IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D5 of 2013

BETWEEN:

**Attorney-General for the Northern Territory**
First Appellant

**The Northern Territory of Australia**
Second Appellant

and

**Reginald William Emmerson**
First Respondent

**Director of Public Prosecutions**
Second Respondent



# SUBMISSIONS OF THE ATTORNEY-GENERAL FOR NEW SOUTH WALES (INTERVENING)

## Part 1: Publication of Submissions

1. These submissions are suitable for publication on the internet.

## Part II: Basis of Intervention

2. The Attorney-General for New South Wales intervenes in this proceeding pursuant to s. 78B of the Judiciary Act 1903 (Cth) in support of the Appellants.

## Part III: Why Leave to Intervene Should be Granted

3. Not applicable.

## Part IV: Constitutional and Legislative Provisions

4. The Appellants have referred to the applicable constitutional and legislative provisions. The Attorney-General for New South Wales also relies on the provisions of Division 2 of Part 4 of the Criminal Property Forfeiture Act 2002 (NT), set out in the appendix to these submissions.

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## Part V: Argument

Summary of argument

5. The question in this case is whether the Court of Appeal of the Northern Territory erred in Emmerson v Director of Public Prosecutions (2013) 33 NTLR 1 in holding that the legislative scheme comprising s 36A of the Misuse of Drugs Act 1990 (NT) ("Drugs Act") and s 94 of the Criminal Property Forfeiture Act 2002 (NT) ("Forfeiture Act") was invalid by reason of the principle in Kable v Director of Public Prosecutions (NSW) 189 CLR 51 ("Kable"). It is accepted that the Kable principle applies equally in Territory courts: Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337 at 363 [81]; North Australian Aboriginal Legal Aid Service Inc v Bradley (2004) 218 CLR 146 at 163 [29].

6. The Attorney-General for New South Wales submits:

(a) the Kable principle applies only to legislation of an extraordinary character which substantially impairs the institutional integrity of the Court including by fundamentally distorting the judicial process or substantially undermining the independence of the court;

(b) in determining the application of the Kable principle, it is necessary to consider the operation of the process mandated by the legislative scheme;

(c) the substance of that process is that forfeiture is effected by legislation rather than by judicial order. The Court's involvement in the forfeiture is limited to making orders regarding two of the constituent conditions leading to the trigger for legislative forfeiture, being the making of a "restraining order" and the making of a "drug trafficker" declaration;

(d) in making either of these orders, it cannot be said that the Court has been required to act in a way that compromises its institutional integrity, nor can it be said that the Court has been a mere instrument of the executive;

(e) accordingly, the legislative scheme is valid.

The Kable principle

7. The principle which the High Court developed in Kable arises out of the integrated Australian court system established under Ch III of the Constitution, pursuant to which State courts are vested with federal jurisdiction (in particular, from ss 71, 73(ii) and 77(iii)). See Kable at 100-103 per Gaudron J, at 109-115 per McHugh J and 140-143 per Gummow J. A consequence of the integrated Australian court system is that a State or Territory body that is maintained as a court (and therefore capable of being vested with federal jurisdiction) must be a suitable repository for the investment of federal jurisdiction. See Forge v Australian Securities and Investment Commission (2006) 228 CLR 45 at [40] per Gleeson CJ; Fardon v Attorney-General (Qld) (2004) 223 CLR 575 at 591 [15] per Gleeson CJ, 595 [32] per McHugh J, 627 [137] per Kirby J; Baker v The Queen (2004) 223 CLR 513 at 519 [5] per Gleeson CJ. This requirement of suitability entails a limit on the functions with which State or Territory courts can be invested. That limit is defined by reference to the institutional integrity of a State or Territory court, which cannot be impaired to a degree that is repugnant to or incompatible with the exercise or potential exercise by that court of federal jurisdiction: see eg Assistant Commissioner Condon v Pompano Pty Ltd (2013) 87 ALJR 458 at 487 [123] ("Pompano"). Relevantly, "the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes": Pompano at 488 [124] per Hayne, Crennan, Kiefel and Bell JJ, quoting Fardon at 618 [104] per Gummow J.

8. As both Toohey J and Gummow J separately stated in Kable, the legislation there at issue was of an "extraordinary character" (at 98 and 134 respectively; see also at 121 per McHugh J). See also Fardon v Attorney-General (Qld) (2004) 223 CLR 575 at 591 [16] per Gleeson CJ, 595 [33] per McHugh J. In Fardon at 601 [43], McHugh J said that "Kable is a decision of very limited application."

9. The legislation in Kable was held to distort the judicial process to a fundamental degree. It was, in the words of Gaudron J, "the antithesis of the judicial process" (at 106). Justice McHugh found that the legislation "expressly removes the

ordinary protections inherent in the judicial process" (at 122). See also the reasons of Toohey J at 98; Gummow J at 134.

10. The legislation also substantially undermined the institutional independence of the Supreme Court. Justice McHugh said that the legislation made the Supreme Court the "instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process that is far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person" (at 122). To like effect, Gummow J found that the laws sapped the appearance of "institutional impartiality" (at 133) and that the judiciary was apt to be seen as "but an arm of the executive which implements the will of the legislature" (at 134). See also Forge v Australian Securities and Investment Commission (2006) 228 CLR 45 at 76 [63] per Gummow, Hayne and Crennan JJ.

11. The Kable principle was applied to invalidate the legislation at issue in International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319 ("International Financial Trust"). A majority found that the legislation involved the Supreme Court of New South Wales in an activity that was repugnant in a fundamental degree to the judicial process. As French CJ described it (at 354-355 [55]):

> To require a court, as s 10 does, not only to receive an ex parte application, but also to hear and determine it ex parte, if the Executive so desires, is to direct the court as to the manner in which it exercises jurisdiction and in so doing to deprive the court of an important characteristic of judicial power. That is the power to ensure, so far as practicable, fairness between the parties.

12. Justices Gummow and Bell concluded that the legislation "conscripted" the Court for a process "which requires in substance the mandatory ex parte sequestration of property upon suspicion of wrong doing, for an indeterminate period, with no curial enforcement of the duty of full disclosure on ex parte applications" (at 366 [97]).

13. The Kable principle was also engaged in South Australia v Totani (2010) 242 CLR 1 ("Totani") to invalidate s 14(1) of the Serious and Organised Crime (Control) Act 2008 (SA). As noted by the plurality in TCL Air Conditioner v Judges of the Federal Court (2013) 87 ALJR 410 at 431-432 [105], both Kable and Totani were situations where State courts were enlisted by the executive to perform a task which did not engage the court's independent judicial power to quell controversies. In Totani, s 14(1) directed the Court to make a control order against a person if satisfied of one matter, namely whether the person was a member of a "declared organisation". It was the responsibility of the Attorney General under s 10(1) to declare the organisation. The declaration of the Attorney General rested upon findings that members of the organisation had committed criminal offences in respect of which they may never have been charged or convicted. Where the Court made a control order, it could then make numerous orders pursuant to s 14(6) including prohibiting a "controlled" person from associating with certain people, going to certain places and engaging in certain activities. Breach of these prohibitions was a criminal offence. French CJ found that the curial process was in substance directed by the executive such that the Court lacked "decisional independence" (at 48 [70], 50 [75], 52-53 [82]-[83]). Gummow J found that s 14(1) enlisted the court to effectively act at the behest of the Attorney General (at 67 [149], see also at 66 [142]). Justice Hayne also referred to the Court being "enlisted" by the executive (at 88 [226]). Justices Crennan and Bell found that the adjudicative process under s 14(1) was so confined and so dependent upon the executive's declaration that it was impermissible as it undermined independent curial determination (at 160 [436]). Similarly, Kiefel J found that s 14(1) "involves the enlistment of the Court to give effect to legislative and executive policy": at 173 [481].

14. The Kable principle also invalidated the Crimes (Criminal Organisations Control) Act 2009 (NSW) in Wainohu v New South Wales (2011) 243 CLR 181 ("Wainohu"). However, the circumstances in Wainohu are far removed from the present case. The vice in that case was to vest powers in a judge of the Supreme Court acting in an administrative rather than a judicial capacity (called an "eligible judge") which substantially undermined the institutional integrity of the Supreme

Court, chiefly because that eligible judge was under no obligation to give reasons in determining that an organisation was a "declared organisation".

15. The legislation in this case does not bear the extraordinary features of the impugned laws in Kable, International Finance Trust, Totani or Wainohu. It neither impermissibly distorts the judicial process nor makes the judiciary a mere instrument of the executive.

The operation of the legislative scheme

16. To determine whether the Kable principle invalidates legislation that invests power in a court, it is necessary to consider the substance of the process (International Finance Trust at 366 [97] per Gummow and Bell JJ; Totani at 49 [71] per French CJ) or the practical operation of the law (Totani at 50 [74] per French CJ and at 63 [134] and 65 [138] per Gummow J). Whether the legislative scheme is invalid depends upon the "particular combination of features" in the process: Totani at 82 [204] per Hayne J.

17. The majority in the Court of Appeal erred in failing to properly identify the substance and practical operation of the legislative scheme for forfeiting the property of declared "drug traffickers" to the Territory, and in failing to take due account of the particular combination of features of the legislative scheme. In particular, the Court of Appeal failed to consider an integral part of that scheme, which was the Court's role in making restraining orders. The substance of the legislative scheme is discussed below.

18. The Forfeiture Act commenced on 1 June 2003: see s 2 and Gazette G21, 28 May 2003, p 2. That same day, s 36A of the Drugs Act, which was introduced by s 4 of the Criminal Procedure Forfeiture (Consequential Amendments) Act 2002 (NT), took effect. Section 36A makes provision for the Court to declare a person to be a "drug trafficker".

19. To adopt the nomenclature of French CJ in International Finance Trust (at 345 [28]), the Forfeiture Act is a civil asset forfeiture statute. The Forfeiture Act operates to forfeit certain property associated with people involved or taken to be involved in criminal activities to the Territory in three types of situations:

(a) first, by s 94(1) all property subject to a restraining order that is owned or effectively controlled by a person declared by the Court to be a "drug trafficker" pursuant to s 36A of the Drugs Act is forfeited. This includes persons who are taken to be "drug traffickers" pursuant to s 8 of the Drugs Act;

(b) secondly, at the application of either a police officer or the DPP, the Court can order the forfeiture of "crime-used property" or "crime-derived property" under ss 96 or 97 respectively. The Court "must" make the order if it is satisfied on the civil standard that the property is either "crime used" or "crime-derived" (as relevant); and

(c) thirdly, at the application of the DPP, the Court has a discretion to make a forfeiture order with respect to property that is subject to a restraining order and which is subject to a "criminal benefit declaration" under s 75 (s 99), an "unexplained wealth declaration" under s 71 (s 100) or a "crime-used property substitution declaration" under s 81 (s 101).

20. In all cases, a necessary pre-requisite to forfeiture is that the Court has previously made a "restraining order" over the subject property. In contrast to the second and third types of forfeiture, forfeiture under s 94(1) is ultimately a result of legislative action rather than judicial action. Thus, the Court does not order the forfeiture. However, under s 94(3), the DPP may apply to the Supreme Court for a declaration that the property has been forfeited. By s 94(4), the Court must make the declaration of forfeiture if it finds that the property specified in the application has been forfeited by operation of s 94. This declaration occurs after the fact of forfeiture. In making such a declaration, the Court is merely making a determination of rights and liabilities, something that lies at the heart of the judicial power: Totani at 86 [220] per Hayne J; TCL Air Conditioner v Judges of the Federal Court (2013) 87 ALJR 410 at 419 [27] per French CJ and Gageler J.

21. There are three necessary conditions to trigger a forfeiture under s 94(1) of the Drugs Act:

(a) first, the property must be subject to a "restraining order";

(b) secondly, the property must either be owned or effectively controlled by the person or have been given away by that person; and

(c) thirdly, that person must be declared a "drug trafficker" by the Court pursuant to s 36A of the Drugs Act.

Each of these conditions is discussed in more detail below.

10 Restraining order

22. Provision is made for the imposition of restraining orders by the courts in Division 2 (ss 41-54) of Part 4 of the Forfeiture Act. Section 49(1) provides that a restraining order has two consequences. First, the property generally cannot be dealt with (the concept of "dealing with" the property is given an extended definition in s 56). Secondly, it entitles an application to be made that some or all of the property the subject of the restraining order be forfeited (although clearly no application is needed if the forfeiture occurs under s 94(1) since no judicial action is required to effect the forfeiture).

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23. Relevantly, under s 44(1)(a) of the Forfeiture Act the Supreme Court has a discretion whether to make a restraining order in relation to the property of a person named in an application if the person has been charged or is intended within 21 days of the application to be charged with an offence that, if it resulted in conviction, could lead to the person being declared a "drug trafficker" under s 36A of the Drugs Act. As to the existence of the discretion, see Burnett v Director of Public Prosecutions (2007) 21 NTLR 39 at 76 [73]; Director of Public Prosecutions v Dickfoss (2011) 28 NTLR 71 at [91] and Director of Public Prosecutions v Atkinson [2011] NTSC 73 at [7]-[8].

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24. The Court also has a discretion as to what property of the person is to be restrained (s 44(2)(a)). While it is the case that potentially all the property owned or effectively controlled by the putative "drug trafficker" can be subjected to a restraining order, the restraining order can apply to "all or any property". It may be expected that the Court would exercise its discretion with the objects of s 3 of the Forfeiture Act firmly in mind: cf Wotton v Queensland (2002) 246 CLR 1 at 9 [9], where it was stated that discretionary powers conferred in broad terms "must

be understood with regard to the subject matter, scope and purpose of the statute". Pursuant to s 3, the 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 activities.

25. The duration of the restraining order made under s 44 is in the Court's discretion under s 51(1), and the order may be extended upon application: s 51(2). A restraining order made under s 44(1)(a) ceases to have effect if within 21 days after the date of the order, the person has not been charged with the offence indicated in the application (s 52(2)) or where the charge is determined without the person being declared to be a drug dealer (s 52(3)(a)) or the charge is disposed of without being determined: s 52(3)(b).

26. Proceedings for a restraining order are civil in nature and questions of fact must be decided on the balance of probabilities (s 136(1) and (2)(d) of the Forfeiture Act). The rules of evidence applicable to civil proceedings apply (s 136(b)) save to the extent excluded by ss 139 to 145. The proceeding may, but not must, be heard *ex parte* (s 41(3)). As the Court of Appeal of the Northern Territory held in Burnett v Director of Public Prosecutions (2007) 21 NTLR 39 at 76 [73]; "[i]f an application is made to proceed *ex parte*, the court is given an unfettered discretion in determining whether to accede to the application".

27. The court hearing the application has a discretion to close the court, limit the persons permitted to the present in court or make a non-publication order regarding some or the whole of the proceedings (s 42). The court would presumably exercise that discretion in accordance with the principle of open justice: Hogan v Hinch (2011) 243 CLR 506 at 535 [27] per French CJ; see also at 541-542 [46].

28. Pursuant to s 59 of the Forfeiture Act, a person may object to a restraining order. In addition, a restraining order made under s 44(1)(a) may be set aside under s 65(1) where the court finds that it is more likely than not that the putative "drug trafficker" does not own or effectively control the property and has not at any time given it away.

29. A right of appeal lies from the decision to make a restraining order, although, as an interlocutory decision, leave is required: ss 51 and 53(1) of the Supreme Court Act 1979 (NT). Additionally, there is facility to seek judicial review of the restraining order. There is no privative clause.

Ownership or effective control of property

30. According to s 7(1) of the Forfeiture Act, a person has the effective control of property where, although they do not hold the legal estate in the property, the property is ultimately held for their benefit or is subject to their direct or indirect control. Whether a person has ownership or effective control of property or has given that property away is a question of fact for the Court to determine when deciding whether to make a restraining order.

Declared "drug trafficker"

31. Section 36A(1) of the Drugs Act authorises the DPP to apply to the Supreme Court for a declaration that a person is a "drug trafficker". By s 36A(2), that application may be made at the time of the hearing of an offence or at any other time. Section 36A(3) provides that the Court "must" declare the person to be a drug trafficker if the criteria in both sub-paragraph (a) and (b) are satisfied.

32. Section 36A takes its place in a scheme of declarations that the Court may be called upon to make in order to enliven the forfeiture provisions in the Forfeiture Act. Those other declarations are found in Part 6 (ss 67-86) of the Forfeiture Act, being unexplained wealth declarations, criminal benefit declarations and crime-used property substitution declarations.

33. It is not correct to suggest that s 36A(3) of the Drugs Act dictates a result to the Court and altogether takes away from it the power of fact-finding in relation to whether a person meets the statutory designation "drug trafficker". The Court must have placed before it evidence upon which it can make required findings of fact. Only if those findings are made can the Court make the declaration. Those required findings are:

(a) that a person has been found guilty in respect of what may be called the principal offence in s 36A(3)(a). Thus the Court is required to base its findings on previous judicial decisions;

(b) the date upon which the principal offence occurred;

(c) that either on two or more different occasions before the day on which the principal offence was committed or on one other occasion but in relation to two separate charges, the person has been found guilty of offences "corresponding" to offences identified in s 36A(6);

(d) the date upon which those other findings of guilt were made;

(e) in some circumstances where the person has served a term of imprisonment, the length of that imprisonment in order to determine by how long the 10 year period of time in s 36A(3)(b) is to be extended: s 36A(5).

34. So far as the Court is required to make a finding as to whether an offence "corresponds" to one indentified in s 36A(6), the words "correspond" and "corresponding" are not defined in the Drugs Act or in s 7 of the Interpretation Act (NT). So the Court will need to determine a question of construction. The Shorter Oxford English Dictionary supplies a range of meanings for the word "correspond": "1. Be congruous or in harmony (with), be agreeable or conformable (to). 2 Have a similar or analogous character, form or function". As noted by Asche CJ in Samarkos v Commissioner for Corporate Affairs (1988) 52 NTR 1, "the range is from exact likeness to broad similarity".

35. Nothing in the Drugs Act excludes the rules of evidence in an application for a declaration under s 36A. The burden remains the civil burden. The application is not heard *ex parte*. The usual rights of appeal and review attend the making of the declaration: see Supreme Court Act (NT), s 51. The Supreme Court retains its inherent powers to prevent an abuse of process and, more generally, its "capacity to act fairly and impartially": Pompano at 495 [167].

36. Simply because the ambit of the factual inquiry the Court is called upon to undertake in the course of the application under s 36A is narrow does not mean the

Court is not involved in a genuine fact-finding function. Further, a law which provides that there is a duty to exercise the power if the Court decides that the conditions attached to the power are satisfied is "not to be stigmatised on that ground alone as an attempt to direct the Supreme Court as to the outcome of the exercise of its jurisdiction": International Finance Trust at 360 [77] per Gummow and Bell JJ; see also at 352 [49] per French CJ; Totani at 48-49 [71] per French CJ.

37. It is not correct to characterise s 36A of the Drugs Act as requiring the Court to make a "declaration of fact" that does not correlate with the reality of the situation, as Barr J did (at 37 [106]) below. The Court is called upon to determine whether a person falls within the statutory designation "drug trafficker" on the basis that he or she meets the statutory criteria for such a designation: see Emmerson at 17 [34] per Riley CJ. That statutory designation is then a factum that triggers certain consequences under s 94 of the Forfeiture Act. The legislature can "select whatever factum it wishes as the 'trigger' of a particular legislative consequence": Baker v The Queen (2004) 223 CLR 513 at 532 [43] per McHugh, Gummow, Hayne and Heydon JJ; Totani at 49 [71] per French CJ; see also Silbert v Director of Public Prosecutions (WA) (2004) 217 CLR 181 at 186-187 [12]-[13] (noting that conviction operated as condemnation of goods under the forfeiture provisions at issue in Burton v Honan (1952) 86 CLR 169), 195 [43]-[44].

Conclusions on operation of the process mandated by the legislative scheme

38. In the result, the substance of the process created by the legislative scheme may be characterised as follows. The legal consequence of forfeiture is imposed by statute rather than by judicial order. As such, it cannot be said that forfeiture itself substantially impairs the institutional integrity of the court. Further, the process leading to forfeiture, so far as it involves the Court, does not substantially impair the institutional integrity of the Court. The manner in which the Court deals with an application under s 36A of the Drugs Act is not in any respect dictated by the executive: cf International Finance Trust at 355 [56] per French CJ.

39. Forfeiture follows under s 94 of the Forfeiture Act if certain conditions are satisfied. The Court has a role in contributing to the formation of two of those conditions. First, it is for the Court to declare a person to be a "drug trafficker".

Secondly, it is for the Court to impose a "restraining order" before property is liable to forfeiture. In making either of these orders, it cannot be said that the Court has been required to act in a way that is incompatible with the judicial process; nor can it be said that the Court has been a mere instrument of the executive.

40. For the reasons discussed at paragraphs [31] to [37] in relation to the "drug trafficker declaration" and paragraphs [22] to [29] above in relation to the restraining order, unlike the situation in both Kable and International Finance Trust (and bearing in mind the plurality's caution in Pompano at 490-491 [137] regarding the use of explanations in other cases about other legislation when applying the Kable doctrine), there is nothing in this case to suggest the usual incidents of the curial process were not available in making those orders. In particular, it cannot be said that the Court was required to act in a way that was incompatible with the judicial process.

41. The present situation may be contrasted with the legislation at issue in Totani. In that case, French CJ emphasised the "dominance of the executive act" in declaring an organisation (at 52 [81]) and found that s 14(1) was a "substantial recruitment of the judicial function of the Magistrate's Court to an essentially executive process" (at 52 [82]). In this case, it cannot be said that there is an executive "dominance" in the process, or in the words of Gummow J in Totani at 62 [130] that an executive decision was a "significant integer for the decision of the Court" (see also at 65 [140] and 67 [149]).

42. While it is the case that the DPP applies for a declaration that a person is a "drug trafficker", it remains for the court to engage in the fact finding process necessary to reach that conclusion. And, critically, those findings of fact do not turn on a prior executive decision as they did in Totani, but rather, on the prior exercise of judicial power, which resulted in a conviction: see also the discussion of prosecutorial choice in relation to the Commonwealth statute at issue in Magaming v R (2013) 302 ALR 461 at 469-470 [38]-[41] per French CJ, Hayne, Crennan, Kiefel and Bell JJ. While it was the anterior decision of the executive branch (protected by a privative clause) which drove the curial process in Totani,

in the present case it is the anterior decisions of the judicial branch which form essential integers of the process.

43. Further, it cannot be suggested the Supreme Court has been co-opted into a process of imposing "double punishment": cf Emmerson at 34 [94] per Kelly J, 36 [102] per Barr J. It is clear that the objective of forfeiture, and thus the objectives of the antecedent restraining order and "drug trafficker" declaration, is to prevent the unjust enrichment of those involved in criminal activities (s 3, Forfeiture Act) and compensate the Territory for the costs of deterring, detecting and dealing with criminal activities (s 10(2), Forfeiture Act). These are not punitive purposes.

44. Forfeiture is just one example of a long list of legislative consequences that can follow from the fact of conviction. For example, under s 206B of the Corporations Act 2001 (Cth), a person becomes disqualified from managing corporations upon conviction of certain offences. Under s 18 of the Child Protection (Working with Children Act) 2012 (NSW), a person is disqualified from obtaining a working with children check if convicted of certain offences. Upon conviction for a prescribed content of alcohol offence, licence disqualification follows automatically (Road Transport Act 2013 (NSW) s 205(2)). Such provisions do not involve the imposition of additional criminal penalties.

45. Once the substance of the process mandated by the legislative scheme is considered, the contention that the combined effect of s 94 of the Forfeiture Act and s 36A of the Drugs Act is to compel the court to declare a state of facts which might not be true and to impose substantial double punishment on offences selected at the discretion of the executive cannot stand.

**Part VI: Estimate of Time for Oral Argument**

46. Approximately 15 minutes will likely be required for oral argument.

Dated: 22 November 2013

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## LEGISLATIVE APPENDIX

Criminal Property Forfeiture Act 2002 (NT) (electronic compilation as in force at 1 January 2013)

# Part 4 Ensuring property remains available for forfeiture

## Division 2 Restraining orders in relation to property

### 41 Applications for restraining orders

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

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

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

### 42 Proceedings for restraining orders

In proceedings for a restraining order, the court that is hearing the application under section 41 may do any or all of the following:

(a) order that the whole or any part of the proceedings is to be heard in closed court;

(b) order that only persons or classes of persons specified by the court may be present during the whole or any part of the proceedings;

(c) make an order prohibiting the publication of a report of the whole or any part of the proceedings or of any information derived from the proceedings.

### 43 Restraining order in relation to specified property

(1) Subject to section 135, the Local Court may, on application by a police officer or the DPP, make a restraining order in relation to property specified in the application if there are reasonable grounds for suspecting that the property is crime-used or crime-derived.

(2) The Supreme Court may, on application by the DPP, make a restraining order in relation to property specified in the application in any of the following cases:

(a) if there are reasonable grounds for suspecting that the property is crime-used or crime-derived;

(b) if the property is a subject of an examination order, whether or not the person to whom the examination order is directed owns or

effectively controls the property;

(c) if the property is funds held in an account that is a subject of a monitoring order;

(d) if the property is funds held in an account to which a suspension order applies.

(3) Subsection (2) also applies to property where the court is advised that an application has been made, or it is intended that within 21 days after the application for the restraining order an application will be made, for the examination order, monitoring order or suspension order (as the case may be).

**44 Restraining orders in relation to property of named persons**

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

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

(b) an application has been made, or it is intended that within 21 days after the application for the restraining order an application will be made, for one or more of the following in relation to the person:

(i) a production order;

(ii) an unexplained wealth declaration;

(iii) a criminal benefit declaration;

(iv) a crime-used property substitution declaration; or

(c) an order or declaration mentioned in paragraph (b) has been made in relation to the person.

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

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

(b) all property acquired:

(i) by the person; or

(ii) by another person at the request or direction of the person

named in the application for the restraining order;

after the restraining order is issued.

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

**45 Restraining order to specify grounds**

(1) If an application is made under section 41 for a restraining order, the court that is hearing the application must:

(a) consider each matter that is alleged by the applicant, either in the application or in the course of the proceedings, as a ground for making the order; and

(b) if the order is made – set out in the order each ground that the court finds is a ground on which the order may be made.

(2) If the court that is hearing an application under section 41 is satisfied that the release of information contained in an affidavit in support of the application may materially prejudice an ongoing investigation, the court may order that the information is not to be provided when a copy of the restraining order is served on any person.

**46 Scope of restraining order**

(1) In a restraining order, the court that makes the order may do any or all of the following:

(a) direct that any income or other property derived from the property while the order is in force is to be treated as part of the property;

(b) if the property is moveable – direct that the property is not to be moved except in accordance with the order;

(c) appoint the Public Trustee or another person to manage the property while the order is in force;

(d) give any other directions necessary to provide for the security and management of the property while the order is in force;

(e) provide for meeting the reasonable living and business expenses of the owner of the property.

(2) In subsection (1)(e), reasonable living and business expenses does not include legal expenses mentioned in section 154.

**47 Service of restraining order**

(1) As soon as practicable after a restraining order is made, the applicant in relation to the order must arrange for a copy of the order and a notice that complies with subsection (5) to be served personally on each of the following persons:

(a) if property that is subject to the order was taken from a person or is in the custody of a person – that person;

(b) any person known to the applicant at the time the order was made who has, may have or claims to have an interest in the property subject to the order.

(2) If property subject to the order is registrable under an Act other than the *Land Title Act*, the applicant must notify the appropriate registrar of the issue of the notice.

(3) If, as a result of a statutory declaration made in accordance with section 48 by a person who was served under subsection (1) with a copy of the restraining order, the applicant becomes aware of another person who has, may have or claims to have an interest in the property subject to the order, the applicant must arrange for personal service of a copy of the order on the other person as soon as practicable.

(4) Subsections (1) and (3) do not prevent the applicant from serving a copy of the restraining order and a notice at any time on any other person of whom the applicant becomes aware who has, may have or claims to have an interest in the property.

(5) The notice mentioned in subsection (1) is to:

(a) summarise the effect of the order, including the period for which it applies; and

(b) advise the person on whom the order and the notice are served:

(i) that the property described in the order may be forfeited under this Act; and

(ii) that he or she can, within 28 days after being served with the copy of the order, file in the court that made the order an objection to the restraint of the property; and

(iii) of the person's obligation to make and lodge a statutory declaration in accordance with section 48.

(6) The applicant in relation to the restraining order must ensure that:

(a) an affidavit of service is endorsed on a copy of each copy of the restraining order that is served on a person; and

(b) each endorsed copy is filed in the court that made the order.

**48 Statutory declaration required from person served with restraining order**

(1) A person who is served under section 47(1) or (3) with a copy of a restraining order must make a statutory declaration as to the matters set out in subsection (2) and file the declaration in the court that made the restraining order within 7 days after being served with the order.

(2) In a statutory declaration under this section, the declarant must:

(a) state the name and, if known, the address of any other person of whom the declarant is aware who has, may have or claims to have an interest in property that is subject to the restraining order; or

(b) if the declarant is not aware of any other person who has, may have or claims to have an interest in property that is subject to the restraining notice – make a statement to that effect.

Maximum penalty: 2 000 penalty units or imprisonment for 2 years.

**49 Effect of restraining order**

(1) While a restraining order is in effect in relation to property:

(a) subject to Division 3, the property cannot be dealt with; and

(b) the applicant in relation to the restraining order may apply under this Act to the court that made the restraining order for an order that all or some of the property is forfeit to the Territory.

(2) 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.

(3) A person may apply to the court that made a restraining order for the release of property that is subject to the order to meet reasonable living and business expenses of the owner of the property.

(4) In subsection (3), reasonable living and business expenses does not include legal expenses mentioned in section 154.

**50 Setting aside of restraining order**

(1) The applicant in relation to a restraining order under section 43(1) or (2)(a) must request the court that made the order to set the order aside if the grounds for suspecting that the property is crime-used or crime-derived no longer exist.

(2) The applicant in relation to a restraining order under section 44(1)(a) must request the court that made the order to set the order aside if the

person could not be declared to be a drug trafficker.

(3) The applicant in relation to a restraining order may request the court that made the order to set the order aside for any other reason.

(4) If a restraining order relating to property is set aside, the applicant in relation to the restraining order must ensure that:

(a) notice of the setting aside is served personally, as soon as practicable, on each person on whom a copy of the restraining order was served under section 47; and

(b) any property subject to the restraining order that is being retained under section 39(2) is returned to the person from whom it was seized unless it is to be otherwise dealt with under this Act or another Act; and

(c) any property subject to the restraining order that is being guarded under section 39(2) is released from guard; and

(d) if the applicant is aware that the person to whom property is to be returned under paragraph (b) is not the owner of the property – the owner is notified, where practicable, of the setting aside of the restraining order and the return of the property.

**51 Duration of restraining order**

(1) A restraining order under section 43 or 44 has effect for the period set by the court when the order is made.

(2) On application, the court that made a restraining order may extend the duration of the order for a further period.

(3) The court that made a restraining order may extend the duration of the order on as many occasions as the court sees fit.

(4) If the period of a restraining order is extended under this section, the applicant in relation to the order must serve a notice of the extension on each person on whom a notice was served under section 47.

**52 Restraining order ceases to have effect**

(1) If a restraining order has been made under section 43(1) or (2)(a) in relation to suspected crime-used or crime-derived property, the order ceases to have effect if within the period set (or extended) by the court under section 51 an application has not been made:

(a) if the property is crime-derived – either under section 73 for a criminal benefits declaration or under Part 7 for forfeiture of the property; or

(b) if the property is crime-used – under Part 7 for forfeiture of the

property.

(2) If a restraining order has been made under section 44(1)(a) in relation to property of a person who was to be charged with an offence, the order ceases to have effect if within 21 days after the date of the order the person has not been charged with the offence indicated in the application for the order or an alternative offence.

(3) If a restraining order has been issued under section 44(1)(a) in relation to property of a person who has been charged, or who was to be charged and a charge has been laid within 21 days after the date of the order, the order ceases to have effect:

(a) if the charge is finally determined but the person is not declared under section 36A of the *Misuse of Drugs Act* to be a drug trafficker; or

(b) if the charge is disposed of without being determined.

(4) If a restraining order has been made under section 43 on the basis that an application had been made or was to be made for another order, the restraining order ceases to have effect if:

(a) within 21 days after the making of the restraining order an application has not been made for the other order; or

(b) the application for the other order is withdrawn; or

(c) the application for the other order is finally determined but the court that heard the application does not make the other order.

(5) If a restraining order has been made under section 44(1)(b) on the basis that an application was to be made for a production order or a declaration, the restraining order ceases to have effect if:

(a) within 21 days after the making of the restraining order an application has not been made for the production order or the declaration; or

(b) the application for the production order or declaration is withdrawn; or

(c) the application for the production order or declaration is finally determined but the court that heard the application does not make the production order or declaration; or

(d) if a declaration is made – the respondent's liability to pay to the Territory the amount ordered by the court that made the declaration (including any costs awarded against the respondent) is satisfied, whether or not all or any of the property subject to the restraining order was transferred to the Territory to satisfy the liability.

(6) A restraining order made under section 43 or 44 ceases to have effect if the order is set aside under section 50 or Part 5.

(7) Despite anything in this section, a restraining order that was issued under both sections 43 and 44 or on more than one ground under either section:

(a) only ceases to have effect if set aside on all grounds; and

(b) if set aside on only some of the grounds – continues in effect on each remaining ground.

(8) A restraining order ceases to have effect in relation to property if the property is forfeited to the Territory under Part 7, Division 3.

**53 Real property**

(1) If a restraining order is issued in relation to land:

(a) the applicant in relation to the restraining order must lodge an instrument, together with a copy of the restraining order, with the Registrar-General; and

(b) the instrument has effect as a memorandum mentioned in section 35 of the *Land Title Act* and is taken to be lodged by the appropriate Minister; and

(c) the restraining order takes effect in relation to the land when the instrument is registered under the *Land Title Act* and the Registrar-General enters a statutory restrictions notice in the land register.

(2) If, in accordance with section 52, a restraining order ceases to have effect and the order relates wholly or in part to land:

(a) the DPP must lodge an instrument with the Registrar-General advising that the order has ceased to have effect; and

(b) despite section 52, the restraining order only ceases to have effect in relation to the land when the instrument mentioned in paragraph (a) is registered under the *Land Title Act* and the statutory restrictions notice is removed from the land register.

**54 Property may be restrained under more than one order**

(1) Property may be restrained under this Act under more than one order at the same time on the same or different grounds.

(2) If a restraining order ceases to have effect in relation to property, the property remains restrained under any other restraining order in relation to the property while the other order remains in effect.