DPP v Emmerson & Anor [2012] NTSC 60

PARTIES:	THE DIRECTOR OF PUBLIC PROSECUTIONS v EMMERSON, Reginald William And: ATTORNEY GENERAL OF THE NORTHERN TERRITORY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20 of 2011 (21107399)
DELIVERED:	15 August 2012
HEARING DATES:	20, 21 and 22 February 2012
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

CONSTITUTIONAL LAW – *Criminal Property Forfeiture Act* s 94(1) and s 36A *Misuse of Drugs Act* – whether invalid – *Kable* principle – whether s 94(1) invalid as an acquisition of property otherwise than on just terms – *Northern Territory (Self-Government) Act* 1978 (Cth) s 50(1); *Constitution* (Cth) s 51(xxxi)

CRIMINAL PROPERTY FORFEITURE - *Criminal Property Forfeiture Act* – validity of legislation -- whether institutional integrity of the Court impaired.

CRIMINAL PROPERTY FORFEITURE – application for declaration of respondent as drug trafficker under s 36A *Misuse of Drugs Act* – whether declaration is a pronouncement of fact or form of declaratory relief – whether civil or criminal proceedings.

CRIMINAL PROPERTY FORFEITURE – forfeiture application – nexus between forfeited property and criminal conduct of respondent – whether substantial connection necessary.

CRIMINAL PROPERTY FORFEITURE – forfeiture application - quantum of forfeiture – nexus between value of property forfeited and cost of police operations - whether unfair or unjust to respondent.

STATUTORY INTERPRETATION – *Criminal Property Forfeiture Act* – s 52(3) - whether criminal proceedings against respondent had been 'finally determined' – whether restraining order ceased to have effect.

Criminal Property Forfeiture Act (NT) s 3, s 7, s 8(1)(a), s 8(2), s 8(3), s 10(2), s 41(2), s 42, s 44, s 44(1), s 44(1)(a), s 44(2), s 44(3), s 46, s 51, s 52(3), s 59, s 62(1), s 63, s 64, s 65, s 94, s 94(1), s 136, s 146
Misuse of Drugs Act (NT) s 5, s 9(2)(e), s 20, s 36A
Misuse of Drugs Act (WA) s 32A, 36A(3)
Northern Territory (Self-Government) Act 1978 (Cth) s 50(1)
Supreme Court Act s 51, s 53
Supreme Court Rules 23.01(c)

Aboriginal Legal Services Ltd v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 69 FCR 565
Airservices Australia v Canadian Airlines (1999) 202 CLR 133
Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corp (1985) 1 NSWLR 561
Attorney-General (NT) v Chaffey (2007) 231 CLR 651
Austin v United States (1993) 509 US 602
Baker v The Queen (2004) 223 CLR 513
Burnett v DPP (2007) 21 NTLR 39
Burton v Honan (1952) 86 CLR 169
Calero-Toledo v Pearson Yacht Leasing Co (1974) 416 US 663
R v Carpentieri (2001) 81 SASR 164
Cohen v The State of Western Australia (No 2) [2007] WASCA 279
Della Petrona v Director of Public Prosecutions (Cth) (No 2) (1995) 38 NSWLR 257
Dickfoss v Director of Public Prosecutions and Ors (2012) 31 NTLR 16
Director of Public Prosecutions v Gary Wayne Atkinson [2011] NTSC 73

Director of Public Prosecutions v Hennig (2005) 154 A Crim R 550
Re Director of Public Prosecutions; Ex parte Lawler (1994) 179 CLR 270
DPP v Atkinson [2011] NTSC 73
DPP v Dickfoss (2011) 28 NTLR 71
DPP v George (2008) 102 SASR 246
Donohoe v The Director of Public Prosecutions [2011] WASCA 239
Fardon v Attorney-General (QLD) (2004) 233 CLR 575
Georgiadis v Australian and Overseas Telecommunications Corp (1993-94) 179 CLR 297
Health Insurance Commission v Peveril (1993-94) 179 CLR 151
Hemming v Perkins (1999) 74 SASR 307
Hepworth v Director of Public Prosecutions (SA) (2001) 79 SASR 480
Hiron v The Queen [2003] WASCA 310
ID v Department of Juvenile Justice (2008) 188 A Crim R
Inagra-Brisa v The Queen [2004] WASCA 68
International Finance v Crime Commissioner (2009) 240 CLR 319
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51
Kennedy v Mendoza-Martinez (1963) 372 US 144
Kirby v The Queen [2003] WASCA 614
McInerny (1986) 28 A Crim R 318
R v McLeod (2007) 174 A Crim R 526
Macri v The State of Western Australia [2006] WASCA 63
Mada v The Queen [2003] WASCA 1
Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd (1996) 91 LEGRA 31
Municipal Officers Association v Lancaster (1981) 54 FLR 129
Murphy v Farmer (1988) 165 CLR 19
Mutual Pools & Staff Pty Ltd v Commonwealth (1994) 179 CLR 155
North Australian Aboriginal Legal Aid Service Inc v Bradley (2004) 218 CLR 146
The Queen v Rowe (1992) 5 WAR 491
Russo v Aiello (2003) 215 CLR 643
S v Australian Crime Commission (2005) 144 FCR 431
South Australia v Totani (2010) 242 CLR 1
Theophanous v The Commonwealth (2006) 225 CLR 101
Tickner v Bropho (1993) 40 FCR 183
Trade Practices Commission v Tooth & Co Ltd (1979) 142 CLR 397
Trajkoski v Director of Public Prosecutions (2010) 41 WAR 105
United States v Halper (1989) 490 US 435
United States v Lacher (1890) 134 US 624

United States v Ward (1980) 448 US 242
Wacando v Commonwealth (1981) 148 CLR 1
Wainohu v New South Wales (2011) 243 CLR 181
Re Yanner (2000) 100 FCR 551

REPRESENTATION:

Counsel:

Applicant:	R Jobson
Respondent/Objector:	A Wyvill SC and N Aughterson
Intervener:	M Grant QC and R Bruxner

Solicitors:

Applicant:	Solicitor for the Northern Territory
Respondent/Objector:	Ward Keller
Intervener:	Solicitor for the Northern Territory

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

DPP v Emmerson & Anor [2012] NTSC 60
No. 20 of 2011 (21107399)

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS
Applicant

AND:

REGINALD WILLIAM EMMERSON
Respondent/Objector

And:

ATTORNEY GENERAL OF THE NORTHERN TERRITORY
Intervener

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 15 August 2012)

Introduction

[1] The Director of Public Prosecutions has applied for a declaration under s 36A of the *Misuse of Drugs Act* (NT) that Reginald William Emmerson is a drug trafficker.

[2] Mr Emmerson was convicted of various drug offences on 17 August 2007, 12 March 2010 and 22 September 2011. He committed the offences between 28 February 2007 and 18 February 2011. The details of the offences are set

out in par [10] to par [12] below. As a result of Mr Emmerson's most recent convictions for drug offences the Director of Public Prosecutions claims that Mr Emmerson must be declared to be a drug trafficker. If Mr Emmerson is declared to be a drug trafficker, all of his property which is restrained by the order of the Court made on 11 April 2011 will be forfeited to the Northern Territory by operation of s 36A of the *Misuse of Drugs Act* and s 94(1) of the *Criminal Property Forfeiture Act* (NT).

[3] The total value of the restrained property is somewhere between $854,000 and $1.027million. Apart from $70,050 in cash (being the proceeds of various drug transactions), the restrained property is unconnected to the commission of any criminal offence.

[4] The provisions of s 36A of the *Misuse of Drugs Act* (NT) and s 41(2), s 44(1)(a) and s 94(1)(a) of the *Criminal Property Forfeiture Act* (NT) establish an overlapping statutory scheme for forfeiture of the property of recidivist drug offenders who are declared to be drug traffickers. The scheme operates as follows. (1) The Director of Public Prosecutions may apply to the Supreme Court for a restraining order over a person's property.[1] (2) The Supreme Court may make a restraining order over a person's property if the person has been charged, or it is intended that within 21 days after the application for a restraining order the person will be charged, with an offence that, if the person is convicted of the offence, could lead to the

[1] s 41(2) *Criminal Property Forfeiture Act* (NT).

person being declared a drug trafficker.[2] (3) The Director of Public Prosecutions may then apply to the Supreme Court for a declaration that the person is a drug trafficker.[3] (4) The Supreme Court must declare the person to be a drug trafficker if the person is a recidivist drug offender of a certain category.[4] (5) If the person is declared to be a drug trafficker, all of the property owned or effectively controlled by the person that is subject to a restraining order is forfeited to the Northern Territory.[5]

The application is opposed

[5] Mr Emmerson opposes the application for a declaration that he is a drug trafficker. He does so, on the following grounds. First, it is submitted that s 36A of the *Misuse of Drugs Act* is invalid because it confers powers and functions on the Supreme Court which are incompatible with the status of the Court as a court which exercises federal jurisdiction. It is submitted that the provisions of s 36A of the *Misuse of Drugs Act* substantially impair and distort the Court's institutional integrity and are inconsistent with the defining characteristics of the Court including the reality and appearance of independence and impartiality. Secondly, it is submitted that s 94(1) of the *Criminal Property Forfeiture Act* is invalid because, contrary to the provisions of s 50(1) of the *Northern Territory (Self-Government) Act 1978* (Cth), it is a law with respect to the acquisition of property otherwise than

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2 s 44(1)(a) *Criminal Property Forfeiture Act* (NT).
3 s 36A(1) *Misuse of Drugs Act* (NT).
4 s 36A(3) *Misuse of Drugs Act* (NT).
5 s 94 (1) *Criminal Property Forfeiture Act* (NT).

on just terms. Mr Emmerson's defence is essentially a defence in the nature of a collateral attack upon the applicable legislative provisions.

[6] Mr Emmerson has also taken a number of other steps to try and prevent his property being forfeited to the Northern Territory. Under s 59 of the *Criminal Property Forfeiture Act* he has objected to the restraining order on similar grounds to those stated in par [5] above. By summons he has applied to set aside the restraining order on the ground that it would be unfair and unjust for his property to be forfeited to the Northern Territory. By reason of s 52(3) of the *Criminal Property Forfeiture Act* it was also submitted that the restraining order made by Mildren J on 11 April 2011 ceased to have effect on 22 September 2011 when the criminal proceedings which resulted in his most recent convictions were "finally determined". Accordingly, it was submitted that there is no property which is owned or controlled by him which is subject to a restraining order within the meaning of s 94(1) of the *Criminal Property Forfeiture Act* (NT). Therefore s 94(1) cannot operate in this case and the application for a declaration that Mr Emmerson is a drug trafficker is futile.

The facts

[7] Mr Emmerson is 55 years of age. He was born on 28 July 1957 in Lismore, New South Wales. He attended high school at Home Hill in Queensland. When he left High School he became an apprentice plumber at the Inkerman Sugar Mill. He has been in meaningful and remunerative employment for most of his adult life. From time to time he has operated his own businesses

and he has played in and managed musical bands which performed in the Northern Territory and Western Australia.

[8] In 2010 Mr Emmerson seriously injured his back at work and he received worker's compensation. His lower back pain continues to this day. He also suffers from depression which is related to his work injury. He is prescribed medication for back pain and depression.

[9] Since he was 16 years of age Mr Emmerson has on various occasions possessed, misused and supplied dangerous drugs. Up until 2006 he smoked cannabis. In 2006 he was introduced to amphetamines and in 2008 he was introduced to the crystal methamphetamine known as "ice". He became addicted to crystal methamphetamine. He has been convicted of a number of drug offences both in the Northern Territory and interstate including the following offences which are relevant to this application.

[10] On 17 August 2007 Mr Emmerson was convicted by the Court of Summary Jurisdiction at Darwin of the following offences which he committed on 28 February 2007.

1. Unlawful possession of 5.9 grams of MDMA which is a trafficable quantity of the dangerous drug, contrary to s 9(1) and s (2)(e) of the *Misuse of Drugs Act*.

2. Unlawful possession of methyl amphetamine contrary to s 9(1) of the *Misuse of Drugs Act*.

3. Unlawful possession of lysergic acid contrary to s 9(1) and s (2)(c)(i) of the *Misuse of Drugs Act*.

4. Unlawful possession of cannabis plant material contrary to s 9(1) and (2)(f)(ii) of the *Misuse of Drugs Act*.

5. Administering MDMA, methyl amphetamine and cannabis to himself contrary to s 13 of the *Misuse of Drugs Act*.

[11] On 12 March 2010 Mr Emmerson was convicted by the Court of Summary Jurisdiction at Darwin of the following offences which he committed on 17 October 2008.

1. Unlawful possession of 20.8 grams of cannabis oil which is a trafficable quantity of the dangerous drug, contrary to s 9(1) and s (2)(e) of the *Misuse of Drugs Act*.

2. Unlawful possession of 64.1 grams of cannabis plant material which is a trafficable quantity of the dangerous drug, contrary to s 9(1) and (2)(e) of the *Misuse of Drugs Act*.

[12] On 22 September 2011 Mr Emmerson was convicted by the Supreme Court at Darwin of the following offences which he committed on 18 February 2011.

1. Unlawfully supplying 18.6646 kilograms of cannabis which is a commercial quantity of the dangerous drug, contrary to s 5(1) and s (2)(b)(iii) of the *Misuse of Drugs Act*.

2. Possessing $70,050 which the respondent obtained directly from the commission of offences against s 5 of the *Misuse of Drugs Act*, contrary to s 6(1)(a) of the Act.

[13] For the first three offences referred to in par [10] above Mr Emmerson was sentenced to an aggregate sentence of two months imprisonment which was wholly suspended. For the last two offences referred to in par [10] above he was fined $500 and a victim's levy of $40 was imposed on him. For the two

offences referred to in par [11] above he was sentenced to an aggregate period of 18 months imprisonment which was again wholly suspended. For the two offences referred to par [12] above he was sentenced to a total sentence of six years imprisonment with a non-parole period of three years. The sentencing judge also ordered that the sentences of imprisonment which were held in suspense for the two offences referred to in par [11] above were to be served in full and concurrently with the sentence of six years imprisonment that was imposed on Mr Emmerson by the Supreme Court on 22 September 2011.

[14] The circumstances of Mr Emmerson's offending on 18 February 2011 are as follows.[6] Mr Emmerson is an associate of Ashley Dennis Bradbury and Peter Tincknell. On an unknown date and in unknown circumstances Mr Bradbury sourced 18.6646 kilograms of cannabis from South Australia. At some stage it was packed in 41 cryovac bags and placed in a number of 20 litre plastic containers. The containers were then filled with sand in an attempt to avoid the drugs being detected.

[15] On 14 February 2011 Mr Bradbury attended at ABC Transport in Adelaide. He arranged for the containers in which the cannabis was concealed to be sent by consignment to Darwin by ABC Transport. The paperwork which he provided contained his mobile telephone number and falsely identified the goods to be transported as "one pallet of paint". At the time Mr Bradbury

[6] I have taken the facts directly from the sentencing remarks of Mildren J on 22 September 2011 in *The Queen v Ashley Bradbury and Reginald William Emmerson* SCC 21106092, 21106091 which were tendered in evidence.

and Mr Tincknell resided in South Australia. Mr Emmerson resided on his property in Virginia and he had travelled to Adelaide. He had been introduced to Mr Bradbury by Mr Tincknell five years previously.

[16] Arrangements were made for Mr Emmerson, Mr Bradbury and Mr Tincknell to travel to Darwin on 16 February 2011. However, their flight was delayed due to Cyclone Carlos and they arrived in Darwin on 17 February 2011. On arrival Mr Tincknell telephoned a car rental company to hire a van. Mr Bradbury told Mr Tincknell to hire a motor vehicle for two days. Although some motor vehicles were available for two days, none of them was suitable for transporting the drugs. As a result Mr Tincknell telephoned another motor vehicle hire company and he requested that a utility be put aside in the name of Mr Bradbury. Ultimately, Mr Bradbury hired a one tonne utility and he drove away in the utility with Mr Tincknell as a passenger. They drove in the direction of ABC Transport at East Arm. It is not known if they stopped there or drove on.

[17] At 2:20 pm on 17 February 2011 Mr Bradbury and Mr Ticknell were seen walking towards the hired utility and a shed on Mr Emmerson's property at Virginia. Mr Bradbury then drove the utility to ABC Transport and he loaded the plastic containers which contained the cannabis onto the back of the utility. Subsequently, Mr Emmerson also left his property. He drove a white Toyota Hilux.

[18] At 3:35 pm Mr Emmerson was seen by police driving his motor vehicle on old Virginia Road. He made an attempt to avoid apprehension but was stopped by the police who found seven of the 20 litre plastic containers in the back of his motor vehicle. He was asked if there were any drugs in his motor vehicle and Mr Emmerson said that there were a lot of drugs in the motor vehicle. The police then searched the containers and found the cannabis. Before the containers were transferred to Mr Emmerson's motor vehicle, Mr Emmerson and Mr Bradbury removed the sand and placed all of the cryovac bags of cannabis in the seven containers which were placed in Mr Emmerson's motor vehicle. They discarded the other containers.

[19] Police stopped the hired utility driven by Mr Bradbury 150 metres further down the road. There were no plastic containers in the hired utility. When Mr Bradbury was arrested he told the police that he was "just a gofer".

[20] Police then searched Mr Emmerson's property at Virginia. They found two more plastic containers matching the appearance of those found in his motor vehicle, a number of mobile telephones and a notebook containing a map. Underneath the floor of a boat, the police found an ice cream packet which contained $40,050 and a plastic bag which contained a further $30,000. Mr Emmerson obtained the money from the sale of cannabis on various occasions. Mr Emmerson was arrested and interviewed by the police. He made no admissions when interviewed.

[21] On 22 September 2011 Mr Emmerson pleaded guilty to each of the two counts referred to in par [12] above. As I have stated, he was convicted and sentenced to a term of imprisonment.

[22] The sentencing Judge found that Mr Emmerson committed the offences for commercial gain and they were committed while he was under a suspended sentence of imprisonment for previous drug offences. Based on known prices for cannabis in the Darwin area, the cannabis had a potential commercial yield of between $184,500 and $918,400 depending on the size of the quantities of the drug that were sold.

[23] I find that the evidence before the Court establishes beyond reasonable doubt that Mr Emmerson has been convicted of all of the offences referred to in par [10], par [11] and par [12] above; and that Mr Emmerson's convictions for the first offence referred to in par [10] above, the two offences referred to in par [11] above, and the first offence referred to in par [12] above make him liable to be declared a drug trafficker under s 36A of the *Misuse of Drugs Act*. Mr Emmerson does not dispute that the preconditions specified in s 36A(3) of the *Misuse of Drugs Act* (NT) for declaring him to be a drug trafficker are satisfied.

[24] It is also obvious that Mr Emmerson was in fact trafficking in significant quantities of dangerous drugs at the time of his arrest. Mr Emmerson was found to be in possession and control of $70,050 which was obtained directly from the commission of offences against s 5 of the *Misuse of Drugs*

Act (NT) and he was involved in the importation of a significant quantity of cannabis into the Northern Territory from South Australia.

[25] It was common ground between the parties that, apart from the $70,050 seized at Mr Emmerson's property (which is crime-derived property), all of the restrained property was neither crime-derived nor crime-used property. Nor was it unexplained wealth. The property has no connection with any criminal offences whatsoever. It is property that has been acquired by Mr Emmerson through legitimate means.

[26] There was no evidence placed before the Court, either during the application for a restraining order before Mildren J or during this application, about the cost of the police operations that resulted in the apprehension of Mr Emmerson and his co-offenders, or the costs of the various prosecutions against him over the relevant 10 year period, or the likely costs of his incarceration. However, if the daily costs of imprisonment referred to in *Director of Public Prosecutions v Gary Wayne Atkinson*[7] are any sort of a guide, the costs of Mr Emmerson's incarceration alone are likely to be somewhere between $240,000 and $480,000 depending whether he is granted parole at the end of his three year non-parole period, or at some later time, or not at all.

[7] [2011] NTSC 73 at [34] ($219.44 per day).

The history of the civil proceedings against Mr Emmerson

[27] On 21 February 2011 Mr Emmerson was charged with the drug offences he committed on 17 February 2011.

[28] On 28 February 2011 the Director of Public Prosecutions filed an application for a restraining order under s 41(2), s 44(1)(a) and s 44(2) of the *Criminal Property Forfeiture Act*. The application was supported by three affidavits of Detective Sergeant Wendy Schultz which she swore on 25 February 2011, 1 March 2011 and 2 March 2011 respectively. The basis of the application was that if Mr Emmerson was found guilty of the supply of 18.6640 kilograms of cannabis on 17 February 2011 his history of offending over the previous 10 years meant that he was likely to be declared a drug trafficker under s 36A(3) of the *Misuse of Drugs Act* and, if so, his property would be forfeited to the Northern Territory under s 94(1) of the *Criminal Property Forfeiture Act*.

[29] On 2 March 2011 Mildren J made an interim restraining order over some of Mr Emmerson's property. The order was to expire at the close of business on 11 April 2011. Mr Emmerson was unrepresented on this occasion and he appeared in person.

[30] On 14 March 2011 a notice of appearance on behalf of Mr Emmerson was filed by Maleys who were his solicitors at that time. On the same day, a notice of objection to the interim restraining order made on 2 March 2011 was also filed on behalf of Mr Emmerson under s 59 of the *Criminal*

Property Forfeiture Act. The notice of objection stated that certain items of property that had been restrained were neither crime-used nor crime-derived. This was not a valid basis of objection to an interim restraining order made under s 44(1) of the Act. The only grounds of objection to a restraining order made under s 44(1)(a) is that the person does not own or effectively control the property, and has not at any time given it away.[8]

[31] On 18 March 2011 a further notice of objection was filed by Mr Emmerson's solicitors. It stated that Mr Emmerson's real property which is located at 60 Galbraith Road, Virginia was neither crime-used nor crime-derived property. This also was an invalid objection for the reasons stated in par [30] above.

[32] On 11 April 2011 a restraining order until further order was made by Mildren J over Mr Emmerson's real and personal property. The ground for making the order was that certain offences specified in the order were qualifying offences for the purposes of s 36A of the *Misuse of Drugs Act* and if Mr Emmerson was convicted of another qualifying offence which was alleged to have been committed by Mr Emmerson on 17 February 2011 this could lead to him being declared a drug trafficker. Mr Emmerson consented to the order being made. He did so under s 146 of the *Criminal Property Forfeiture Act*.

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[8] s 62(1) and s 65(1) *Criminal Property Forfeiture Act* (NT).

[33] The restraining order made by Mildren J on 11 April 2011 related to the following property.

1. Mr Emmerson's freehold estate being section 4188 Hundred of Strangways and being a 10 acre block of land at Virginia.

2. Twelve motor vehicles, comprising a ute, a van, a boat and trailer, and 9 motorbikes;

3. Money in a savings account in the name of Mr Emmerson (circa $27,000);

4. Money in a term deposit account in the name of Mr Emmerson (circa $90,000);

5. Cash in the sum of $70,050;

6. Money in a cheque account in the name of Mr Emmerson (circa $11,000);

7. All other property owned or effectively controlled by Mr Emmerson 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.

[34] All of the parties accept that the property listed in subparagraphs [33] 1 to 6 above is owned and/or effectively controlled by Mr Emmerson within the meaning of s 7 of the *Criminal Property Forfeiture Act*.

[35] On 18 May 2011 an objection was filed on behalf of Ms Christina Marie Petrides under s 59 of the *Criminal Property Forfeiture Act*. Ms Petrides objected to the restraining order being made on the following grounds.

(1) Ms Petrides owned 50 per cent of the real property situated at

60 Galbraith Road, Virginia. (2) At all material times she was in a de facto relationship with Mr Emmerson. Her objection was discontinued on 5 December 2011.

[36] On 1 June 2011 Mr Emmerson was granted leave to file an amended objection. On 1 November 2011 Mr Emmerson filed an affidavit which was affirmed by him on 28 October 2011. In the affidavit Mr Emmerson sets out his life history and he complains about the hardship that he will suffer if his property which is restrained is forfeited to the Northern Territory. He states that after he is released from prison he will be reduced to live on welfare and he will struggle with his ongoing back condition. At the time he is released from prison he will be approaching 60 years of age. He will be released in circumstances where he will have no home to go to and minimal prospects for gainful employment. However, it is common ground between the parties that when Mr Emmerson is released from prison he will have access to fully paid redeemable shares in HSBC Trustee (Cook Islands) Ltd which has a registered office in the Cook Islands. The shares are beyond the ambit of the restraining order. As at 30 June 2011 his shares were valued at $124,237.60. The fund matures and will become available to Mr Emmerson on 31 December 2013.

[37] On 22 September 2011 Mr Emmerson was convicted and sentenced by Mildren J of the offences he committed on 18 February 2011.

[38] On 1 December 2011 Mr Emmerson filed the amended notice of objection. The amended objection states that the power to restrain the property of a named person under s 44(1)(a) of the *Criminal Property Forfeiture Act* and the power to forfeit the restrained property under s 94 of the Act, in combination of s 36A of the *Misuse of Drugs Act,* are beyond the legislative powers of the Northern Territory.

[39] On 13 February 2012 under s 36A of the *Misuse of Drugs Act* the Director of Public Prosecutions filed the application seeking a declaration that Mr Emmerson is a drug trafficker. On 15 February 2012 Mr Emmerson filed a summons seeking an order setting aside the restraining order made by Mildren J of 11 April 2011 on the grounds that, in the circumstances as described in Mr Emmerson's affidavit which was affirmed on 28 October 2011, it would be unfair and unjust for the respondent's property to be forfeited to the Northern Territory.

[40] On 21 February 2012 Senior Counsel for Mr Emmerson, submitted that by reason of s 52(3) of the *Criminal Property Forfeiture Act* the restraining order made by Mildren J ceased to have effect on 22 September 2011, when the criminal proceedings which were relied on to support the restraining order were "finally determined". On the same day I found to the contrary and I said that I would publish my reasons later.

Statutory framework

[41] It is convenient now to consider in detail the statutory framework for forfeiture of the property of a person who is declared to be a drug trafficker under s 36A of the *Misuse of Drugs Act*. As I have stated above, such forfeiture involves sections of both the *Misuse of Drugs Act* and the *Criminal Property Forfeiture Act* which comprise an overlapping legislative scheme.

[42] The *Criminal Property Forfeiture Act* commenced on 1 June 2003. The Act is an Act to provide for the forfeiture, in certain circumstances, of property acquired as a result of criminal activity and property used for criminal activity, to provide for the reciprocal enforcement of certain Australian legislation relating to the forfeiture of proceeds of crime and forfeiture of other property, and for related purposes.[9] With some limited exceptions, the Act provides non-conviction, civil based arrangements for the forfeiture of property. The arrangements are intended to operate outside the criminal jurisdiction of the Court. The Act targets the proceeds of crime in order to prevent the unjust enrichment of certain persons involved in criminal activities.[10] It applies to property in three primary circumstances. First, property may be forfeited to the Northern Territory if the property is owned or effectively controlled by a person who is involved or taken to be involved in criminal activities. Secondly, property may be forfeited to the Northern

[9] Preamble *Criminal Property Forfeiture Act* (NT).
[10] s 3 *Criminal Property Forfeiture Act* (NT).

Territory if the property is crime-used. Thirdly, property may be forfeited to the Northern Territory if the property is crime-derived property.[11]

[43] The *Misuse of Drugs Act* (NT) commenced on 1 November 1990. Section 36A was inserted into the *Misuse of Drugs Act* in 2002. The Act establishes a conviction based scheme for the forfeiture of property that operates within the criminal jurisdiction of the Court.[12] An application for forfeiture of property is made by the Crown. The scheme applies to property in three primary circumstances. First, on the finding of guilt for an offence against the Act, any dangerous drug or precursor in respect of which the finding of guilt is made is forfeited to the Crown. Secondly, a vehicle, vessel, aircraft or other conveyance may be forfeited to the Crown if it relates to a proven offence committed by a person against the Act. That is, the Act applies to particular types of crime-used property.[13] Thirdly, money, money's worth, valuable security, acknowledgement, note or other thing may be forfeited to the Crown if it relates to a proven offence committed by a person against the Act. That is, it applies to some of the proceeds of crime and to some of the means of financing crime.[14]

[44] This case is concerned with the property of a person who is taken to be involved in criminal activities under the provisions of the *Criminal Property Forfeiture Act.*[15] A person is taken to be involved in criminal activities if

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[11] s 10(1) *Criminal Property Forfeiture Act* (NT).
[12] s 34 *Misuse of Drugs Act.*
[13] s 34(13)(b) *Misuse of Drugs Act.*
[14] s 34(13)(c) & (d) *Misuse of Drugs Act.*
[15] s 10(4) *Criminal Property Forfeiture Act.*

the person is declared under s 36A of the *Misuse of Drugs Act* to be a drug trafficker; or an unexplained wealth declaration or a criminal benefit declaration is made in relation to the person; or the person is found guilty of a forfeiture offence.[16]

[45] The objective of forfeiting to the Northern Territory the property of persons who are taken to be engaged in criminal activities is set out in s 10(2) of the *Criminal Property Forfeiture Act*. The objective is to compensate the Territory community for the costs of deterring, detecting and dealing with certain criminal activities. Subsection 10(2) states:

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

[46] Subsection 10(2) of the *Criminal Property Forfeiture Act* seems to contemplate some limit on the extent of forfeiture. While the operative sections of the Act do not expressly set any limits on the extent to which the property of a person who is declared to be a drug trafficker is forfeited to the Northern Territory, the scope of the objective is to compensate the Territory community for the costs of deterring, detecting and dealing with **the criminal activities of the person** whose property is forfeited to the Northern Territory [*emphasis added*]. The only criminal activities referred to in s 10(2) of the *Criminal Property Forfeiture Act* are the criminal

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[16] s 10(4) *Criminal Property Forfeiture Act.*

activities of a person who is involved or taken to be involved in criminal activities and the insertion of the definite article immediately before the words "criminal activities" last appearing in s 10(2) of the *Criminal Property Forfeiture Act* makes the scope of the objective clear.

[47] Subsection 10(2) of the *Criminal Property Forfeiture Act* does not represent the sole object of forfeiture of the property of a person who is taken to be involved in criminal activities. Parliament's intention must be determined from a consideration of the whole of the Act and regard must be had to sections other than s 10(2) of the *Criminal Property Forfeiture Act.*[17] In addition, regard must be had to s 36A of the *Misuse of Drugs Act*, and the whole of that Act. Despite the distinct and different nature of each of the forfeiture mechanisms created by the two Acts, s 36A was inserted in the *Misuse of Drugs Act* and the declaration that a person is a drug trafficker is conviction based. This tends to suggest that the objects of property forfeiture in such circumstances include punishment and deterrence. By facilitating such forfeiture it appears that Parliament intends to impose an additional penalty on certain drug offenders.[18]

[48] In *Russo v Aiello*[19] Gleeson CJ stated legislative declarations of the objects of an Act are not an exercise in apologetics. They may give practical content to an understanding of the terms used in an Act. The significance of an objects clause to both the construction and operation of a statute has been

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[17] *Municipal Officers Association v Lancaster* (1981) 54 FLR 129 at 153.
[18] *Hiron v The Queen* [2003] WASCA 310 at [28].
[19] *Russo v Aiello* (2003) 215 CLR 643 at 645 per Gleeson CJ.

emphasised in other cases.[20] The relevance of s 10(2) of the *Criminal Property Forfeiture Act* to the scope and operation of s 44 of the Act is discussed in par [53] to par [55] below.

[49] Section 8(1)(a) of the *Criminal Property Forfeiture Act* provides that "declared drug trafficker" means a person who is declared to be a drug trafficker under s 36A of the *Misuse of Drugs Act* or a person who is taken to be declared a drug trafficker under s 8(2) or (3) of the *Criminal Property Forfeiture Act*. The provisions of s 8(2) and (3) are irrelevant to this application.

[50] Subsection 41(2) of the *Criminal Property Forfeiture Act* states that the Director of Public Prosecutions may apply to the Supreme Court for a restraining order which includes an order made by the Court under s 44 of the *Criminal Property Forfeiture Act*. The purpose of a restraining order is to identify the property which is said to be owned or effectively controlled or previously owned by a person who is liable to be declared a drug trafficker and to ensure that the property remains available for forfeiture to the Northern Territory. That is, to prevent the identified property being dealt with or dissipated before the declaration that a person is a drug trafficker is made and the property is forfeited to the Northern Territory.

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[20] *Wacando v Commonwealth* (1981) 148 CLR 1 at 23 per Mason J; *ID v Department of Juvenile Justice* (2008) 188 A Crim R 165 at 217 per Johnson J; *Re Yanner* (2000) 100 FCR 551 at [95] – [97] per Dowsett J; *Aboriginal Legal Services Ltd v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 69 FCR 565 at 568; *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LEGRA 31 at 38, 72 and 75 per Cole JA; *Tickner v Bropho* (1993) 40 FCR 183 at 209.

[51] Subsection 44(1)(a) of the *Criminal Property Forfeiture Act* states that the Supreme Court **may** [*emphasis added*], on application by the Director of Public Prosecutions, 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 a drug trafficker under s 36A of the *Misuse of Drugs Act*. The court that is hearing the application for a restraining order must consider each matter that is alleged by the Director of Public Prosecutions, either in the application or in the course of the proceedings, as a ground for making the order; and, if the order is made, the Court must set out in the order each ground that the Court finds is a ground on which the order might be made.[21]

[52] When hearing an application for a restraining order the Supreme Court of the Northern Territory still retains its inherent powers to ensure that its processes are not used oppressively and to ensure that the parties to such an application receive a fair hearing.[22] Rule 23.01(c) of the *Supreme Court Rules* specifically empowers the Court to stay a proceeding where the proceeding is an abuse of process.

[53] In my opinion, it is arguable that in a case where a restraining order is sought on the ground that the offender is likely to be declared a drug

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[21] s 45(1) *Criminal Property Forfeiture Act.*
[22] *Burnett v DPP* (2007) 21 NTLR 39.

trafficker, the scope of the restraining order may be confined to the cost of deterring, detecting and dealing with the criminal activities of the particular offender whose property is sought to be restrained. Further, any affidavit material relied on in support of the application for a restraining order should contain evidence of those costs including the costs of the police investigations of the offender's criminal activities, the likely costs of prosecuting the offender and the likely costs of any term of imprisonment that the offender is likely to be required to serve. Nowhere in either Act is there any suggestion that an offender should be required to pay for the costs of deterring, detecting and dealing with the criminal activities of others and specific provision is made for the forfeiture of property that constitutes unexplained wealth or a criminal benefit.

[54] In *Burnett v Director of Public Prosecutions*[23] the Court of Appeal held that the court had a virtually unfettered discretion as to whether or not to make a restraining order under s 42 to s 46 of the *Criminal Property Forfeiture Act*. While s 44(3) of the Act prevents the court from refusing to make an order if the only reason is because the value of the property exceeds, or could exceed, the amount that the person could be liable to pay to the Territory if the relevant declaration were made, the subsection does not prevent the Court making a restraining order over only such property that is of sufficient value to pay for the costs of deterring, detecting and dealing with the criminal activities of the particular offender that is before the Court. A

[23] (2007) 21 NTLR 39 at [73]-[74], [227] and [280]; see also *DPP v Dickfoss* (2011) 28 NTLR 71 at [91]; *DPP v Atkinson* [2011] NTSC 73 at [8].

restraining order which is so confined would be consistent with the object specified in s 10(2) of the Act and with the objects of the Act as a whole.

[55] However, as this interpretation of s 10(2) and s 44(1) of the *Criminal Property Forfeiture Act* was not argued in this case, it is unnecessary to decide it.

[56] Subject to the period being extended, the restraining order has effect for the period set by the court.[24] The court that made the restraining order may extend the duration of the restraining order on as many occasions as the court sees fit.[25] While the restraining order is in effect, the restrained property cannot be dealt with subject to certain circumstances which are not in issue in this case; the Director of Public Prosecutions may apply to the court that made the restraining order for a declaration that the person is a drug trafficker; income or other property that is derived from property subject to a restraining order is taken to be part of the property and is also subject to the restraining order; and a person may apply to the court that made a restraining order for release of property that is subject to the order to meet reasonable living and business expenses of the owner of the property.[26]

[57] The Director of Public Prosecutions must request the court that made the restraining order to set the order aside if the person could not be declared a drug trafficker.[27] A restraining order made under s 44(1)(a) of the *Criminal*

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[24] s 51 *Criminal Property Forfeiture Act.*
[25] s 51(2) *Criminal Property Forfeiture Act.*
[26] s 49(1), (2) and (3) *Criminal Property Forfeiture Act* and s 36A *Misuse of Drugs Act.*
[27] s 50(2) *Criminal Property Forfeiture Act.*

Property Forfeiture Act ceases to have effect within 21 days after the date of the order if the person has not been charged with the offence indicated in the application for a restraining order or an alternative offence.[28] A restraining order made under s 44(1)(a) of the *Criminal Property Forfeiture Act* also ceases to have effect if the charge is finally determined but the person is not declared to be a drug trafficker under s 36A of the *Misuse of Drugs Act*.[29]

[58] Under s 51 and s 53 of the *Supreme Court Act* a person has a right to apply for leave to appeal against a restraining order.[30]

[59] Under s 59(1) of the *Criminal Property Forfeiture Act* a person may, within 28 days after the day on which the copy of a restraining order was served on the person,[31] file in the court that made the relevant restraining order an objection to the restraint of the property. The objection is to identify the property to which the restraining order relates and the grounds for objection against the property being restrained.[32]

[60] Part 5 of the *Criminal Property Forfeiture Act* specifies the grounds on which an objection to a restraining order may be made. Subsection 62(1) of the *Criminal Property Forfeiture Act* states that the court that is hearing an objection to the restraint of property may set aside the relevant restraining order to the extent provided by s 63, s 64 or s 65 of the *Criminal Property Forfeiture Act*. Section 63 of the Act deals with setting aside a restraining

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[28] s 52(2) *Criminal Property Forfeiture Act.*
[29] s 52(3) *Criminal Property Forfeiture Act.*
[30] *Burnett v DPP* (2007) 21 NTLR 39.
[31] s 60(1)(a) *Criminal Property Forfeiture Act.*
[32] s 59(2) *Criminal Property Forfeiture Act.*

order made on the ground that the restrained property is crime-used property. Section 64 deals with setting aside a restraining order made on the ground that the restrained property is crime-derived property. Subsection 65(1) deals with setting aside a restraining order where the ground for making the order was that, if the person is convicted of the offence with which he is charged, the person could be declared a drug trafficker under s 36A of the *Misuse of Drugs Act.* Subsection 65(2) deals with setting aside a restraining order where the ground for making the order was unexplained wealth.

[61] Subsection 65(1) of the *Criminal Property Forfeiture Act* states:

> The court that made the restraining order under section 44(1)(a) may set the order aside if the court finds that it is more likely than not that the person who is or will be charged with the offence does not own or effectively control the property, and has not at any time given it away.

[62] The only available ground of objection to a restraining order made under s 44(1)(a) of the *Criminal Property Forfeiture Act* is that it is more likely than not that the person named in the restraining order does not own or effectively control some or all the of the property that is subject to the restraining order. The person making the objection bears the burden of proving the ground of objection on the balance of probabilities. While there is no express provision in the *Criminal Property Forfeiture Act* that states that the objector bears the burden or onus of proof in this regard, s 65(1) of the Act states that the Court may set the restraining order aside if the court

finds that **it is more likely than not** [*emphasis added*] that the person who is or will be charged with the relevant offence does not own or effectively control the property, and has not at any time given it away.

[63] As I said in *Burnett v DPP,*[33] it is not unusual for there to be specific rules about the burden and standard of proof for specific classes of case. Nor is it unusual for the burden of proof to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted.[34]

[64] After a restraining order has been made by the Court, the Director of Public Prosecutions may apply under s 36A(1) of the *Misuse of Drugs Act* (not the *Criminal Property Forfeiture Act*) for a declaration that a person is a drug trafficker. The application may be made at the time of hearing for an offence under the *Misuse of Drugs Act* or at any other time.[35] Subsection 36A(3) of the *Misuse of Drugs Act* states that the Supreme Court **must** [*emphasis added*] declare a person a drug trafficker if: (1) the person has been found guilty by the court of an offence referred to in s 36A(6) of the Act that was committed after the commencement of s 36A of the Act; and (2) subject to s 36A(5) of the Act, in the 10 years prior to the day on which the offence was committed, the person has been found guilty: (a) on two or more occasions of an offence corresponding to an offence referred to in s 36A(6) of the Act; or (b) on one occasion of two or more separate charges

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[33] (2007) 21 NTLR 39 at par 276.
[34] *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corp* (1985) 1 NSWLR 561.
[35] s 36(2) *Misuse of Drugs Act.*

relating to separate offences of which two or more correspond to an offence or offences referred to in s 36A(6) of the Act.

[65] The principal categories of drug offences referred to in s 36A(6) of the *Misuse of Drugs Act* include the unlawful supply of any quantity of a dangerous drug, the cultivation of a traffickable or commercial quantity of a dangerous drug, the manufacture of any quantity of a dangerous drug and the possession of a traffickable or commercial quantity of a dangerous drug. A person may be declared a drug trafficker if they have been found guilty on three separate occasions over a period of 10 years of merely possessing a traffickable quantity of a Schedule 2 dangerous drug contrary to s 9(2)(e) of the *Misuse of Drugs Act*. A person may, for example, be declared to be a drug trafficker if the person has been convicted on three separate occasions, over a 10 year period, of possessing 50 grams of cannabis on each occasion.

[66] Section 36A of the *Misuse of Drugs Act* confers on the Supreme Court a power with a duty to exercise the power if the Supreme Court determines that the conditions attached to the power are satisfied. Such provisions are not uncommon and are not to be stigmatised as an attempt to direct the Supreme Court as to the outcome of the exercise of its jurisdiction on that ground alone.[36]

[67] The nature of the declaration that the Court is empowered to make under s 36A of the *Misuse of Drugs Act* bears close consideration. There is a

[36] *International Finance v Crime Commissioner* (2009) 240 CLR 319 at par [77].

question about whether a declaration that a person is a drug trafficker is merely a formal pronouncement of fact, that is, declaratory relief in the strict sense, or some other kind of order. A number of text books dealing with declaratory relief distinguish between declarations in the strict sense, which are not capable of being coercively enforced, and orders which are "constitutive-investitive" or "divestive", as the case may be, which do not pronounce upon the existence of legal relationships but create a new one.[37] In my opinion, a declaration made by the Court under s 36A of the *Misuse of Drugs Act* is not merely a formal statement pronouncing upon the existence of the matters specified in s 36A(3) and (6) of the Act. The declaration is divestive of property rights. Forfeiture of a person's property occurs upon a declaration being made by the Court under s 36A of the Act. While the Court does not make a forfeiture order as such, forfeiture of property is an immediate consequence of the declaration that a person is a drug trafficker. Section 94(1) of the *Criminal Property Forfeiture Act* states that if a person is declared to be a drug trafficker all property subject to a restraining order is forfeited to the Northern Territory. This construction of the effect of a declaration is consistent with the opinion that was expressed by the Attorney-General of the Northern Territory during the Parliamentary debate about the *Criminal Property Forfeiture Bill*, namely that the *Criminal Property Forfeiture Act* was not declaration-based. An appropriate order of

[37] See, for example, PW Young QC, Declaratory Orders (2nd ed. Butterworths) at p 3; Zamir & Woolf, The Declaratory Judgment (1993 Sweet & Maxwell) at p 2 par [1.03].

the Court was necessary because of the requirement for the acquisition of property to be on just terms.[38]

[68] There is also a question as to whether an application for a declaration that a person is a drug trafficker is a civil proceeding or a criminal proceeding. The following factors tend to suggest that the proceeding is a criminal proceeding.

[69] First, the *Misuse of Drugs Act* does not contain a provision which is equivalent to s 136 of the *Criminal Property Forfeiture Act*. Neither s 36A nor any other section of the *Misuse of Drugs Act*, states that an application for a declaration that a person is a drug trafficker is taken to be a civil proceeding. Nor does the *Misuse of Drugs Act* state that questions of fact on an application for a declaration that a person is a drug trafficker are to be determined on the balance of probabilities. In contrast to the provisions of the *Criminal Property Forfeiture Act* which create a non-conviction based civil scheme of property forfeiture, the *Misuse of Drugs Act* contains a number of sections dealing with the forfeiture property that are conviction based.

[70] Secondly, the *Misuse of Drugs Act* is a penal or criminal statute that creates certain offences and specifies penalties for those offences. Section 20 of the *Misuse of Drugs Act* states that the *Criminal Code*, with the necessary changes, shall be read and construed with the *Misuse of Drugs Act*.

[38] 18 June 2002, Debates – Ninth Assembly, First Session – Parliamentary Record No: 5.

[71] Thirdly, the provisions of s 36A of the *Misuse of Drugs Act* key into conduct that has already been proven to be criminal. An essential prerequisite to a declaration that a person is a drug trafficker and to the forfeiture of property is proof that the person has a number of convictions for specified drug offences. 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. If the person is not convicted of the charge or charges which formed the basis of the restraining order, the declaration cannot be made and the person's property is not forfeited to the Northern Territory.

[72] Fourthly, an application for a declaration that a person is a drug trafficker may be made at the time of the hearing of an offence contrary to the provisions of the *Misuse of Drugs Act*. That is, the application for a declaration that a person is a drug trafficker may be made during the course of a proceeding in which the Court is exercising its criminal jurisdiction.

[73] Fifthly, the terms of the declaration are stigmatic. A declaration that a person is a drug trafficker, like a conviction for a drug offence or any other offence, is a significant act of legal and social censure. The declaration is a further mark of the Court's and society's disapproval of a person's wrongdoing.[39] The declaration represents a judgment of moral culpability and provides a further statement that the person is worthy of censure.[40] A

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[39] *McInerny* (1986) 28 A Crim R 318 at 329.
[40] Fox and Freiberg, Sentencing State and Federal Law in Victoria (2nd ed Oxford University Press) at p 70.

person who is declared to be a drug trafficker is likely to become known as a drug trafficker.

[74] Sixthly, there is a diminution of the person's legal rights. The person's property is automatically forfeited to the Northern Territory if the declaration is made by the Court. While the stated objective of the forfeiture of the property of a person who engaged in criminal activities is to compensate the community for the costs of deterring, detecting and dealing with criminal activities, the declaration is in the nature of a mandatory punishment for a multiple offender of a particular category. Section 36A of the *Misuse of Drugs Act* places a special burden on a group of persons who have violated certain legal prohibitions a specified number of times. It causes someone to suffer for an offence.[41] Further, subject to what I have said in par [44] to par [47] and par [52] to par [54] above, more often than not, the burden imposed on the individual is likely to be an excessive burden which is very significantly disproportionate to the whole of the criminal conduct engaged in by the person who is declared to be a drug trafficker. The Supreme Court of the United States of America has held that a proceeding may be so punitive that it must be considered criminal.[42]

[75] In my opinion, the making of a declaration that a person is a drug trafficker does amount to the imposition of a punishment on the person who's property

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[41] A different view was reached by the Supreme Court of Western Australia in *The Queen v Rowe* (1992) 5 WAR 491. However, the criminal property forfeiture legislation under consideration in that case contemplated a further proceeding and a further order of the court before forfeiture occurred.

[42] *Kennedy v Mendoza-Martinez* (1963) 372 US 144; *United States v Ward* (1980) 448 US 242.

is the subject of a restraining order. The statutory scheme for forfeiture of the property of a person who is declared to be a drug trafficker is similar to common law forfeiture upon conviction for a felony or for treason.[43] The statutory framework is one of *in personam* criminal property forfeiture. The Supreme Court of the United States of America has held that *in personam* criminal forfeitures punish the property owner's criminal conduct.[44] The consequence of the declaration is so excessive that the sanction cannot be fairly said to solely serve a remedial purpose, but rather can only be explained as also serving a retributive or deterrent purpose.[45] In *Director of Public Prosecutions (NT) v Hennig*[46] Thomas J held that s 36A of the *Misuse of Drugs Act* involved a criminal sanction and she interpreted the provisions of the section according to the principles of statutory interpretation applying to legislation involving a criminal sanction. The Court of Appeal in Western Australia has repeatedly acknowledged that the compulsory loss of assets, where those assets are not acquired through the proceeds of the crimes that led to their confiscation, is a significant punishment.[47] Similar

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[43] *Calero-Toledo v Pearson Yacht Leasing Co* (1974) 416 US 663 at 682.
[44] *Austin v United States* (1993) 509 US 602.
[45] *United States v Halper* (1989) 490 US 435 at 448.
[46] (2005) 154 A Crim R 550 at par [42].
[47] *Cohen v The State of Western Australia [No 2]* [2007] WASCA 279 at par[12], [14]; *Kirby v The Queen* [2003] WASCA 164 [166] to [177]*; Mada v The Queen* [2003] WASCA 1; *Inagra-Brisa v The Queen* [2004] WASCA 68 [19] to [26]; *Macri v The State of Western Australia* [2006] WASCA 63 [15] to [16].

statements have been made by the Supreme Court of Victoria[48] and the Supreme Court of South Australia.[49]

[76] However, the notion of punishment cuts across the division between the civil and the criminal law. Sanctions frequently serve more than one purpose. Civil proceedings may advance punitive as well as remedial goals, and, conversely, both punitive and remedial goals may be served by the criminal penalties. In his Second Reading Speech on 16 May 2002 when introducing the *Criminal Property Forfeiture Bill*, the Attorney General described the new scheme as a non-conviction civil based scheme with three objectives: (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 unjust enrichment of criminals who profit at society.[50] Two of those objectives are consistent with the objectives of sentencing a person for a criminal offence.

[77] The following factors tend to suggest that an application for a declaration that a person is a drug trafficker is a civil proceeding. First, s 36A of the *Misuse of Drugs Act* is part of an overlapping legislative scheme that is comprised of sections in two statutes. Secondly, the legislative scheme established by the *Criminal Property Forfeiture Act* is substantially a civil

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48 *R v McLeod* (2007) 174 A Crim R 526 at par [21].
49 *R v Carpentieri* (2001) 81 SASR 164 at [26], [27], [38], [47], [50]; *Hemming v Perkins* (1999) 74 SASR 307 at 313 – 314; *Hepworth v Director of Public Prosecutions (SA)* (2001) 79 SASR 480 at 485.
50 *Burnett v DPP* (2007) 21 NTLR 39 at [21].

scheme for the forfeiture of property which operates outside the criminal jurisdiction of the Court. Thirdly, s 10(2) of the *Criminal Property Forfeiture Act* states that the property of a person who is taken to be involved in criminal activities is forfeit to the Northern Territory to compensate the community for the costs of deterring, detecting and dealing with those criminal activities, which is a remedial objective. Fourthly, the application for the restraining order which precedes the application for a declaration that a person is a drug trafficker is a civil proceeding.[51] Fifthly, the application for a declaration that a person is a drug trafficker is a separate proceeding to the sentencing proceeding. It is brought by another party. The application for a declaration that a person is a drug trafficker is not made by the Crown but by the Director of Public Prosecutions and the declaration may be made by a judge who was not the sentencing judge. Sixthly, the application for a declaration that a person is a drug trafficker may be made after the sentencing proceedings have been completed. Seventhly, the declaration that a person is a drug trafficker cannot be made of the Court's own motion during sentencing proceedings. It cannot be made without an application being made by the Director of Public Prosecutions. Eighthly, a declaration under s 36A of the Act is not a specific sentencing disposition relating to a particular offence. Ninthly, no appeal lies under s 410 of the *Criminal Code* against a declaration made under s 36A of the *Misuse of Drugs Act*.

[51] s 136 (1) *Criminal Property Forfeiture Act.*

[78] In my opinion, a proceeding for a declaration that a person is a drug trafficker is a civil proceeding not a criminal proceeding. In resolving the conflicting matters referred to in par [68] to par [77] above, I have felt constrained to follow the Western Australian Court of Appeals decisions in *Trajkoski v Director of Public Prosecutions*[52] and *Donohoe v The Director of Public Prosecutions.*[53] In both these cases the Court of Appeal in Western Australia considered s 32A of the *Misuse of Drugs Act* (WA) which is a similar provision to s 36A of the *Misuse of Drugs Act* (NT). In the first case Buss JA and Owen JA held that a drug trafficker declaration was not part of the sentence imposed on the offender. In the second case the Court of Appeal unanimously determined that an application under s 32A of the *Misuse of Drugs Act* (WA) was a civil proceeding. An application for special leave to appeal was made to the High Court of Australia in the case of *Donohoe v The Director of Public Prosecutions*. The High Court held that such a characterisation of an application under s 32A of the *Misuse of Drugs Act* (WA) was reasonably open.[54]

[79] While the Court does not make a forfeiture order under s 36A of the *Misuse of Drugs Act*, s 94(1) of the *Criminal Property Forfeiture* Act states:

> (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

[52] (2010) 41 WAR 105.
[53] [2011] WASCA 239.
[54] [2012] HCA Trans 153 per French CJ and Bell J.

(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.

[80] If a person fails to take any action necessary to comply with or give effect to the *Criminal Property Forfeiture Act* then – (a) at the Direction of the Court or a Judge, a Registrar of the Supreme Court may take the necessary action; and (b) the action of the Registrar has effect for all purposes as if it had been done by the person.[55] Further, a person who fails to (a) deliver up forfeited property to the Territory on demand; or (b) permit the Territory to take possession of forfeited property; commits a criminal offence which is punishable by a maximum penalty of a fine of 1000 penalty or imprisonment for five years.[56]

[55] s 147 *Criminal Property Forfeiture Act.*
[56] s 152 *Criminal Property Forfeiture Act.*

The application to set aside the restraining order

[81] Senior Counsel for the respondent submitted that in *Burnett v Director of Public Prosecutions*[57] the Court of Appeal held that in proceedings for a restraining order under s 44(1) of the *Criminal Property Forfeiture* Act the Court retained its inherent power to ensure fairness and prevent injustice in the conduct of proceedings. These powers extended to preventing **substantive** unfairness [*emphasis added*]. Save for the provisions of s 44(3) of the Act, the Court has an unfettered discretion when deciding whether to grant or refuse an application for a restraining order and under its inherent jurisdiction the Court may set aside a restraining order in the interests of justice.

[82] In *DPP v Dickfoss*[58] at par [91], par [94] and par [95] Mildren J stated:

> In *Burnett v Director of Public Prosecutions* the Court of Appeal held that the court has a discretion whether or not to make a restraining order. Perhaps the discretion is not entirely unfettered because s 44(3) of the Act prevents the court from refusing to make an order if the *only* reason is because the value of the property exceeds, or could exceed, the amount that the person could be liable to pay to the Territory if the relevant declaration is made. However, if another reason or reasons exist, s 44(3) does not operate. This provision appears to have limited application to property in which others (who are not the subject of the order) have an interest. Otherwise the discretion is unfettered. Because this court is a court of equity, and the legislature must have intended to take the court as it finds it the court may, at the time it makes a freezing order, exempt certain property for the purposes of legal expenses; set aside an order without waiting for an objector to file an objection for reasons such as absence of jurisdiction, material non-disclosure and changed circumstances, or grant a stay for abuse of process at any stage of the proceedings. The relevant powers include in my opinion, all and any

[57] (2007) 21 NTLR 39.
[58] (2011) 28 NTLR 71 at [91] and [94].

> of the remedies available to the court when considering whether, in its discretion, it should grant a freezing order, and if so, on what terms, to avoid unfairness and injustice in the administration of the powers conferred on the court by s 43(2) of the Act. **A court of equity has the power to refuse injunctive relief if that would result in substantial hardship and disproportionate prejudice to the defendant, or if the order would affect innocent third parties** [*emphasis added*], particularly if there has been delay bringing the application. Indeed delay, or laches, may in itself be sufficient to refuse an application in certain circumstances. Bearing in mind that the Act is particularly draconian, and complex in its various provisions, in my opinion it would be open to the court to refuse an application where the forfeiture offence was minor, technical or trivial, and the value of the crime-used property was substantial so that there was significant disproportionality between the remedy sought and the purposes which the remedy sought to achieve, particularly if there would be significant hardship to the defendant or others with an interest in the property. Similarly it would be open to be refused, or limited in its application, if the connection between the forfeiture offence and the property is clearly not likely to result in a forfeiture order. Furthermore, **there are no fixed categories of circumstances where the Court might be persuaded that it is not in the interests of justice to grant the relief sought** [*emphasis added*]. These factors are also relevant to the construction to be given to s 95 of the Act, and whether or not the court has a discretion to refuse to make a forfeiture order.
>
> As noted already, the court retains an inherent power to set aside the restraining order **at any time** [emphasis added], if there are proper grounds for doing so. ….
>
> Although the Act is draconian, the court has the power to refuse to make a restraining order where the justice of the case requires it, for the reasons I have already expressed, **and in certain circumstances, could set it aside in the exercise of its inherent jurisdiction** [*emphasis added*], as well as, or alternatively on, the statutory grounds.

[83] Senior Counsel for the respondent submitted that the restraining order made by Mildren J on 11 April 2011 should be set aside for the following reasons.

1. Apart from the events the subject of the 2011 offences, Mr Emerson has not been and is not engaged in drug-trafficking.

This single event does not justify him being described as a drug trafficker, if that term is intended (as it appears) to refer to his occupation at the time of the declaration and over the period of the triggering offences specified in s 36A(3) of the *Misuse of Drugs Act*.

2. The property is not crime-used or crime-derived and bears no relationship to any offence alleged against the respondent.

3. The forfeiture is not consistent with the stated objective of the Act. By s 3 of the *Criminal Property Forfeiture Act* the stated objective of the Act is "to target the proceeds of crime in general and drug-related crime in particular in order to prevent the unjust enrichment of persons involved in criminal activity. That objective is also reflected in the preamble to the Act and in the Second Reading Speech.

4. The forfeiture of the property is disproportionate to the offences for which Mr Emmerson has been sentenced, noting in particular that all of the offences committed by him are Schedule 2 offences. This is more so when the prospect of forfeiture was not taken into account by Mildren J when sentencing Mr Emmerson.

5. The forfeiture of the property which is subject to the restraining order will result in substantial hardship and disproportionate prejudice to Mr Emmerson. By force of the order, Mr Emmerson will lose all of his assets. He is presently incarcerated and at the time of his release he will be approaching 60 years of age. He will be released in circumstances where he will have no home to return to, no means of support, and with reduced, and quite likely minimal, prospects for gainful employment. This is likely to weigh on Mr Emmerson while incarcerated and could well impact on his endeavours towards rehabilitation.

[84] In making this submission Senior Counsel for Mr Emmerson expressly eschewed any submission that the making of the restraining order was an abuse of process. He stated that, save that any application which was made pursuant to an invalid statutory provision was arguably an abuse of process,

the respondent did not assert that the application for the restraining order was an abuse of process. It was not, for example, submitted that the application for a restraining order was made for an improper purpose or that the application was "oppressive" in the procedural sense in which that word is often used. In substance, reliance was placed on the broader equitable notions considered by Mildren J in *DPP v Dickfoss*[59] to argue that the restraining order was substantively unfair.

[85] In my opinion, none of the submissions made on behalf of Mr Emmerson provide a basis for setting aside the restraining order made by Mildren J on 11 April 2011. The restraining order was obtained by consent.

Mr Emmerson was a drug trafficker at the time of his arrest. He had $70,050.00 in his possession that was the proceeds of drug transactions and he was involved in the importation of 18.6646 kilograms of cannabis into the Northern Territory. It is irrelevant to the application for a restraining order under s 44(1) of the *Criminal Property Forfeiture Act* that (save for the $70,050 which was crime-derived) the property which is restrained is neither crime-used nor crime-derived. Both the application for a restraining order and the application for a declaration are consistent with the objective expressed in s 10(2) of the Act. Section 3 of the Act does not contain the sole objectives of the Act. Parliament's intention must be determined from a consideration of the whole of the relevant Act or Acts and regard must be

[59] (2011) 28 NTLR 71 at [91] and [94].

had to sections other s 3 of the Act.[60] Section 3 of the Act cannot cut down the plain and unambiguous meaning of a provision if that meaning in its textual and contextual surroundings is clear.[61] Section 3 of the Act does not command a particular outcome or exercise of discretionary power.[62] While Mildren J did state that it would be open to the court to refuse an application where the forfeiture offence was minor, technical or trivial, and the value of the property sought to be restrained was substantial so that there was significant disproportionality between the remedy sought and the purposes which the remedy sought to achieve, particularly if there would be significant hardship to the defendant or others with an interest in the property, this is not such a case. The 18.6646 kilograms of cannabis that Mr Emmerson and the others imported into the Northern Territory had a potential commercial yield of between $184,500 and $918,400 depending on the size of the quantities of the drug that were sold. Cannabis is a dangerous drug which causes considerable harm in the community. The maximum penalties for the latest offences committed by Mr Emmerson are 14 and 25 years imprisonment. Mr Emmerson was sentenced to a significant period of imprisonment. The cost of his incarceration alone for the length of his sentence of imprisonment or until he is paroled will be substantial and it can reasonably be inferred that the costs of the police investigation into all of his criminal activities and the costs of the various prosecutions against

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60 *Municipal Officers Association v Lancaster* (1981) 54 FLR 129 at 153.
61 *S v Australian Crime Commission* (2005) 144 FCR 431 per Mansfield J at 439.
62 *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 per Cole JA at 78.

him are not insignificant. It was not submitted that the costs of deterring, detecting and dealing with Mr Emmerson's criminal activities were significantly disproportional to the value of the restrained property. All of the facts and circumstances about Mr Emmerson's financial, health and employment situation now relied on by Mr Emmerson were known to him at the time that he consented to the restraining order and he elected not to rely on them when the application for a restraining order was before Mildren J. I am not aware of any decision of a superior court setting aside a restraining order (which has been regularly obtained) because of the hardship that a respondent will suffer if the final relief sought by an applicant is granted. Nor am I aware of any decision of a superior court setting aside a restraining order (which has been regularly obtained) because the value of the property which may be forfeited is disproportionate to the seriousness of the respondent's criminal conduct.

The objection under s 59

[86] In my opinion, the amended objection filed on behalf of Mr Emmerson under s 59 of the *Criminal Property Forfeiture Act* on 1 December 2011 should be dismissed. The grounds of objection fall outside the provisions of s 65(1) of the *Criminal Property Forfeiture Act*. According to s 65(1) of the Act the only available ground of objection to a restraining order made under s 44(1) of the Act is that it is more likely than not that Mr Emmerson does not own or effectively control the property that is subject to the restraining order made by Mildren J on 11 April 2011.

[87] Mr Wyvill all but conceded that the amended objection to the restraining order could not succeed. He candidly stated that the purpose of making the amended objection was meet any suggestion that may have been made by counsel for the Director of Public Prosecutions to the effect that the collateral attack should have been made at an earlier time.

Acquisition of property

[88] As to the first collateral ground of attack upon the application for a declaration that Mr Emmerson is a drug trafficker, Senior Counsel for the respondent submitted that s 36A of the *Misuse of Drugs Act* allied with s 94(1) of the *Criminal Property Forfeiture Act* should be characterised as a law "with respect to the acquisition of property otherwise than on just terms" and hence subject to s 50(1) of the *Northern Territory (Self Government) Act 1978* (Cth). If the sections are so characterised they are invalid because the power of the Legislative Assembly of the Northern Territory does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms.

[89] In his oral submissions Mr Wyvill stated that the provisions of s 36A of the *Misuse of Drugs Act* and s 94(1) of the *Criminal Property Forfeiture Act* are not forfeiture provisions and the taking of property under Northern Territory law is not removed from s 50(1) of the *Northern Territory (Self-Government) Act 1978* simply because it is described as forfeiture by the legislature. The overlapping legislative arrangements which are applicable

in this case were simply designed to collect property of substantial value for consolidated revenue and no more.

[90] Subsection 50(1) of the *Northern Territory (Self-Government) Act 1978* applied to this case for the following reasons. The object of s 94(1) was not punitive. Subsection 5(4)(b) and (c) of the *Sentencing Act* (NT) excluded such acquisitions of property from being taken into account in the sentencing process. The object of the overlapping statutory arrangements was the acquisition of property for its own sake. The criteria in s 36A(3) and (6) of the *Misuse of Drugs Act* that determined whose property may be forfeited to the Northern Territory under s 94(1) of the *Criminal Property Forfeiture Act* were formalistic and not substantive. The procedures for the acquisition of property that are contained in the overlapping legislative scheme are in truth and substance administrative procedures. The Director of Public Prosecutions has an unlimited discretion as to who is to be the subject of an application for a declaration under s 36A of the Misuse of Drugs Act and only people with significant assets who fall within the relevant criteria are likely to be made respondents to an application for a declaration. There is no requirement that the property which is to be forfeited to the Northern Territory must be crime-used or crime-derived. The property that is forfeited to the Northern Territory is unconnected with any criminal offence.

[91] In his written submissions Mr Wyvill stated that s 36A and s 94(1) should be characterised as a law "with respect to the acquisition of property otherwise than on just terms" for the following reasons.

1. There is no association between the restrained property and the offences committed by an offender. The property is neither crime-derived nor crime-used.

2. The forfeiture of the property has no relationship with the sentencing process. The application for forfeiture is at the discretion of the executive arm of government and can be made at any time, even years after the relevant conviction and after any related sentence has been served in full.

3. The excuse for forfeiture appears to be the respondent's status as a drug trafficker at the time of the declaration and over the period of the triggering offences specified in s 36A(3) of the *Misuse of Drugs Act*. This suggests that the object of the forfeiture is either: (a) to recover the proceeds of conducting the business of drug trafficking; and/or to disable the continuation of the business of drug trafficking. However, these provisions only have practical significance where the subject property was not the proceeds of past drug trafficking or deployed in past drug trafficking or likely to be deployed in future drug trafficking. Because of what, in effect are, deeming provisions in s 36A of the *Misuse of Drugs Act*, whether or not the respondent was in fact a drug trafficker over the relevant period is not material.

4. Not being linked to the sentencing process, the forfeiture is an end in itself. It is the acquisition of property for its own sake. The purpose is solely for the purpose of revenue collection. The Director of Public Prosecutions is hardly likely to press for a declaration unless, as here, it is likely to generate a substantial net benefit to the Territory.

5. As the application may be made at any time, the application may be made in circumstances where it is too late to appeal a sentence which took no account of any forfeiture of property. It will be too late where the sentence has already been served. In

the present case, the potential property forfeiture was not taken in account when Mr Emmerson was sentenced.

6. The scope of the property caught by the declaration is extraordinarily wide and can include the property owned by third parties. Any landlord or lessor is at risk of forfeiting their property, even though it has no association with any offence, simply because it is controlled by a person who is declared to be a drug trafficker under s 36A of the *Misuse of Drugs Act*.

[92] Mr Wyvill submitted that such forfeiture of property cannot be characterised as falling outside the requirement of just terms on the basis that the notion of fair compensation for the taking of property would be incongruous or irrelevant.

[93] In support of these propositions, Mr Wyvill relied on the following authorities: *Theophanous v The Commonwealth*[63] at par [55] to par [63] per Gummow, Kirby, Hayne, Heydon and Crennan JJ; *Airservices Australia v Canadian Airlines*[64] at par [101] per Gleeson CJ and Kirby J; *Dickfoss v Director of Public Prosecutions*[65] at par [63] per Riley CJ; and Dickfoss v Director of Public Prosecutions[66] at par [103] per Mildren J. His principal submission was that in order to avoid the application of s 50(1) of the *Northern Territory (Self-Government) Act 1978* the relevant statutory forfeiture provisions had to be *in rem* forfeiture provisions.

[94] In my opinion, the authorities to which Mr Wyvill referred do not support the propositions for which he contended. His submissions fail to recognise

[63] (2006) 225 CLR 101.
[64] (1999) 202 CLR 133.
[65] (2012) 31 NTLR 16.
[66] (2011) 28 NTLR 71.

that "modern forfeiture laws have evolved from two sources: from the common law action for deodands, whereby an object causing the death of a person or animal was forfeited, and from common law forfeiture, whereby the estate of the criminal was forfeited only upon conviction of a felony. The action of deodands was directed solely against property and hence was an *in rem* proceeding. Common law forfeiture, on the other hand, required criminal conviction of the felon as an essential prerequisite to the Crown's seizure of the property."[67] Both types of forfeiture arrangements do not permit of just terms. To characterise the forfeiture arrangements in this case as an acquisition of property subject to just terms would be incongruous.

[95] The propositions referred to in pars [88] to [93] above do not provide a proper basis for characterising the forfeiture of property facilitated by s 36A of the *Misuse of Drugs Act* and s 94(1) of the *Criminal Property Forfeiture Act* as an acquisition of property that is subject to the just terms requirement of s 50(1) of the *Northern Territory (Self-Government) Act*. It is irrelevant that the property is neither crime-used nor crime-derived property. It is also irrelevant that the forfeiture of property has no relationship with the sentencing process. The statutory scheme established by s 36A of the *Misuse of Drugs Act* and s 94(1) of the *Criminal Property Forfeiture Act* is one of *in personam* criminal property forfeiture. Such property forfeiture schemes have been known to the law for centuries. The forfeiture of the property is not an end in itself. Contrary to Mr Wyvill's submissions, the

[67] Robert E Edwards, "*Forfeitures – Civil or Criminal?*", [1970] 43 Temple Law Quarterly 191.

principal objective of the scheme established by s 36A of the *Misuse of Drugs Act* and s 94(1) of the *Criminal Property Forfeiture Act* is to compensate the Territory community for the costs of deterring, detecting and dealing with the criminal activities of a certain category of recidivist drug offender.[68] The cost of imprisoning such drug offenders alone may be a significant cost to the Territory community. Further, as I have stated above, the value of property which is made subject to a restraining order should, where possible,[69] be proportional to the actual or likely costs of deterring, detecting and dealing with the criminal activities of the particular person who is likely to be declared a drug trafficker. The fact that there are also deterrent and punitive objects of the property forfeiture scheme established by s 36A and s 94(1) suggests that by its very nature and objects the concept of "just terms" compensation is irrelevant or incongruous and therefore inapplicable to these statutory provisions.

[96] Subsection 50(1) of the *Northern Territory (Self-Government) Act 1978* (Cth) is to be construed and applied in the same way as s 51(xxxi) of the *Constitution.*[70] The power of the Commonwealth Parliament to make laws for the penal forfeiture of assets unaffected by the "just terms" requirement of s 51(xxxi) of the *Constitution* applies also to the power of the Northern Territory Parliament to make such laws outside the scope of s 50(1) of the

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[68] s 10(2) *Criminal Property Forfeiture Act.*
[69] Subject to the constraint stipulated by s 44(3) of the *Criminal Property Forfeiture Act.*
[70] *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at [3]-[4] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

Northern Territory (Self-Government) Act 1978.[71] It is well established that not every acquisition of property affected by legislation falls within the scope of the "just terms" requirement. This is because certain categories of law cannot permit of just terms and therefore cannot be laws "with respect to the acquisition of property" as that term is used in s 50(1) of the Act.[72]

[97] I accept the submissions of the Solicitor General that there are at least three distinct categories in which an acquisition of property will fall outside the scope of the "just terms" requirement:[73] (1) where the property is "inherently susceptible" to variation or termination; (2) where the acquisition is such that, by its very nature and object, concepts of compensation are irrelevant or incongruous,[74] and (3) where the law is not one for the acquisition of property as such, but is rather part of and incidental to a general regulatory scheme aimed at the adjustment of competing rights and liabilities.

[98] One commonly cited example of laws which fall outside the "just terms" requirement are those providing for the forfeiture of property in the context of criminal activity.[75] In *Dickfoss v Director of Public Prosecutions and Ors*[76] the Court of Appeal of the Northern Territory confirmed the

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71 *Dickfoss v Director of Public Prosecution and Ors* [2012] HCA Trans 139.
72 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 408 per Gibbs J.
73 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 177-178 per Brennan J.
74 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 408 per Gibbs J; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 219-220 per McHugh J; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285 per Deane and Gaudron JJ; *Health Insurance Commission v Peveril* (1993-94) 179 CLR 151 at 237 per Mason CJ, Deane and Gaudron JJ; *Georgiadis v Australian and Overseas Telecommunications Corp* (1993-94) 179 CLR 297 at 308 per Mason CJ, Deane and Gaudron JJ.
75 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 278, 285, 291, 292, 292 – 293; *Burton v Honan* (1952) 86 CLR 169 at 180 per Dixon CJ.
76 (2012) 31 NTLR 16.

application of the above principles to other sections of the *Criminal Property Forfeiture Act*. There is no material distinction between the circumstances in this case and those in *Dickfoss v Director of Public Prosecutions and Ors*. I am bound by that decision. In my opinion, the provisions of s 36A of the *Misuse of Drugs Act* and s 94(1) of the *Criminal Property Forfeiture Act* are not by their nature and object provisions to which s 50(1) of the *Northern Territory (Self-Government) Act 1978* applies. It was on the same basis that the provisions of the former Commonwealth forfeiture legislation was held not to fall within the ambit of the "just terms" guarantee.[77]

[99] Where the subject matter of the Northern Territory legislation is of a type for which the notion of fair compensation for the taking of the property effected by the statutory provisions would be incongruous or irrelevant, such as *in personam* criminal property forfeiture, s 50(1) of the *Northern Territory (Self-Government) Act 1978* has no application. The question of whether the statutory provisions are reasonably adapted or proportionate to the purpose is one within the exclusive province of the Northern Territory Parliament and is not amenable to curial determination. Once the subject matter is fairly within the province of the Northern Territory Parliament, the justice and wisdom of the provisions which it makes in the exercise of its

[77] *Della Petrona v Director of Public Prosecutions (Cth) (No 2)* (1995) 38 NSWLR 257.

powers over the subject matter are matters entirely for the Parliament and not for the Judiciary.[78]

Kable v Director of Public Prosecutions (NSW)

[100] The Supreme Court of the Northern Territory exercises the judicial power of the Commonwealth as one of the other courts that the Australian Parliament has invested with federal jurisdiction under s 71 of the *Constitution*. Consequently, the principles enunciated in *Kable v Director of Public Prosecutions (NSW)*[79] apply to legislation passed by the Northern Territory Parliament.[80]

[101] In *South Australia v Totani*[81], French CJ stated the consequences of the constitutional placement of State [and Territory] courts in the integrated Australian court system include the following:

1. A State legislature cannot confer upon a court of a State a function which substantially impairs its institutional integrity and which is therefore incompatible with its role as a repository of federal jurisdiction.

2. State legislation impairs the institutional integrity of a court if it confers upon it a function which is repugnant to or incompatible with the exercise of the judicial power of the Commonwealth.

3. The institutional integrity of a court requires both the reality and appearance of independence and impartiality.

4. The principles underlying the majority judgments in *Kable* and further expounded in the decisions of this Court which have

[78] *Burton v Honan* (1952) 86 CLR 169 at 179 per Dixon CJ.
[79] (1996) 189 CLR 51.
[80] *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [28] - [29].
[81] (2010) 242 CLR 1 at par [69].

followed after *Kable* do not constitute a codification of the limits of State legislative power with respect to State courts. Each case in which the *Kable* doctrine is invoked will require consideration of the impugned legislation because: "the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes." For legislators this may require a prudential approach to the enactment of laws directing courts on how judicial power is to be exercised, particularly in areas central to the judicial function such as the provision of procedural fairness and the conduct of proceedings in open court. It may also require a prudential approach to the enactment of laws authorising the executive government or its authorities effectively to dictate the process or outcome of judicial proceedings.

5. The risk of a finding that a law is inconsistent with the limitations imposed by Ch III, protective of the institutional integrity of the courts, is particularly significant where the law impairs the reality or appearance of the decisional independence of the court.

[102] As to the second collateral ground of attack upon the application for a declaration that Mr Emmerson is a drug trafficker, it was submitted, on his behalf, that s 36A of the *Misuse of Drugs Act* and s 94(1) of the *Criminal Property Forfeiture Act* were invalid because the effect of those sections is that the Supreme Court of the Northern Territory has been conscripted to perform functions which are incompatible with its character and status as a repository of federal jurisdiction. It was said on behalf of the respondent that s 36A of the *Misuse of Drugs Act* does not comply with the principles enunciated in *Kable v Director of Public Prosecutions (NSW)*.

[103] In his oral submissions junior counsel for Mr Emmerson, Mr Aughterson, stated that the overlapping statutory arrangements impair the reality and

appearance of the Court's decisional independence because the court is impermissibly directed as to the outcome of an application for a declaration that a person is a drug trafficker. The ordinary meaning of "drug trafficker" is to deal or trade in drugs illegally, to buy and sell drugs, to commercially deal in drugs, to carry on dealings of an illicit kind in drugs. Under s 36A of the *Misuse of Drugs Act* the Court is required to make a declaration that a person is a drug trafficker in accordance with anteriorly specified criteria which deprive the Court of the capacity to conduct a proper judicial enquiry into such matters. Any enquiry is perfunctory and merely involves a review of the record of the Court and the declaration will invariably be made at the request of the executive because the executive will not make an application for a declaration that a person is a drug trafficker without being capable of establishing that the respondent is a recidivist offender of the required category. The Court cannot go behind the respondent's criminal record to determine if in fact the respondent was a drug trafficker. The declaration of the Court may be counter factual. The triggering criteria for the declaration may be established if a person is merely proven to have been found guilty of three minor drug possession charges over a period of 10 years. A respondent to an application for a declaration that he or she is a drug trafficker is deprived of the opportunity of demonstrating that he or she was not a drug trafficker. The circumstances in this case are analogous to the circumstances in *South Australia v Totani*[82] and *Wainohu v New South*

[82] (2010) 242 CLR 1.

Wales[83]. Further, the provisions of s 36A of the *Misuse of Drugs Act* infringed the rule against double punishment. The provisions of the section impermissibly required the Court to doubly punish a person who met the criteria specified in s 36A(3) and (6) of the Act. The declaration is solely based on a respondent's prior convictions and it constitutes an increase in the punishment already judicially imposed on a respondent by reference to his or her earlier convictions.[84] Unlike the legislation considered by the High Court in *Fardon v Attorney-General (QLD),*[85] the overlapping legislative provisions do not set up their own intervening normative structure.

[104] In his further written submissions, Mr Aughterson stated that s 36A of the *Misuse of Drugs Act* and s 94(1) of the *Criminal Property Forfeiture Act* have the following effect on the Court.

1. The legislature has made an anterior determination about which people fall within the class of people that may be declared drug traffickers. It has fixed the class of people who may be a declared drug trafficker without the need for any judicial enquiry as to whether or not a person is in fact a drug trafficker.

2. If an application for a declaration that a person is a drug trafficker is made to the Court, the Court is required to do no more than examine the records of the Supreme Court and the Court of Summary Jurisdiction in order to determine whether or not a person falls within the specified class of people. The examination of those records will produce a definitive result.

[83] (2011) 243 CLR 181.
[84] *Fardon v Attorney-General (QLD)* (2004) 233 CLR 575 per Kirby J at par [182].
[85] (2004) 233 CLR 575 per Gummow J at par [74].

3. The process pursuant to which a person may be declared a drug trafficker is purely arbitrary. The Court cannot declare a person to be a drug trafficker of its own motion. Whether a person is to be declared a drug trafficker is contingent upon the Director of Public Prosecutions making an application for a declaration under s 36A of the *Misuse of Drugs Act*. There are no guidelines about when such an application should be made by the Director of Public Prosecutions. The Director of Public Prosecutions has an unfettered discretion to determine which members of the class are to suffer forfeiture of their property.

4. If the Director of Public Prosecutions makes an application for a declaration that a person is a drug trafficker, the subsequent involvement of the court is tantamount to a formality. Invariably the Court must make the declaration that a person is a drug trafficker. It is highly unlikely that the Director of Public Prosecutions will make an application for a declaration that a person is a drug trafficker unless a person falls within the requisite class of persons which is a readily and easily identifiable class of people. However, the appearance is that the basis of the forfeiture of property is the Court's exercise of its judicial function by making a declaration that a respondent is a drug trafficker.

5. The law is of unequal application. Not all people who fall within the class of people who may be declared drug traffickers will be declared to be drug traffickers. There is no requirement that an application for a declaration that a person is a drug trafficker be made against everybody who falls within the specified class of people.

6. This forfeiture arrangement targets property with no link or relationship to the triggering offences and therefore the forfeiture is punishment. Moreover as a declaration that a person is a drug trafficker will invariably follow the passing of a sentence for the triggering offence. Therefore a declaration that a person is a drug trafficker is a double punishment.

7. The Court must doubly punish any person who is a member of the specified class of offenders who is selected by the Director of Public Prosecutions for such double punishment. The Court has no discretion.

[105] Mr Aughterson submitted that as a result of the effect of s 36A of the *Misuse of Drugs Act* and s 94(1) of the *Criminal Property Forfeiture Act* the Court has lost its institutional integrity and its independence. The Northern Territory Parliament has clothed a statutory forfeiture scheme with the appearance of judicial process.

[106] In my opinion, this argument cannot be sustained for the following reasons. The overlapping statutory arrangements do not impermissibly change the relationship between the Court and Parliament or the executive. The object of the overlapping statutory arrangements is to require recidivist offenders of a certain category to compensate the Territory community for the costs of deterring, detecting and dealing with their criminal activities. The arrangements have a remedial purpose. The arrangements do not subject the Court in reality or appearance to direction from the executive as to the content of the relevant judicial decision. The Court is required to make the declaration under s 36A of the *Misuse of Drugs Act* if the Director of Public Prosecutions proves that a respondent is a recidivist offender of the specified category. There is no subterfuge in this regard. The criteria are plainly set out in s 36A(3) and (6) of the Act. The Director of Public Prosecutions must prove to the satisfaction of the Court that the relevant criteria are established and a respondent is accorded the opportunity to argue that the relevant criteria have not been established. It is not unusual for legislation to provide that, if in proceedings before a court specified matters are established, a particular consequence will follow or a particular order

will be made.[86] It is also the case that in general, a legislature can select whatever factum it wishes as the trigger for a particular legislative consequence.[87] Neither the ease of proof of the specified criteria nor the failure to impose a judicial discretion between the establishment of the criteria and the making of the order are problematic. Section 36A of the *Misuse of Drugs Act* and s 94(1) of the *Criminal Property Forfeiture Act* are not to be stigmatised as an attempt to direct the Supreme Court as to the manner and outcome of the exercise of its jurisdiction on those grounds alone. The specified criteria about which multiple offenders fall within the class of offenders whose property may be forfeited to the Territory are substantive criteria. A person must have been found guilty of multiple drug offences of a certain type. He or she must be a recidivist offender of a certain category. The judicial process is a reality. The Director of Public Prosecutions must satisfy the requirements of s 36A(3) of the *Misuse of Drugs Act*. The Court must decide if the criteria have been proven on the balance of probabilities. The application for a declaration that a person is a drug trafficker is a civil proceeding which is primarily brought for remedial purposes. The fact that the Director of Public Prosecutions may consider whether a respondent has sufficient assets to make the application worthwhile does not impact upon the function that is performed by the Court. Such considerations are part and parcel of all decisions about whether or not to commence a civil proceeding. The provisions are equally

[86] *DPP v George* (2008) 102 SASR 246 per Doyle CJ at [112], [113].
[87] *South Australia v Totani* (2010) 242 CLR 1 per French CJ at par [71]; *Baker v The Queen* (2004) 223 CLR 513 per McHugh J at par [43].

applicable to all citizens. The property which may be forfeited to the Northern Territory is property which is subject to a restraining order and the Court has a wide discretion whether to grant or refuse a restraining order. The Court may refuse to grant a restraining order for the reasons specified by Mildren J in *DPP v Dickfoss.*[88] A restraining order may be confined to property of a value that is proportional to the likely cost of deterring, detecting and dealing with the criminal activities of the particular offender who is the respondent to the application for a restraining order. An offender who is the subject of an application for a declaration that the offender is a drug trafficker is not made subject to another criminal proceeding or another criminal penalty. The overlapping property forfeiture scheme provided by the two Acts which are applicable in this case does not derogate from the previous convictions of an offender. Rather, the scheme provides for a fresh civil claim which is not brought by the Crown but by the Director of Public Prosecutions and is contingent upon the proof of the offender's prior convictions. While an additional civil penalty is imposed on a respondent if a declaration is made, such penalties have not been held to infringe the rule against double punishment. To date, such provisions have not been found to be incompatible with the character and status of the Supreme Courts of the States and Territories of Australia being repositories of federal jurisdiction. The overlapping statutory scheme which is the subject of this case is distinguishable from the legislation that was the subject of the decisions of

[88] (2011) 28 NTLR 71 at [91] to [95].

the High Court in *South Australia v Totani*[89] and *Wainohu v New South Wales*[90].

[107] I accept the submissions of the Solicitor General that the process provided by s 36A of the *Misuse of Drugs Act* and the relevant provisions of the *Criminal Property Forfeiture Act* are not repugnant in a fundamental degree to the judicial process as understood and conducted throughout Australia. The overlapping legislative scheme established by the two Acts contains sufficient objective and reasonable safeguards for the property of persons affected by it. In particular:

1. Hearings are conducted in public in accordance with the ordinary judicial process.

2. With certain exceptions the onus of proof is on the applicant.

3. The rules of evidence apply.

4. The duty to make a declaration that a person is a drug trafficker is conditioned upon specified criteria.

5. The outcome of each case is to be determined on the merits.

6. The Court retains its inherent powers to ensure fairness and prevent injustice in the conduct of its proceedings.

7. There is a right of appeal.

[108] While the making of a restraining order and a declaration that a person is a drug trafficker may operate harshly on a person who falls within the purview

[89] (2010) 242 CLR 1.
[90] (2011) 243 CLR 181.

of the overlapping legislative scheme, such harshness is not a warrant for this Court to refuse to apply the relevant provisions of the two Acts.

Subsection 52(3) of the Criminal Property Forfeiture Act

[109] During the course of the hearing, Senior Counsel for Mr Emmerson made a submission that as a result of the operation of s 52(3) of the *Criminal Property Forfeiture Act* the restraining order made by Mildren J on 11 April 2011 ceased to have effect on 22 September 2011 when the criminal proceedings relied on to support the restraining order were finally determined. Accordingly, it was submitted that there was no property which was subject to a restraining order within the meaning of s 94(1) of the *Criminal Property Forfeiture Act* and therefore any declaration that Mr Emmerson was a drug trafficker would be futile as there was no property on which s 94(1) could operate.

[110] Subsection 52(3) states:

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

[111] Mr Wyvill said that s 52(3) of the *Criminal Property Forfeiture Act* should be interpreted so that the phrase "but the person is not declared under s 36A

of the *Misuse of Drugs Act* to be a drug trafficker" is satisfied if the declaration has not been made at the time "the charge is finally determined". Subsection 52(3)(b) of the *Criminal Property Forfeiture Act* amounted to a temporal limitation on a restraining order made under s 44(1) of the *Criminal Property Forfeiture Act*. Rather than follow Western Australia and fix a limitation period of six months from the date of conviction for making an application for a declaration that a person was a drug trafficker, the Northern Territory Parliament has required applications for declarations to be made and determined before the prosecution in relation to the s 36A(3)(a) of the *Misuse of Drugs Act* offence has been finally determined. If a declaration under s 36A of the *Misuse of Drugs Act* was not made before the relevant triggering charge was finally determined then the restraining order expires and is no longer of any force or effect.

[112] He relied on the following points in support of the above interpretation of s 52(3) of the *Criminal Property Forfeiture Act*.

1. The text of the subsection, and the use of the present tense in both s 52(3)(a) and s 52(3)(b) of the *Criminal Property Forfeiture Act*.

2. If the subsection is interpreted otherwise restraining orders will have effect for an open ended period, which is contrary to the purpose of s 52 of the *Criminal Property Forfeiture Act*. The purpose of s 52 of the Act is to fix precise periods after which a restraining order ceases to have effect.

3. The text of s 44(1) of the *Criminal Property Forfeiture Act* which links the right to seek a restraining order to the criminal proceedings for a charge which, if a finding of guilt is made,

will provide a basis for making the declaration under s 36A of the *Misuse of Drugs Act*. Subsection 44(1) of the *Criminal Property Forfeiture Act* does not link this right to the prospect that a declaration under s 36A of the *Misuse of Drugs Act* may be made per se, which may happen at any time. When the charge which may satisfy s 36A(3)(a) of the *Misuse of Drugs Act* has been "finally determined", even if as part of the process there is a finding of guilt, the Director of Public Prosecutions has no right under s 44(1) of the Criminal Property Forfeiture Act to apply for a restraining order to freeze property which belongs to the offender even if he intends applying shortly thereafter for a declaration under s 36A.

4. Given the very straightforward nature of an application for a declaration that a person is a drug trafficker, the requirement, that the declaration be made once (or as soon as) a finding of guilt is made in relation to the s 36A(3)(a) offence, is a convenient and appropriate requirement as it ensures finality of all of the consequences of the offending thereby respecting the principles in relation to double jeopardy.

5. This interpretation of s 52(3) is reinforced by s 9 of the *Criminal Property Forfeiture Act*. The latter section permits a declaration that a person is a drug trafficker to be made in relation to a deceased person who dies before the s 36A(3)(a) charged is finally determined but not if the person dies after the charge has been finally determined.

6. As the legislation is draconian legislation then, where the words permit, the legislation ought to be interpreted in favour of the respondent. A person's property should not be forfeited unless he falls plainly and unmistakably within the provisions of the overlapping statutory scheme: *Murphy v Farmer.*[91]

7. The preferable interpretation is to read s 52(3) of the *Criminal Property Forfeiture Act* in such a way that there is no right to forfeiture unless a declaration that a person is a drug trafficker is made before or at the same time as the s 36A(3)(a) proceedings are finally determined.

[91] (1988) 165 CLR 19 at 29 approving *United States v Lacher* (1890) 134 US 624 at 628.

8. This interpretation of s 52(3) of the *Criminal Property Forfeiture Act* does not render nugatory the reference to "at any time" in s 36A(2) of the *Misuse of Drugs Act*. The interpretation still permits applications for a declaration with the object of recovering property from third parties which has been "given away" by the drug trafficker under s 94(1)(b) of the *Criminal Property Forfeiture Act*. This reflects a sensible division between declaration proceedings for the object of recovering property owned or effectively controlled by the offender (which must be completed as part of the criminal proceedings in relation to the s 36A(3)(a) offence) and declaration proceedings for the object of recovering property given tom third parties which do not need to be subject of a restraining order to be liable to forfeiture and which may be commenced at any time.

[113] As I have stated, I rejected Mr Wyvill's submissions on 21 February 2012. My reasons for doing so were as follows. The text of s 52(3) of the *Criminal Property Forfeiture Act* does not permit the interpretation contended for by the respondent. There is no temporal limitation attached to s 52(3) and there is nothing in the wording of the subsection to require that the declaration must be sought and made contemporaneously with the final disposition of the s 36A(3)(a) of the *Misuse of Drugs Act* charge. Subsection 52(3) *Criminal Property Forfeiture* Act does not stipulate a limitation period. The subsection simply provides that a restraining order issued under s 44(1)(a) of the *Criminal Property Forfeiture Act* will cease to have effect in certain circumstances. Those circumstances are (1) if a s 36A(3)(a) charge is determined but the person is not declared to be a drug trafficker; and (2) if the s 36A(3)(a) charge is disposed of without being determined. Subsection 52(3)(a) caters for situations where, notwithstanding the determination of the charge, a declaration that a person

is a drug trafficker is not made. The kind of scenarios which ordinarily fall within these provisions include a finding of not guilty, or a failure by the Director of Public Prosecutions to prove the other relevant criteria, or a discontinuance or withdrawal or dismissal of the application for a declaration. If a person is found not guilty of the s 36A(3)(a) charge, then the person cannot be declared to be a drug trafficker as one of the necessary factums for such a declaration, is not established. As a restraining order is contingent upon the possibility of a declaration that a person is a drug trafficker being made by the Court, the restraining order must cease if a declaration cannot be made.

[114] Subsection 52(3) is to be construed in the context of s 51 of the *Criminal Property Forfeiture Act* and s 36A of the *Misuse of Drugs Act*. Neither of those sections is expressed to be subject to s 52(3) of the *Criminal Property Forfeiture Act*. Section 51 provides as follows. A restraining order under s 44 of the *Criminal Property Forfeiture Act* has effect for the period set by the Court when the order is made. The Court that made the restraining order may extend the duration of the order for a further period on as many occasions as the court sees fit. Subsection 36A(2) *Misuse of Drugs Act* states that an application for a declaration that a person is a drug trafficker may be made at the time of the hearing for an offence or at any other time. The purpose of s 52(3) of the *Criminal Property Forfeiture Act* is simply to provide for the cessation of a restraining order in circumstances where a declaration that a person is a drug trafficker is not made by the Court

without the need for any further order. It would cause great inconvenience in sentencing proceedings if the Court was required to interpose and deal with a civil application after a finding of guilt but before the pronouncement of a sentence. If there was any undue delay by the Director of Public Prosecutions in filing an application for a declaration the position of the respondent may be protected by bringing an application to strike out the restraining order for want of prosecution or by staying the application for a declaration.

Conclusion

[115] In the circumstances, I make the following orders. The application to set aside the restraining order is dismissed. The respondent's amended objections under s 59 of the *Criminal Property Forfeiture Act* are dismissed. I am satisfied that the matters specified in s 36A(3) of the *Misuse of Drugs Act* are proven in this case and I declare that Reginald William Emmerson is a drug trafficker.

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