IN THE HIGH COURT OF AUSTRALIA **No. D5 of 2013**
DARWIN REGISTRY

BETWEEN: **ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY**
Appellant

AND: **THE NORTHERN TERRITORY OF AUSTRALIA**
Second Appellant

AND: **REGINALD WILLIAM EMMERSON**
First Respondent

AND: **THE DIRECTOR OF PUBLIC PROSECUTIONS**
Second Respondent

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

I. CERTIFICATION

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

II. BASIS OF INTERVENTION

2. The Attorney-General for Queensland intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

III. WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

IV. APPLICABLE LEGISLATION

4. The applicable legislation is identified in the appellants' submissions.

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Filed on behalf of: Attorney-General for the State of Queensland

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V. ARGUMENT

5. The Attorney-General for the State of Queensland intervenes in support of the first and second appellants. In summary, the Attorney-General submits that:

(a) the principle established in *Kable v Director of Public Prosecutions (NSW)*[1] ('the *Kable* principle') does not prevent the Parliament of a State or Territory from enacting a law which requires a court to make specified orders if certain conditions are satisfied, even if satisfaction of such conditions depends upon a decision of the executive government or one of its authorities;

(b) the legislative scheme comprised by s 36A of the *Misuse of Drugs Act* (NT)('the MDA'), s 94 of the *Criminal Property Forfeiture Act* (NT) ('the CPFA') and their related provisions ('the legislative scheme') does not undermine the independence and impartiality of the Supreme Court of the Northern Territory; and

(c) accordingly, the appeal should be allowed.

(a) The legislative scheme

6. The operation of s 36A of the MDA and s 94 of the CPFA must be understood against the broader legislative scheme.

7. Section 3 of the CPFA provides that 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'.

8. Consistent with that objective, the Director of Public Prosecutions can apply to the Supreme Court for a restraining order. Such an application may be made *ex parte*,[2] but there is no requirement that the application must be determined *ex parte*.[3]

9. In simple terms, the Supreme Court may make a restraining order in two circumstances: first, where the person has been charged or is intended to be charged within 21 days with a drug-related offence that may lead to the person being declared to be a drug trafficker under s 36A of the MDA; and second, where an application will be made in the near future for substantive orders such as an 'unexplained wealth declaration', a 'criminal benefit declaration' or a 'crime-used property substitution declaration' order.[4]

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1 (1996) 189 CLR 51.
2 CPFA, s 41(2)-(3).
3 See CPFA, s 42(b).
4 CPFA, s 44(1).

10. A restraining order can apply to all property that is owned or effectively controlled by the person at the time of the application of the restraining order.[5]

11. Where a restraining order is made in the first circumstance in paragraph 9 above, it ceases to have effect if the person has not been charged within the specified time.[6] It also ceases if the charge is finally determined but the person is not declared to be a drug trafficker under s 36A or if the charge is disposed of without being determined.[7]

10 12. A person whose property is the subject of the restraining order may file an objection to the restraint of the property.[8] The bases on which a court can set aside a restraining order depend on why the property was restrained and the power under which the order was made. Where a restraining order was made in the first circumstance in paragraph 9 above, for example, the court can set the order aside if the court finds the person charged or to be charged does not own or effectively control the property and has not at any time given it away.[9]

13. All proceedings on applications under the CPFA are taken to be civil proceedings.[10] The rules of evidence in civil proceedings apply, and a question
20 of fact to be decided by a court in proceedings on an application under the Act is to be decided on the balance of probabilities.[11]

14. Section 36A of the MDA enables the Director of Public Prosecutions to apply to the Supreme Court for a declaration that a person is a drug trafficker. In simple terms, the Supreme Court, on hearing the application, must declare a person to be a drug trafficker if:

(a) the person has been found guilty of committing a specified offence; and

30 (b) in the ten years prior to the day on which the offence was committed, the person was found guilty on at least two occasions of an offence 'corresponding to' such an offence.

The specified offences consist of the supply of a dangerous drug where the amount supplied is not a commercial quantity;[12] the cultivation of prohibited plants;[13] the manufacture or production of small quantities of a dangerous drug for the offender's personal use;[14] and receiving or possessing tainted property

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5 CPFA, s 44(2)(a).
6 CPFA, s 50(2).
7 CPFA, s 50(3).
8 CPFA, s 59.
9 CPFA, 65.
10 CPFA, s 136.
11 CPFA, s 136(2)(b) and (d).
12 MDA, s 5(2)(a).
13 MDA, s 7(1).
14 MDA, s 8.

obtained directly or indirectly from the commission of offences such as supplying, cultivating or possessing a dangerous drug.[15]

15. Section 94 of the CPFA relevantly provides that if a person is declared a drug trafficker under s 36A of the MDA, all property subject to a restraining order is forfeited to the Territory.

(b) No breach of the Kable principle

10 16. It is well established that legislatures can enact a law which requires a court to make specified orders if certain conditions are satisfied, even if satisfaction of such conditions depends upon a decision of the executive government or one of its authorities. In *Palling v Corfield*,[16] for example, this Court considered s 49 of the *National Service Act 1968* (Cth) ('the NSA'). It provided for notices to be served upon persons which required them to attend examinations for the purpose of determining their suitability for national service under s 49(1) of the NSA. Where a person failed to attend for such an examination, and was convicted of such an offence, the person was liable to a fine.

20 17. Section 49(2) of the NSA further provided that upon such a person being convicted, and upon the request of the prosecution, the court was required to ask the person whether they were willing to enter into a recognizance to comply with any further notice issued under the NSA for them to attend such an examination. If the person did not enter into such a recognizance to the satisfaction of the court, the court was to impose a mandatory sentence of seven days' imprisonment.

18. The applicant in that case contended that s 49(2) was invalid because it conferred a judicial power on the prosecution or interfered with the exercise of
30 judicial power.[17] The Court rejected these arguments. Chief Justice Barwick stated:[18]

> [I]t is within the competence of the Parliament to determine and provide in the statute a contingency on the occurrence of which the court shall come under a duty to impose a particular penalty or punishment. The event or the happening on which a duty arises or for that matter a discretion becomes available to a court in relation to the imposition of penalties or punishments may be objective and necessary to have occurred in fact or it may be the formation of an opinion by the court or, in my opinion, by some specified or identifiable person not being a court. The circumstance that on this happening
> 40 or contingency, the court is given or is denied as the case may be any discretion as to the penalty or punishment to be exacted or imposed will not mean, in my opinion, that judicial power has been invalidly invaded or that judicial power is attempted to be made exercisable by some person other than a court within the Constitution.

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15 MDA, s 6.
16 (1970) 123 CLR 52.
17 (1970) 123 CLR 52 at 53.
18 (1970) 123 CLR 52 at 58-59.

19. Justice Walsh stated:[19]

> Parliament has chosen to make part of the consequence of conviction of an offence under s. 49 (1) dependent upon an administrative act or decision of a person who is in control of the prosecution. In my opinion there is no constitutional reason why the Parliament may not, if it chooses to do so, make such an enactment.

20. The reasoning of the other members of the Court was similar.[20]

21. The proposition that a court can be required to make orders on the occurrence of some event, including some action by a person or body other than a court, has been affirmed in later cases. In *International Finance Trust Co Ltd v New South Wales Crime Commission*[21] and *South Australia v Totani* ('*Totani*'),[22] various members of the Court accepted that requiring a court to make orders upon the taking of some step by another body was not, by itself, prohibited by Chapter III. In other words, absent other factors that would deprive a court of institutional integrity, such laws would not infringe the *Kable* principle.

22. In this case, there is no other factor that would deprive the Supreme Court of the Northern Territory of its institutional integrity. The legislative scheme does not compromise the Supreme Court's institutional integrity because it does not deprive that court of any of the essential characteristics that distinguish courts from other decision-making bodies.[23] In particular, it does not deprive the Supreme Court of the reality and appearance of independence and impartiality.[24] Forfeiture occurs by force of s 94 of the CPFA only if there is a restraining order and a declaration under s 36A of the MDA. Each of these is made after the Supreme Court has engaged in a genuine adjudicative process:

(a) the Supreme Court makes a restraining order under s 44 of the CPFA after hearing an application by the Director of Public Prosecutions. The preconditions for the making of a restraining order must be proved on the balance of probabilities and the rules of evidence in civil proceedings apply. The Court, moreover, has discretion to make the order;

(b) if a person whose property is the subject of the restraining order files an objection, the Supreme Court may set aside a restraining order if it finds

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19 (1970) 123 CLR 52 at 69.

20 (1970) 123 CLR 52 at 64-65 (Menzies J), 65 (Windeyer J), 66-67 (Owen J).

21 (2009) 240 CLR 319 at 360 [77] (Gummow and Bell JJ), 386 [157] (Heydon J).

22 (2010) 242 CLR 1 at 49 [71] (French CJ), 129 [339] (Heydon J).

23 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ); *Wainohu v New South Wales* (2011) 243 CLR 181 at [44] (French CJ and Kiefel J); *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 ('*Pompano*') at [67] (French CJ).

24 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [78] (Gummow, Hayne and Crennan JJ); *Pompano* [2013] HCA 7 at [67] (French CJ), [125] (Hayne, Crennan, Kiefel and Bell JJ), [182] (Gageler J).

certain grounds established. Any such objection would again be determined in accordance with the rules of evidence applying to civil proceedings;

(c) the convictions necessary to found a declaration under s 36A are the product of traditional criminal trials; and

(d) the Supreme Court must find the necessary facts, on the civil standard, before making a declaration under s 36A.

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23. When these matters are understood, it is difficult to see any basis for Kelly J's claim that the legislative scheme as 'functionally equivalent to the legislation under consideration in *Totani*'.[25] In that case, s 10 of the *Serious and Organised Crime (Control) Act 2008* (SA) ('the SOC Act') provided for the State Attorney-General, on application by the Commissioner of Police, to make a declaration in relation to an organisation if satisfied that members of the organisation associated for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity.[26] Subsection 14(1) then provided that, on application by the Commissioner of Police, the Magistrates
20 Court of South Australia had to make a control order against a person if satisfied that the person was a member of a declared organisation.[27]

24. The vice of s 14(1) of the SOC, which led to its invalidity, was that the State required Magistrates Court to exercise judicial power to make a control order after undertaking an adjudicative process that was 'so confined, and so dependent on the Executive's determination in the declaration that it depart[ed] impermissibly from the ordinary judicial processes of an independent impartial tribunal'.[28] In other words, the Magistrates Court was no more than an instrument of the Executive for preventing certain persons from associating.[29]
30 By contrast, the role of the judiciary in making the restraining order under the CPFA, in convicting the person of any offences and in determining whether the requirements of s 36A are satisfied makes it difficult to understand how the legislative scheme comprises the Supreme Court's independence and impartiality in any way.

25. It is no answer to these points to claim that the DPP selects the members of a very wide class whom the Supreme Court must label drug traffickers and whose assets must be forfeited.[30] The decision of the DPP to apply for a declaration is analogous to a decision to charge a person with a particular
40 offence that carries a mandatory minimum sentence—something that would influence the punishment that the court metes if it is satisfied of the requisite

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25 (2013) 275 FLR 368 at [92].
26 *Pompano* [2013] HCA 7 at [132] (Hayne, Crennan, Kiefel and Bell JJ).
27 *Pompano* [2013] HCA 7 at [132] (Hayne, Crennan, Kiefel and Bell JJ).
28 *Totani* (2010) 242 CLR 1 at [436] (Crennan and Bell JJ). See also at [139], [149] (Gummow J), [226] (Hayne J), [480]-[481] (Kiefel J).
29 *Pompano* [2013] HCA 7 at [133].
30 (2013) 275 FLR 368 at [84] (Kelly J).

matters.[31] In any event, the Supreme Court is not required to order forfeiture; that occurs by reason of s 94 of the CPFA.

26. Furthermore, the majority's conclusion that the independence and impartiality of the Supreme Court was compromised depended at least partly on construing s 36A as requiring the Supreme Court to make a declaration of fact that a person was a 'drug trafficker', when this might not be true.[32]

27. That construction of s 36A, and its suggested result, should be rejected.

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28. First, s 36A concerns a statutory construct rather than a fact. A declaration depends on a person being convicted of certain drug-related offences within a particular period, and the term 'drug trafficker' is not used elsewhere in the MDA. Both these matters suggest that s 36A is dealing with a label, or a statutory construct. A declaration that a person is a drug trafficker, in other words, would serve the same purpose as a declaration that the person was a 'repeat drug-related offender' and it would have essentially the same meaning.

29. Secondly, and relatedly, there is no authority to suggest that requiring a court,
20 if satisfied of certain matters, to use a label that may not coincide with ordinary parlance means that there is a breach of the *Kable* principle. How the use of such a label is supposed to deprive a court of its independence and impartiality is unclear.

30. Thirdly, the majority's construction ignores the fact that the Supreme Court is not required to state as a fact that a person is a drug trafficker. Nothing in s 36 would prevent the Supreme Court from declaring, for example, that a person was a drug trafficker 'within the meaning of s 36A of the MDA'. The Supreme Court can therefore avoid having to represent as an unqualified fact that a
30 person is a drug trafficker.

31. Finally, in any event, as Riley CJ suggested in dissent, the label applied under s 36A would often be correct.[33] In those circumstances, there is no basis for treating the *Kable* principle as invalidating s 36A.

32. For these reasons, the Court of Appeal erred in finding that the legislative scheme was invalid.

33. The appeal should therefore be allowed.

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31 See *Magaming v The Queen* [2013] HCA 40.

32 *Emmerson v Director of Public Prosecutions* [2013] NTCA 4 at [91] (Kelly J), [131]-[132] (Barr J).

33 *Emmerson v Director of Public Prosecutions* [2013] NTCA 4 at [31].

VII. ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

34. The Attorney-General estimates that 20 minutes should be sufficient to present his oral argument.

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