 13.4).

307.10 Possessing border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported

(1) A person commits an offence if:

(a) the person possesses a substance; and

(b) the substance is reasonably suspected of having been unlawfully imported; and

(c) the substance is a border controlled drug or border controlled plant, other than a determined border controlled drug or a determined border controlled plant.

Penalty: Imprisonment for 2 years or 400 penalty units, or both.

(2) Absolute liability applies to paragraph (1)(b).

(3) The fault element for paragraph (1)(c) is recklessness.

(4) Subsection (1) does not apply if the person proves that the border controlled drug or border controlled plant was not unlawfully imported.

Note: A defendant bears a legal burden in relation to the matter in subsection (4) (see section 13.4).

Subdivision D--Importing and exporting border controlled precursors

307.11 Importing and exporting commercial quantities of border controlled precursors

(1) A person commits an offence if:

(a) the person imports or exports a substance; and

(b) either or both of the following apply:

(i) the person intends to use any of the substance to manufacture a controlled drug;

(ii) the person believes that another person intends to use any of the substance to manufacture a controlled drug; and

(c) the substance is a border controlled precursor; and

(d) the quantity imported or exported is a commercial quantity.

Penalty: Imprisonment for 25 years or 5,000 penalty units, or both.

(2) The fault element for paragraph (1)(c) is recklessness.

(3) Absolute liability applies to paragraph (1)(d).

307.12 Importing and exporting marketable quantities of border controlled precursors

(1) A person commits an offence if:

(a) the person imports or exports a substance; and

(b) either or both of the following apply:

(i) the person intends to use any of the substance to manufacture a controlled drug;

(ii) the person believes that another person intends to use any of the substance to manufacture a controlled drug; and

(c) the substance is a border controlled precursor; and

(d) the quantity imported or exported is a marketable quantity.

Penalty: Imprisonment for 15 years or 3,000 penalty units, or both.

(2) The fault element for paragraph (1)(c) is recklessness.

(3) Absolute liability applies to paragraph (1)(d).

(4) Subsection (1) does not apply if:

(a) in relation to conduct covered by subparagraph (1)(b)(i)--the person proves that he or she neither intended, nor believed that another person intended, to sell any of the controlled drug so manufactured; or

(b) in relation to conduct covered by subparagraph (1)(b)(ii)--the person proves that, although he or she believed that the other person intended to use the substance to manufacture a controlled drug, he or she did not intend to sell any of the substance to the other person.

Note: A defendant bears a legal burden in relation to the matters in subsection (4) (see section 13.4).

307.13 Importing and exporting border controlled precursors

(1) A person commits an offence if:

(a) the person imports or exports a substance; and

(b) either or both of the following apply:

(i) the person intends to use any of the substance to manufacture a controlled drug;

(ii) the person believes that another person intends to use any of the substance to manufacture a controlled drug; and

(c) the substance is a border controlled precursor.

Penalty: Imprisonment for 7 years or 1,400 penalty units, or both.

(2) The fault element for paragraph (1)(c) is recklessness.

(3) Subsection (1) does not apply if:

(a) in relation to conduct covered by subparagraph (1)(b)(i)--the person proves that he or she neither intended, nor believed that another person intended, to sell any of the controlled drug so manufactured; or

(b) in relation to conduct covered by subparagraph (1)(b)(ii)--the person proves that, although he or she believed that the other person intended to use the substance to manufacture a controlled drug, he or she did not intend to sell any of the substance to the other person.

Note: A defendant bears a legal burden in relation to the matters in subsection (3) (see section 13.4).

307.14 Presumptions for importing and exporting border controlled precursors

(1) For the purposes of proving an offence against this Subdivision, if:

(a) a person has imported or exported a substance; and

(b) a law of the Commonwealth required the import or export to be authorised (however described); and

(c) the import or export was not so authorised;

the person is taken to have imported or exported the substance with the intention of using some or all of the substance to manufacture a controlled drug.

(2) Subsection (1) does not apply if the person proves that he or she did not have that intention.

Note: A defendant bears a legal burden in relation to the matter in subsection (2) (see section 13.4).

(3) For the purposes of proving an offence against this Subdivision, if:

(a) a person has imported or exported a substance; and

(b) a law of the Commonwealth required the import or export to be authorised (however described); and

(c) the import or export was not so authorised;

the person is taken to have imported or exported the substance believing that another person intends to use some or all of the substance to manufacture a controlled drug.

(4) Subsection (3) does not apply if the person proves that he or she did not have that belief.

Note: A defendant bears a legal burden in relation to the matter in subsection (4) (see section 13.4).