IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P17 of 2010

BETWEEN:

GARY ERNEST WHITE

Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS (WA)

Respondent

APPELLANT'S SUBMISSIONS

Part I:

1. The submission is in a form suitable for publication on the internet.

Part II:

2. What is the scope of the term 'use' in section 146(1)(a) including what conduct is sufficient to constitute a 'use' of property in connection with the commission of an offence so as to render a person liable to a crime-used property substitution declaration pursuant to section 21 of the *Criminal Property Confiscation Act* 2000 (WA)?

3. Is it sufficient that the conduct constituting the use of the property merely has the consequence or effect of facilitating the offence or must it have been employed by that person for that purpose?

4. Is it a requirement that the act or acts which were the relevant use of the property be done with the intention or purpose of committing the specific offence of which the appellant was convicted?

5. Do the terms 'uses' and 'use' in section 147 of the Act encompass all activities that bring the property within the definition of 'crime-used' under section 146 of the Act?

Part III:

6. The appellant has does not consider any notice should be given in compliance with section 78B of the *Judiciary Act 1903*.

Part IV:

Director of Public Prosecutions (WA) v White (2009) 194 A Crim R 192; [2009] WASC 62

Date of Document	1 February 2011
Filed on behalf of:	The appellant
Prepared by:	
HOLBORN LENHOFF MASSEY	Tel: (08) 9325 9905
3rd Floor, Irwin Chambers	Fax: (08) 9225 5244
16 Irwin Street	Ref: Gary Massey:
Perth WA 6000	GWM:WHG02

Director of Public Prosecutions (WA) v White [2010] WASCA 47

Part V:

7. On 14 May 2003, following a jury trial in the Supreme Court of Western Australia, the appellant was convicted of the wilful murder of Anthony David Tapley ("Tapley") at Maddington on 19 August 2001 **[AB 238.53-58]**.

8. The relevant facts before the jury were:

   (a) The appellant lived at rented premises known as 12 Jade Street, Maddington in the state of Western Australia ("the Property") **[AB 149.10-31]**.

   (b) The Property was in an industrial area **[AB 12.38-40].** From the Property the appellant operated a trucking business with Mr. Les Hoddy **[AB 35.21-29, 148.33-63].**

   (c) The Property was surrounded by a cyclone fence and entry was gained through two gates each six-foot high of chain-mesh fence with three strands of barbed wire on top with a chain and two padlocks **[AB 42.70-43.12, 43.15, 140.10-11, 174.13-21]**.

   (d) Tapley attended the Property with Mrs Suzie Miller on 19 August 2001 for the purpose of obtaining some amphetamine. Both Tapley and Mrs Miller were intoxicated at the time having consumed both alcohol and amphetamine earlier in the day **[AB 238.59-68]**.

   (e) Present at the Property when Mrs Miller and Tapley arrived were three young women, two unidentified men and Mr Jardin (known as 'Rainbow') **[AB 238.70-239.09]**.

   (f) The appellant who was not at the Property telephoned Mr. Sidney Reid ("Reid") to go to the property and lock the gates and not let anyone come or go **[AB 42.36-40].** Reid did not know why the appellant asked him to do this **[AB 42.40-48].**

   (g) When Reid arrived at the Property the front gates were open. He drove in and parked his car. He asked Rainbow, who had a key, to lock the gates **[AB 42.58-63]**. After the gates were locked, he and Rainbow went up to the house **[AB 43.66-73]**.

   (h) There are no phone records which indicate the appellant was informed that Tapley was at the Property **[AB 190-197]**. It was put to the appellant that he had telephoned Reid asking him to close the gates, which the appellant denied **[AB 189.10-13]**. It was also put to the appellant that Miller and Tapley may have turned up at the Property unannounced, which the appellant conceded was a possibility **[AB 190.40-191.10]**.

   (i) A short time later the appellant and Mr. Richard Samuels ("Samuels") arrived at the property. The appellant and Samuels unlocked the gates,

drove a car onto the property, locked the gates behind them and walked to the house **[AB 45.61-68, AB 46.15-18 & AB 46 63-68]**.

(j) The appellant told Mrs Miller and the other women present to leave the Property **[AB 46.70-73 & AB 47.9-12]**. The women left in a car. Rainbow unlocked the gates and relocked them after they left **[AB 48.19-23 & AB.49.38-41]**.

(k) The appellant confronted Tapley about repayment of money. Tapley didn't reply. The appellant said he would make an example of him **[AB 48.63-69]**. Tapley walked from the house towards the back of the property followed by the appellant. The appellant produced a gun and shot Tapley in the left shoulder **[AB 48.41-44 & AB 49.14-21]**.

(l) Tapley ran from the appellant who fired a further three shots before Tapley reached the locked gates **[AB 52.9-30]**.

(m) Tapley climbed the locked gates to leave the Property **[AB 67-69]**. The appellant shot Tapley in the buttocks when Tapley was at the top of the gates **[AB 53.19-22]**.

(n) Tapley came down the other side of the gates and collapsed on the ground outside the gates **[AB 53.27-29]**.

(o) The appellant unlocked the gates and walked out of the Property and shot Tapley in the head killing him **[AB 53.30-31 & AB 54.10-70]**.

(p) The appellant moved Tapley's body onto the Property **[AB 55.17-21]** before transporting it and disposing of the body **[AB 58.26-32]**.

9. In sentencing the appellant to life imprisonment with a non parole period of 22 years, the learned sentencing judge, Scott J, concluded that the reason the appellant asked Reid to lock the gates was "because you knew that the victim, Mr Tapley was inside your yard and you wished to speak to him", although "it is not clear on the evidence what your motivation was" **[AB 239.12-16]**.

10. It appears that there was no evidence that the appellant knew Tapley was present at the Property at the time Reid went to the Property and closed the gates (see paragraphs 8(f) and (h) above); the only evidence was from Reid, that the appellant asked him to go and close the gates but he did not know the reason why. Therefore, the appellant submits there was no evidence to permit Scott J to reach this conclusion which is erroneous.

11. On 17 April 2002, the respondent filed a Notice of Motion seeking a declaration that property of the appellant is available for confiscation instead of crime-used property under section 22(1) of the Act **[AB 2-3]**. The appellant objected pursuant to section 79 of the *Criminal Property Confiscation Act 2000* (WA) ("the Act") **[AB 5]** and the hearing of the application was heard by the Honourable Jenkins J on 29 January 2009. Her Honour handed down her reasons for decision refusing to make the declaration on 19 March 2009 **[AB 246-279]**.

12. Jenkins J held that although the appellant in shooting Tapley on the Property engaged section 146(1)(c) of the Act he did not make criminal use of the Property pursuant to section 147. Her Honour also held that the locked gates assisted the appellant to commit the offence of wilful murder but that the original reason for locking the gates may not have been to facilitate the commission of that offence[1] **[AB 258.13-22]**. In so finding her Honour relied on the erroneous finding of Scott J referred to in paragraph 9 above.

13. The respondent appealed the decision of Jenkins J by Notice of Appeal dated 24 March 2009 **[AB 281-283]**.

14. The Court of Appeal of the Supreme Court of Western Australia ("the Court of Appeal") on 12 March 2010 allowed the appeal and set aside the orders of Jenkins J **[AB 285–307]**.

Part VI:

15. The Court of Appeal erred in:

(a) the finding of fact concerning the number of times the gates at the Property were closed and the purpose for which the gates were closed.

(b) setting aside the decision of the primary judge and holding that the Property was 'crime-used' within the meaning of section 146 (1)(a) of the Act.

(c) holding that the consequence of an act was sufficient to constitute a "use" of the Property for the purposes of section 146 (1)(a) of the Act.

(d) holding that it was not a requirement for the act or acts which were the relevant use of the Property to have been done with the intention or purpose of committing the specific offence of which the appellant was convicted.

(e) holding that the terms 'uses' and 'use' in section 147 of the Act encompasses all activities that bring the Property within the definition of 'crime-used' under section 146 of the Act, including section 146(1)(c).

Errors of finding of facts by the Court of Appeal

16. The Court of Appeal made a finding of fact that the gates to the Property were locked on at least two occasions for the purpose of detaining Tapley and that at the time the instructions were given to effectively detain Tapley, the appellant intended to confront Tapley, with a gun if necessary[2].

17. The evidence at trial compels the conclusion that the gates were locked on at least three occasions before being finally unlocked by the appellant prior to the death of Tapley[3]. The third occasion was by Rainbow who unlocked the gates to allow the

---

[1] (2009) 194 A Crim R 192 at [46]
[2] [2010] WASCA 47 at [37]
[3] Para's 8(f), (g) & (h) supra

females who were present at the Property to leave. This was also the conclusion of Jenkins J[4].

18. Rainbow was not called as a witness. His reason for locking the gates is a matter of conjecture. It is not open to conclude that his locking the gates, which later impeded Tapley's departure from the Property, was an act for or on behalf of the appellant.

19. Nor was it open to conclude that at the times the gates were locked either at first instance or at anytime thereafter the appellant "intended to confront Tapley, with a gun if necessary". The evidence at its highest admitted no more than was found by Scott J in his reasons for sentence, that the gates were locked on the appellant's instructions particularly as there was no evidentiary basis for Scott J's finding

> that you did that because you knew the victim [Tapley] was inside your yard and you wished to speak to him..[i]t is not clear on the evidence what your motivation was **[AB 239.14-15]**.

Was the Property 'crime-used' within the meaning of section 146 (1)(a)?

20. Section 146(1)(a) defines property to be 'crime-used' if the property in question:

(a) is or was used; or

(b) is or was intended for use;

directly or indirectly in

(c) connection with the commission of a confiscation offence; or

(d) facilitating the commission of a confiscation offence; or

(e) connection with facilitating the commission of a confiscation offence.

The use of the Property must relate to the specific confiscation offence

21. Being an application for a crime-used property substitution declaration against the appellant under section 21 of the Act it is relevant to consider section 22 when considering the scope and meaning of section 146 of the Act. It is submitted that when either sections 22(3) or (4) are engaged section 106 of the Act has no effect.

22. Section 22(3) of the Act provides that on the hearing of an application under section 21, if a respondent has been convicted of the relevant confiscation offence, "it is presumed that the respondent made criminal use of the property unless the respondent establishes to the contrary". In the absence of a conviction for the relevant confiscation offence, section 22(4) provides that if it is more likely than not that the crime-used property was in the respondent's possession at the time the offence was committed, or immediately afterwards, then the same presumption of criminal use is created.

---

[4] (2009) 194 A Crim R 192 at [19], [20] & [44]

23. The Glossary in the Schedule to the Act defines "relevant confiscation offence" as

> in relation to confiscable property, means the confiscation offence or suspected confiscation offence that is relevant to bringing the property within the scope of this Act.

24. Section 22(3) applies in this case as the appellant was convicted of the relevant confiscation offence, namely the wilful murder of Tapley. He is presumed therefore to have made criminal use of the Property, unless he establishes the contrary.

25. Accordingly the issue to be determined was whether the appellant could establish either:

(a) that the Property was not 'crime-used' within the meaning of section 146(1), or

(b) if it was 'crime-used' that the appellant had not made 'criminal use' of the Property within the meaning of section 147.

26. To the extent that this focuses attention on section 146(1)(a) of the Act the appellant submits that the inquiry raised is what is the connection between the use or intended use of the property and the commission or the facilitation of the commission of the specific offence of which the appellant was convicted.

Principles of Statutory interpretation

27. The Act permits the forfeiture of property owned by a citizen without compensation if he or she is convicted of a serious offence or, in some circumstances, even if he or she has not been convicted of a serious offence[5].

28. The Act has been described as draconian as noted by Vanstone J in *Director of Public Prosecutions v George*[6]:

> I note that in proposing the current legislation, the South Australian Attorney-general eschewes the Western Australian model which he described as enacting "the most draconian criminal assets confiscation scheme in analogous jurisdictions" and preferred that this State follow the Commonwealth model, which was also used in New South Wales and Victoria.[7]

29. The fundamental principle when interpreting and construing legislation which interferes with an individual's property rights is that such an intention to abrogate fundamental property rights without compensation requires unmistakable and unambiguous language, and is not to be inferred by general words[8].

---

[5] See for example section 22(4)

[6] (2008) 102 SASR 246

[7] *Director of Public Prosecutions v George* (2008) 102 SASR 246, At para [140]

[8] see *Clissold v Perry* (1904) 1 CLR 363 at 373; *Coco v The Queen* (1994) 179 CLR 427 at 437-438; *Attorney –General v De Keyser's Royal Hotel* [1920] AC 508; *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18; *Director of Public Prosecutions (WA) v White* (2009) 194 A Crim R 192 at [50]

30. This was enunciated by Griffith CJ in *Clissold v Perry*[9] as follows

> In considering this matter it is necessary to bear in mind that it is a general rule to be followed in the construction of Statutes such as that with which we are now dealing, that they are not to be construed as interfering with vested interests unless that intention is manifest.

31. In *Bropho v. Western Australia*[10], Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ pointed out that the rationale against the presumption against the modification or abrogation of fundamental rights is to be found in the assumption that it is:

> in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used (*Potter v. Minahan* [1908] HCA 63; (1908) 7 CLR 277 at 304.).

32. More recently, in *Plaintiff s157/2002 v The Commonwealth of Australia*[11] Gleeson CJ said:

> ...[c]ourts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. As Lord Hoffmann recently pointed out in the United Kingdom, for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be 'subject to the basic rights of the individual'. (Citations omitted)

33. In 2004 in *Al-Kateb v Godwin*[12] Gleeson CJ expressed the same view[13]:

> ... In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in

---

[9] (1904) 1 CLR 363 at 373
[10] [1990] HCA 24; (1990) 171 CLR 1 at 18
[11] [2003] HCA 2; (2003) 211 CLR 476 at 492
[12] [2004] HCA 37; (2004) 219 CLR 562
[13] The Chief Justice's comments were affirmed in the joint reasons in *CTM v The Queen* [2008] HCA 25; (2008) 82 ALJR 978.

> question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this court in recent cases. It is not new. In 1908, in this court, O'Connor J referred to a passage from the fourth edition of *Maxwell on Statutes* which stated that '[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness'.
>
> A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.

34. The general principles concerning statutory interpretation set out above were distilled by Cole JA (Handley JA agreeing) in *Jeffrey v The Director of Public Prosecutions (Cth)*[14] as follows:

> The *Proceeds of Crime Act* permits the confiscation of the property of a citizen without compensation if he be convicted of a serious offence. The appellant correctly submitted that the enjoyment of property is a fundamental right under our legal system and any statutory derogation of it is exceptional: *NSW Crime Commission v Younan* (1993) 31 NSWLR 44 at 48; 68 A Crim R 225 at 229. In those circumstances, when construing the provisions of a statute which purports to effect confiscation or derogation from property rights, the following principles of construction are applicable:
>
> 1. An intention to abrogate or curtail fundamental property rights will not be imputed by the courts. It must be 'clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights': *Coco* (1994) 179 CLR 427 at 437; 72 A Crim R 32 at 35-36; *Clissold v Perry* (1904) 1 CLR 363 at 373.
>
> 2. A legislative intention to take away property without compensation requires expression of that intention with 'irresistible clearness' because it is presumed that the legislature would not 'overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness'. Accordingly such an intention is not to be ascribed from use of 'general words, simply because they would have that meaning in their widest, or usual, or natural sense, because so to

[14] (1995) 79 A Crim R 514 at 517

construe those words would be to 'give them a meaning in which they were not really used': *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18.

3. Any statutory ambiguity should be interpreted so as to respect a person's property rights: *DPP v Saxon* (1992) 28 NSWLR 263 at 270; 63 A Crim R 202 at 208-209; *Saffron v DPP (Cth)* (1989) 96 FLR 196 at 199. Unless no other interpretation is possible, justice requires that statutes should not be construed so as to enable the confiscation of an individual's property without payment of just compensation. A fortiori where the statute does not provide for any compensation: *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508 at 576.

4. In construing a penal statute, and confiscation of property without compensation constitutes a penalty, if there are two reasonable interpretations, the more lenient of which will avoid the imposition of the penalty, that more lenient construction must be adopted: *Tuck & Sons v Priester* (1887) 19 QBD 629 at 638 per Lord Esher MR.

What is the 'use' or 'intended use' of property?

35. The term 'use' or 'used' is not defined within the Act. Thus, in accordance with the principles of construction set out above, the ordinary meaning of the word 'use' is to be applied. The Act refers in section 146(1)(a) to "is or was used or intended for use". In this context, the word 'use' is connoting the verb as opposed to the noun.

36. In *R v Rintel*[15] Malcolm CJ said

> [t]he ordinary meaning of the verb 'to use' is to 'employ for a purpose' and the ordinary meaning of 'use' is 'utilization or employment for or with some aim or purpose'[16].

37. Jenkins J, when considering section 146(1)(a), turned to the Macquarie Dictionary definition of 'used' which is "to employ for some purpose; put into service; and turn to account"[17]. The Court of Appeal agreed with Jenkins J that the term 'used' has its ordinary meaning of "employed for some purpose, put into service, or turned to account"[18].

38. The appellant submits that the definition of 'use' imports an element of intent or conscious knowledge on the part of the person who is 'using' the property and that such intent or knowledge exists at the time of the 'use' of the property not after the fact as that would involve unconscious knowledge or unintended use.

---

[15] (1991) 3 WAR 527 at 529
[16] See also *DPP (NSW) v King* (2000) 49 NSWLR 727
[17] (2009) 194 A Crim R 192 at [79] **[AB 268.58-60]**
[18] *DPP v White* [2010] WASCA 47 at [27]-[29]

39. Jenkins J concluded, after considering the definition of 'use', that in order to use property a person must act in a positive and deliberate way in order to involve the property and it does not include an unintended use[19].

40. In *Director of Public Prosecutions v George*[20] in reference to the *Criminal Assets Confiscation Act 2005* (SA) when considering the definition of "instrument" which was defined to mean that property is an "instrument of an offence if it is used in, or in connection with the commission of an offence", Doyle CJ stated:

> ... the definition refers to a use of property that facilitates, assists or contributes to the commission of an offence. That is the starting point, not a conclusion. The use of the property must be sufficiently significant (I realize that this is question begging) to warrant a conclusion (especially when the property is the place where the offence is committed) that the property is used in connection with the commission of the offence. This invites attention to the role that the property plays in the commission of the offence, to the extent to which the property is so used, and to how much of the property, or what part of it is used. I doubt whether one can go further than that.[21]

41. Vanstone J in her dissent said:

> Having regard to the fact that the Act is penal in its operation and that consequences out of all proportion to the gravity of the crime could flow from a wide interpretation of the word "instrument" for this and other serious offences (as defined), I would be prepared, if necessary, to find that a substantial connection is required between the property and the commission of the crime under consideration before it is found to be an instrument of that crime. I would require that the property was put to use in a positive sense; that it was a means through which the crime was effected; that the property was used as a tool in the commission of the crime, or in connection with its commission ... Absent any curial discretion ..., a more wide-ranging interpretation of instrument would result in manifest injustice in imposing a penalty bearing no relationship to the crime committed ...[22]

42. Both Jenkins J and the Court of Appeal considered that 'use' did not incorporate unintended use or accidental use[23]. The Court of Appeal also stated

> However, I doubt that deliberate access over or presence on land in order to commit a confiscation offence is, by itself, sufficient to bring the conduct within either par (a) or (c) of s 146(1)[24].

---

[19] At para [80] **[AB 268.62-68]**
[20] (2008) 102 SASR 246
[21] *Director of Public Prosecutions v George* (2008) 102 SASR 246, at para [65]. White J agreed at para [177]
[22] *Director of Public Prosecutions v George* (2008) 102 SASR 246, at para [167]. Page 281. Note that no curial discretion is vested in the Court by the relevant provisions of the Act.
[23] (2009) 194 A Crim R 192 at [83] and [2010] WASCA 47
[24] [2010] WASCA 47 at [29]

43. The appellant submits that from these decisions and the usual definition of 'use' it can be inferred that an element of knowledge or intent is required in order to 'use' property.

44. The wilful murder of Tapley occurred outside the Property as the fatal shot was fired outside the boundary of the Property. The part of the Property which, according to Jenkins J, could be said to have been involved in the commission or facilitation of the offence is the fence and gates at the Property[25]. That is, the relevant physical action involving the property was the closure of the gates. However, it must also be the appellant's purpose, intention or motive in initially asking for and later closing the gates which is relevant to whether or not the Property was 'used' for the purposes of section 146(1)(a).

45. At its widest section 146(1)(a) requires the use of the property to be indirectly in connection with facilitation of the confiscation offence. This does not contradict the proposition that the use must be a deliberate act to involve the property and that there must be a conscious decision to involve the property in the offence.

46. To interpret the term 'use' otherwise would result in any physical action by a defendant with property, including the physical act of being on land or being in possession of other property, without the intention to indirectly involve it in the facilitation of the confiscation offence engaging section 146(1)(a).

47. The Court of Appeal addressed this issue by considering that each case must be judged on its merits and whether the relationship between the use of the property and the offence is sufficient is a matter of degree and judgment. McLure P stated[26]

> ... having regard to the consequence of falling within the definition of crime-used, it is not sufficient if the relationship be merely tenuous and remote. The requisite relationship would fall between these two extremes and involve matters of degree and judgment.

48. In adopting this approach the Court of Appeal has vested the court with a discretion that the legislature did not and it has done so without setting out any applicable principles for the parameters of such a discretion.

49. As set out above, Reid testified that the appellant requested the gates be closed[27] and that this request was made sometime prior to the appellant attending at the Property. The evidence also established that the gates were closed by Rainbow[28] prior to any action being taken by the appellant that resulted in the wilful murder of Tapley. Rainbow did not give evidence and therefore his reasons for closing and relocking the gates are unknown. This latter point is not something which was considered by Jenkins J or the Court of Appeal.

---

[25] (2009) 194 A Crim R 192 at [97] **[AB 272.44-46]**
[26] [2010] WASCA 47 at [33]
[27] **[AB 42.36-40]**
[28] **[AB 48.19-23, 49.38-41]**

50. Notwithstanding, McLure P (with whom Owen JA and Buss JA agreed) stated[29]:

> On the night in question, the gates were locked on at least two occasions for the purpose of detaining Tapley on the Maddington land so he would be physically available to the respondent. *The subsequent events compel the inference that at the time the instructions were given to effectively detain Tapley, the respondent intended to confront Tapley, with a gun if necessary.* [emphasis added]

51. These findings were not reasonably open. As set out above, they went beyond the evidence at trial, beyond the findings of Scott J, including the erroneous parts mentioned above, and beyond the findings of Jenkins J who in error relied on Scott J's findings.

52. Further, the Court of Appeal held[30] that

> There is a sufficient relationship between the act or acts constituting the use and the specific confiscation offence if the acts have the consequence or effect of facilitating that offence.

53. Relying on the consequences or effect of an act as the basis of finding a purpose or intent for that action having been taken strains the language of the section and the Act as a whole and seeks to abrogate the fundamental rights of an individual in the absence of unmistakable and unambiguous language[31].

54. As referred to above, the term 'use' involves a person doing an action in a positive and deliberate way to involve the property in the commission or facilitating the commission of the offence. This imports an element of knowledge or intent. The consequence of that use of property whether intended or not is irrelevant to whether or not that property was used at the time of the action involving the property.

55. The closure of the gates had the consequence of assisting the appellant to commit the offence of the wilful murder of Tapley but there was no evidence before the court that the gates were closed for that purpose. Further, the appellant was not the last person to close and lock the gates. This was done by Rainbow and his reasons for doing so are unknown.

56. There was no positive or deliberate action by the appellant which resulted in the Property being 'used' in the commission or in connection with the wilful murder of Tapley for the purposes of section 146(1)(a). The Property cannot constitute 'crime-used' property under section 146(1)(a).

57. In addition, it was not open to the Court of Appeal to conclude that the use of the Property to store the body of Tapley fell within section 146(1)(a)[32]. The storing of the body was an act connected with the concealment of the relevant confiscation offence, not an act in connection with its commission.

---

[29] [2010] WASCA 47 at [37]
[30] [2010] WASCA 47 at [39]
[31] *Plaintiff s157/2002 v Commonwealth* (2003) 211 CLR 476
[32] [2010] WASCA 47 at [39]

The scope of section 147 and the terms 'use' and 'uses' in section 147

58. The principles outlined above concerning the interpretation of legislation which abrogates a fundamental right of a citizen, apply equally to the interpretation of this section.

59. In addition, McHugh J observed in *Saraswati v The Queen*[33]:

> In many cases, the grammatical or literal meaning of a statutory provision will give effect to the purpose of the legislation. Consequently, it will constitute the 'ordinary meaning' to be applied. If, however, the literal or grammatical meaning of a provision does not give effect to that purpose, that meaning cannot be regarded as 'the ordinary meaning' and cannot prevail. It must give way to the construction which will promote the underlying purpose or object of an Act: *Interpretation Act*, s 33[34].
>
> ...
>
> But where the text of a legislative provision is grammatically capable of only one meaning and neither the context nor any purpose of the Act throws any real doubt on that meaning, the grammatical meaning is 'the ordinary meaning' to be applied. A court cannot depart from 'the ordinary meaning' of a legislative provision simply because that meaning produces anomalies: cf *Cooper Brookes* (1981) 147 CLR 297, 305, 320.

60. Section 22(3) provides

> [i]f the respondent has been convicted of the relevant confiscation offence, there is a rebuttable presumption that the respondent made criminal use of the property unless the respondent establishes to the contrary.

61. The term 'criminal use' is defined in section 147 of the Act. Section 147 provides that

> a person makes criminal use of property if the person uses or intends to use the property in a way which brings the property within the definition of crime-used property [which is defined in section 146].

62. The language of section 147 mirrors the language in section 146(1)(a) and (b). Therefore any use of the property which brings the property within section 146(1)(a) and/or (b) must fall within section 147 and the person will have made 'criminal use' of the 'crime-used' property.

63. However, section 147 does not encompass section 146(1)(c) as property falling within this subsection does not involve such property being 'used'. Section 146(1)(c) is referable to acts or omissions which occur on or in the property in connection with the commission of an offence and it is this deliberate act which

---

[33] [1991] HCA 21; (1991) 172 CLR 1 at 21

[34] The *Interpretation Act 1984* (WA) s 18 is the equivalent Western Australian provision to s 33 in the New South Wales Interpretation Act.

brings the property within the defined term of 'crime-used' not the use or intended use of the property[35].

64. As Jenkins J stated[36]

> [I]t cannot be said that Parliament by choosing to employ the word 'uses' has clearly manifested, by unmistakable and unambiguous language, an intention to interfere with a person's property rights if that person has not used the property in a way that brings the relevant property within the definition of crime-used property, but has rather done an act on the property in connection with the commission of a confiscation offence so as to bring the property within the definition of crime-used property.

65. Contrary to this position, in finding that section 147 included all 'crime-used' property as defined by section 146 including section 146(1)(c), the Court of Appeal relied on two propositions.

66. Firstly it concluded that because the primary defined term is 'crime-used' to encompass all the activities in sections 146(1) and (3), "[t]hat indicates all those activities are intended to be uses for the purpose of s.147 of the Act."[37]

67. Secondly the Court relied upon what it said would be an inconsistent treatment in relation to the confiscation of crime-used property and the confiscation of property owned by the respondent in place of crime-used property[38].

68. As to the first proposition the appellant submits that the construction of section 147 is principally to be gleaned from the language of the section itself. It is not the defined term that determines its scope. It is the use or intended use of property that brings it within the defined term with which the section is concerned. The proposition is a *non sequitur*.

69. As to the second proposition the appellant submits that in relying upon this principle, the Court of Appeal misconstrued the differing nature of the orders being made under the Act. Applications under section 21 are concerned with orders and declarations against persons. This is compared with provisions of the Act concerned with the confiscation of crime-used property, which is against the property itself[39]. There is no basis on which it can be presumed that Parliament intended that each should receive equal treatment.

70. As McHugh, Gummow, Kirby and Hayne JJ stated in *Project Blue Sky Inc & Ors v Australian Broadcasting Authority*[40]:

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the

---

[35] per Jenkins J in *DPP (WA) v White* (2009) 194 A Crim R 192at [103]-[106] and also per Templeman J in *State of WA v Bowers* [2009] WASC 136 at [12]-[20]
[36] *DPP (WA) v White* (2009) 194 A Crim R 192 at [106]
[37] *DPP (WA) v White* [2010] WASCA 47 at [48]
[38] *DPP (WA) v White* [2010] WASCA 47 at [49]
[39] See sections 8, 33, 34
[40] (1998) 194 CLR 355 at [69]-[70]

provisions of the statute[41]. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"[42]. In *Commissioner for Railways (NSW) v Agalianos*[43], Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed[44].

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals[45]. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions[46].

71. The appellant submits that section 147 is to be interpreted so as to include those activities which fall within section 146(1)(a) and (b) but not those activities which fall within section 146(1)(c).

72. The scope of section 146(1)(c) results in the position that any criminal offence must of its nature fall within section 146(1)(c) in that there is an act or omission in or on property in connection with the commission of an offence.

73. It is submitted that section 147 is a limiting section which limits the scope of the property which may fall within section 22 of the Act by limiting the definition of criminal use of property to those offences where there is actual positive use of the property in connection with or facilitating the commission of the confiscation offence. While all property on which an offence occurs may be crime used within section 146, as it falls within section 146(1)(c), a person does not make criminal use of property simply because the offence occurs on or in the property.

74. It is submitted that this is not inconsistent with the overriding objective of the legislation. Rather, it is consistent with the concept of preventing an offender from profiteering from a criminal enterprise yet avoiding the scenario where all confiscable offences (within section 141) will involve property which falls within section 146(1)(c) and is therefore 'crime-used' falling within the scope of section 22.

---

[41] See *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213 per Barwick CJ.
[42] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320 per Mason and Wilson JJ. See also *South West Water Authority v Rumble's* [1985] AC 609 at 617 per Lord Scarman, "in the context of the legislation read as a whole".
[43] (1955) 92 CLR 390 at 397.
[44] *Toronto Suburban Railway Co v Toronto Corporation* [1915] AC 590 at 597; *Minister for Lands (NSW) v Jeremias* (1917) 23 CLR 322 at 332; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312 per Gibbs CJ, 315 per Mason J, 321 per Deane J.
[45] *Ross v The Queen* (1979) 141 CLR 432 at 440 per Gibbs J.
[46] See *Australian Alliance Assurance Co Ltd v Attorney-General of Queensland* [1916] St R Qd 135 at 161 per Cooper CJ; *Minister for Resources v Dover Fisheries* (1993) 43 FCR 565 at 574 per Gummow J; 116 ALR 54 at 63.

75. To interpret section 147 as encompassing all the activities included in section 146(1) because they are all defined as 'crime-used' and are therefore intended to be 'uses' for the purposes of section 147 is to distort the language of section 147 and to give the term "use' two different meanings within the Act.

76. It is the appellant's submission that this is not what the legislature intended and it is this which section 147 seeks to avoid by limiting the scope of the term 'criminal use'.

77. Such an interpretation does not strain the language of the Act, interprets the Act in accordance with the principles of statutory interpretation where an individual's rights are abrogated and avoids the mischief identified by both Jenkins J and McLure P of the definition of 'crime-used' in section 146 potentially including accidental use of property[47].

Part VII:

The applicable statutory provisions are annexed. These remain in force in this form as at the date of these submissions.

Part VIII:

80. The appeal be allowed.

81. The judgment and orders of the Court of Appeal Supreme Court of Western Australia of 8 April 2010 be set aside.

82. The respondent's Notice of Motion for a crime-used property order substitution declaration be dismissed.

83. The freezing order made by the Supreme Court of Western Australia on 8 April 2002 be dismissed.

84 The respondent pay the appellant's costs of the proceedings.

Dated 1 February 2011.

S A SHIRREFS SC
Tel: 03 9225 8967
Fax: 03 9225 6015
Email: s.a.shirrefs@vicbar.com.au

H J E VAN DEN HEUVEL

[47] *DPP (WA) v White* (2009) 194 A Crim R 192 at [80]-[85] and *DPP (WA) v White* [2010] WASCA 47 at [27], [29]–[31]

ANNEXURE 1 – Relevant statutory provisions

Applicable provisions of the *Criminal Property Confiscation Act 2000* (WA)

22. Making crime-used property substitution declarations

(1) On hearing an application under section 21, the court must declare that property owned by the respondent is available for confiscation instead of crime-used property if —

(a) the crime-used property is not available for confiscation as mentioned in subsection (2); and

(b) it is more likely than not that the respondent made criminal use of the crime-used property.

(2) For the purposes of subsection (1)(a), the crime-used property is not available for confiscation if —

(a) the respondent does not own, and does not have effective control of, the property;

(b) where the property was or is owned or effectively controlled by the respondent, and was or is frozen — the freezing notice or freezing order has been or is to be set aside under section 82(3) in favour of the spouse, a de facto partner or a dependant of the respondent; or

(c) in any other case — the property has been sold or otherwise disposed of, or cannot be found for any other reason.

(3) If the respondent has been convicted of the relevant confiscation offence, it is presumed that the respondent made criminal use of the property unless the respondent establishes the contrary.

(4) If the respondent has not been convicted of the relevant confiscation offence, but the applicant establishes that it is more likely than not that the crime-used property was in the respondent's possession at the time that the offence was committed or immediately afterwards, then it is presumed that the respondent made criminal use of the property unless the respondent establishes the contrary.

(5) In any circumstances except those set out in subsection (3) or (4), the applicant bears the onus of establishing that the respondent made criminal use of the property.

(6) When making a declaration, the court is to —

(a) assess the value of the crime-used property in accordance with section 23; and

(b) specify the assessed value of the crime-used property in the declaration.

(7) The court may make any necessary or convenient ancillary orders.

106. Grounds for finding property is crime-used or crime-derived

A finding that particular property is crime-used or crime-derived, or that there are reasonable grounds for suspecting that it is crime-used or crime-derived, and any decision, declaration or order based on such a finding —

(a) need not be based on a finding as to the commission of a particular confiscation offence, but may be based on a finding that some confiscation offence or other has been committed;

(b) may be made whether or not anyone has been charged with or convicted of the relevant confiscation offence; and

(c) may be made whether or not anyone who owns or effectively controls the property has been identified.

Part 12 — Interpretation

141. Term used: confiscation offence

(1) In this Act, ***confiscation offence*** means —

(a) an offence against a law in force anywhere in Australia that is punishable by imprisonment for 2 years or more; or

(b) any other offence that is prescribed for the purposes of this definition.

(2) An offence of a kind referred to in subsection (1)(a) is a confiscation offence even if a charge against a person for the offence is dealt with by a court whose jurisdiction is limited to the imposition of sentences of imprisonment of less than 2 years.

...

146. Term used: crime-used

(1) For the purposes of this Act, property is crime-used if —

(a) the property is or was used, or intended for use, directly or indirectly, in or in connection with the commission of a confiscation offence, or in or in connection with facilitating the commission of a confiscation offence;

(b) the property is or was used for storing property that was acquired unlawfully in the course of the commission of a confiscation offence; or

(c) any act or omission was done, omitted to be done or facilitated in or on the property in connection with the commission of a confiscation offence.

(2) Without limiting subsection (1), property described in that subsection is crime-used whether or not —

(a) the property is also used, or intended or able to be used, for another purpose;

(b) anyone who used or intended to use the property as mentioned in subsection (1) has been identified;

(c) anyone who did or omitted to do anything that constitutes all or part of the relevant confiscation offence has been identified; or

(d) anybody has been charged with or convicted of the relevant confiscation offence.

(3) Without limiting subsection (1) or (2), any property in or on which an offence under Chapter XXII or XXXI of *The Criminal Code* is committed is crime-used property.

147. Term used: criminal use

For the purposes of this Act, a person makes criminal use of property if the person, alone or with anyone else (who need not be identified) uses or intends to use the property in a way that brings the property within the definition of crime-used property.

...

Schedule

Glossary

1. Terms used

In this Act —

...

crime-used, in relation to property, has the meaning given in section 146;

crime-used property substitution declaration means a declaration under section 22;

...

criminal use, in relation to a person and property, has the meaning given in section 147;

...

owner, in relation to property, means a person who has a legal or equitable interest in the property;

...

premises includes vessel, aircraft, vehicle, structure, building and any land or place whether built on or not;

...

property means —

(a) real or personal property of any description, wherever situated, whether tangible or intangible; or

(b) a legal or equitable interest in any property referred to in paragraph (a);

...

relevant confiscation offence, in relation to confiscable property, means the confiscation offence or suspected confiscation offence that is relevant to bringing the property within the scope of this Act;

respondent means —

(a) in relation to an application for an unexplained wealth declaration, a criminal benefits declaration or a crime-used property substitution declaration — the person against whom the declaration is sought; or

(b) in relation to an unexplained wealth declaration, a criminal benefits declaration or a crime-used property substitution declaration — the person against whom the declaration is made;

10