

*DPP v Dickfoss* [2011] NTSC 04

PARTIES: DIRECTOR OF PUBLIC  
PROSECUTIONS  
(Applicant)

v

MARK WESLEY DICKFOSS  
(Respondent/Objector)

and:

THE NORTHERN TERRITORY OF  
AUSTRALIA  
(Respondent to the Objection)

and:

ATTORNEY GENERAL OF THE  
NORTHERN TERRITORY OF  
AUSTRALIA  
(Intervenor)

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING TERRITORY  
JURISDICTION

FILE NO: 105 of 2009 (20922571)

DELIVERED: 14 January 2011

HEARING DATES: 11-14 October 2010

JUDGMENT OF: MILDREN J

## **CATCHWORDS:**

STATUTORY INTERPRETATION – *Criminal Property Forfeiture Act 2002* – statutory obligation to express grounds in order made – grounds referred to in order did not particularise forfeiture offence or which limb of the definition of “crime-used property” was relied on – whether order restraining property invalid – *Criminal Property Forfeiture Act 2002*, s 45

STATUTORY INTERPRETATION – *Criminal Property Forfeiture Act 2002* – whether objector is an “innocent party” – deceased objector – land jointly owned – whether restraining order severs joint tenancy – whether forfeiture order should be made if deceased was an innocent party but other joint tenant was not – method of valuation of deceased’s interest

CRIMINAL PROPERTY FORFEITURE – whether property was crime-used property – meaning of “property” – meaning of “crime-used” property – whether there needs to be a substantial connection between the forfeiture offence and the property in *Criminal Property Forfeiture Act*, s 11

CRIMINAL PROPERTY FORFEITURE – burden and standard of proof in objection proceedings and forfeiture applications – *Criminal Property Forfeiture Act*, s 63(1)(c), s 96(1), s 136(2)(d)

STATUTORY INTERPRETATION – *Criminal Property Forfeiture Act* – forfeiture application – whether court has discretion to refuse the application – whether “must” means “may” – *Criminal Property Forfeiture Act*, s 95(2)

CRIMINAL PROPERTY FORFEITURE – forfeiture application - what needs to be proved – burden and standard of proof – *Criminal Property Forfeiture Act*, s 96(1)

WILLS AND TRUSTS – joint tenancy – deceased’s interest – whether restraining order severs joint tenancy – right and duty of executor of deceased estate to object to forfeiture application – disposition of proceeds of sale – *Criminal Property Forfeiture Act*, ss 63, 103, 163

CONSTITUTIONAL LAW – *Criminal Property Forfeiture Act* – s 43(2)(a) and 96(1) – whether invalid – *Kable* principle – whether s 96(1) invalid as

an acquisition of property otherwise than on just terms – *Northern Territory (Self-Government) Act 1978 (Cth) s 50(1); Constitution (Cth) s 51(xxxi)*

CRIMINAL PROPERTY FORFEITURE – powers of Court when considering application for restraining order – *Criminal Property Forfeiture Act*, s 43(2)(a) – powers of Court under *Sentencing Act* s 5(4)(a) – whether double jeopardy

Spry, *Equitable Remedies*, 6<sup>th</sup> Edn.

Meagher, Gummow and Lehane, *Equitable Doctrines & Remedies*, 4<sup>th</sup> Edn.

*Constitution (Cth) s 51(xxxi)*

*Controlled Substances Act 1984 (SA)*, s 32(1)(a)

*Criminal Assets Confiscation Act 2005 (SA)*

*Criminal Assets Recovery Act 1990 (NSW)*, s 10

*Criminal Property Confiscation Act 2000 (WA)*, ss 146(1), 146(3)

*Criminal Property Forfeiture Act 2002*, ss 3, 5(4)(a), 6, 10(2) and 10(3), 11, 11(b), 11(c), 11(1), 11(1)(a), (11)(1)(b) and 11(1)(c), 11(2)(c) and 11(2)(d), 41, 41(2), 42, 43(2), 43(2)(a), 44(3), 45(1)(b), 45(2), 46(1)(c), 51, 59, 60(2)(b), 63, 63(1)(a), 63(1)(b) and 63(1)(c), 63(1)(a)(iii) and 63(1)(a)(iv), 63(2), 63(2)(a), 81(1), 81(2)(a), 82(b), 84, 91(1), 95, 95(1), 95(2), 95(4), 96, 96(1), 103(1), 103(1)(d), 106, 140(a), 143, 163, 163(3), 163(4)

*Interpretation Act*, s 62A

*Judiciary Act 1903 (Cth)*, s 78B

*Misuse of Drugs Act*, ss (1), 7(1), 7(2)(c), 9(1)(2)(d), 9(2)(f)(i), 9(2)(f)(ii)

*Northern Territory (Self-Government) Act 1978 (Cth)*, ss 6, 50(1)

*Sentencing Act*, s 5(4)(a)

*Supreme Court Rules*, chapter 1, r 60.08, r 92.02(1), r 92.06(3); r 92.06(4); chapter 7

*Airservices Australia v Canadian Airlines International Limited* (2001) 202 CLR 133; *Attorney-General for the Northern Territory v Chaffey* (2007) 231 CLR 651; *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508; *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18; *Burnett v Director of Public Prosecutions* (2007) 21 NTLR 39; *Clissold v Perry* (1904) 1 CLR 363; *Coco v The Queen* (1994) 179 CLR 427; *Director of Public Prosecutions ex parte Lawler and Another* (1993-1994) 179 CLR 270; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; *International Finance Trust Company & Another v New South Wales Crime Commission and Others* (2009) 240 CLR 319; *Murphy v Farmer* (1988) 165 CLR 19; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; *Palling v Corfield* (1970) 123 CLR 52; *South Australia v Totani* (2010) 271 ALR 662; *Wake v Northern Territory of Australia* (1996) 5 NTLR 170; *Wynbyne v Marshall* (1997) 7 NTLR 97, applied

*Director of Public Prosecutions v Green* (2010) 239 FLR 278, distinguished

*Australian Capital Territory v Pinter* (2002) 121 FCR 509; *Commissioner of Superannuation v Hastings* (1986) 70 ALR 625; *Della Patrona v Director of Public Prosecutions (Cth) No. 2* (1993) 38 NSWLR 257; *R v Hadad* (1989) 16 NSWLR 476; *Rintel v The Queen* (1991) 3 WAR 527, followed

*Director of Public Prosecutions v George* (2008) 102 SASR 246, followed in part; distinguished in part

*R v Ward, Marles and Graham* (1989) 1 Qd.R.194, not followed

*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297; *Re Davis* (1947) 75 CLR 409; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *Howie v Youth Justice Court* (2010) 27 NTLR 132; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Mansfield v Director of Public Prosecutions for Western Australia* (2006) 226 CLR 486; *R v Carroll* (2010) 267 ALR 57, referred to

*Director of Public Prosecutions (WA) v White* (2009) A Crim R 192;  
*Director of Public Prosecutions v White* [2010] WASCA 47, referred to;  
followed in part

**REPRESENTATION:**

*Counsel:*

Applicant/Respondent to the Objection:	R Jobson
Respondent/Objector:	A Wyvill SC and G McMaster
Intervenor:	M Grant QC and S Brownhill

*Solicitors:*

Applicant/Respondent to the Objection:	Solicitor for the Northern Territory
Respondent/Objector:	Ward Keller
Intervenor:	Solicitor-General of the Northern Territory

Judgment category classification:	A
Number of pages:	62



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

*DPP v Dickfoss* [2011] NTSC 04  
No 105 of 2009 (20922571)

BETWEEN:

**DIRECTOR OF PUBLIC  
PROSECUTIONS**  
Applicant

AND:

**MARK WESLEY DICKFOSS**  
Respondent/Objector

AND:

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Respondent to the Objection

AND:

**ATTORNEY GENERAL OF THE  
NORTHERN TERRITORY OF  
AUSTRALIA**  
Intervenor

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 14 January 2011)

**Introduction**

- [1] There are two applications before the Court. The first application is an Objection to a restraining order made on 27 July 2009 by Olsson AJ with respect to a residential property at Lot 370 Darwin River Road by the

registered joint owners of the property, Mark Wesley Dickfoss and Alfred Otto Dickfoss, pursuant to s 59 of the *Criminal Property Forfeiture Act* 2002 (the Act).

- [2] The second application is an application by the Director of Public Prosecutions that the property, the subject of the restraining order be forfeited to the Northern Territory. The application is opposed by Mr Mark Wesley Dickfoss (hereinafter referred to as the objector). After the restraining order was made, Otto Dickfoss passed away on 24 March 2010. As the property was joint property, under the general law it would be owned by Mark Wesley Dickfoss by survivorship. However the general law has been altered by s 163 of the Act. I will deal with that problem in due course.
- [3] It is not in dispute that the objections raised by the objector and his late father must be determined first. It is only if one or both of the objections is or are dismissed that the Court can then consider whether or not to make a forfeiture order.
- [4] One of the grounds upon which the objector seeks to resist the forfeiture order is because it is alleged that both the power to restrain crime-used property under s 43(2)(a) and the power to forfeit crime-used property under s 96(1) are beyond the legislative power of the Territory.
- [5] The relevant notices required by s 78B of the *Judiciary Act 1903* (*Commonwealth*) have been served. Only the Attorney General for the

Northern Territory has intervened. I am satisfied that a reasonable time has elapsed since the giving of the notices and it is appropriate for this Court to proceed.

[6] The grounds of the objector's objection, as set out in the objection filed in the Court, is limited to a single ground that the property is neither crime-used nor crime derived property. At the commencement of the hearing I gave leave to counsel for the objector to amend the grounds of the objection to include two further grounds namely:

(b) the Order of 27 July 2009 should be set aside as it fails to comply with s 45(1)(b) of the Act;

(c) both the power to restrain crime-used property under s 43(2)(a) and the power to forfeit crime-used property under s 96(1) of the Act, are beyond the legislative powers of the Territory.

### **The Facts**

[7] None of the facts in this case are in dispute. The evidence consists of the following material tendered by Mr Wyvill SC for the objector:

Exhibit A1 - A receipt for \$98,000 dated 30 June 2006 recording the objector's Keno winnings at the Litchfield Pub.

Exhibit A2 - The following documents in the hearing book as follows:

(1) The objector's affidavit of 26 August 2010 at tab 12;

- (2) An affidavit by Gregory Vincent Phelps sworn 23 September 2010 at tab 14;
- (3) The Affidavit of Michael Neal Ward of 3 July 2009, paragraphs 7 and 9 and annexure MNW4 at tab 8;
- (4) The following documents in criminal proceedings SCC 20914469, *The Queen v Mark Wesley Dickfoss*, namely:
  - (a) The indictment at tab 4
  - (b) The transcript of the hearing on 12 August 2009 at tab 5
  - (c) The Crown facts at tab 6 (pages 1 – 3 only)
  - (d) A letter from Elva Dickfoss dated 3 August 2009 at tab 6 (pages 8 – 9)
  - (e) A letter from Dr Aulakh dated 4 August 2009 at tab 6 (page 10)
  - (f) A letter from the Minister for Families, Housing, Community Services and Indigenous Affairs and by the Minister for Financial Services, Superannuation, Corporate Law and for Human Services dated 13 June 2009 at tab 6 (page 11)
  - (g) Two references from the Litchfield Trading Company and Berry Springs Mechanical at tab 6 (pages 12 and 13)
  - (h) The transcript of sentence on 7 October 2009 at tab 7.

(5) Mr Jobson for the Director of Public Prosecutions tendered three additional documents, by consent, as follows :

(a) Valuation report relating to Lot 370 Darwin River Road by Herron Todd White with attachments dated 9 November 2009. Counsel for the objector noted that the objector accepted, for the purposes of this hearing only, that the unencumbered value of the freehold estate with the subject land is \$330,000. The valuation and the attached e-mail of 27 September 2010 became Exhibit B1.

(b) A certificate of conviction in relation to the objector which became Exhibit B2.

(c) A bundle of affidavits of service of the application for the restraining order, and of the affidavit in support of Mr Ward sworn 3 July 2009, and of the order made by Olsson AJ. These affidavits became Exhibit B3.

### **The Facts**

[8] The objector is an unemployed single man currently residing at 370 Darwin River Road, Darwin River on the land, the subject of these proceedings (hereinafter called 'the land'). He is 48 years of age having been born on 4 May 1962 at Mt Isa.

- [9] The objector's father was Alfred Otto Dickfoss and his natural mother is Nancy Davis. When the objector was young, Alfred Dickfoss divorced Nancy Davis and married Elva Williams on 23 October 1975.
- [10] The objector has had learning problems from an early age because he is dyslexic. He also suffers from memory problems and has never been able to learn to read and write satisfactorily. His learning difficulties have caused him to find it hard to hold down proper employment; although from time to time he has worked as a labourer and gardener, as a buffalo catcher and in the mining exploration industry.
- [11] In November 1977, Alfred and Elva Dickfoss purchased the land for \$9,700. The land is approximately 25 acres or 9 hectares and 1,000 sq metres. Alfred Dickfoss worked the property as a market garden and also as a piggery.
- [12] In 1982, the objector lived on the property and assisted his father in running the businesses on the property. The piggery, however, was not financially successful and in about 1983, the objector began working with a Mr McLeod as a buffalo catcher, working on stations all around the Territory.
- [13] In 1987, Elva Dickfoss moved to Adelaide to commence tertiary studies. At this time the objector returned to work and live on the land due to injuries that he had sustained working as a buffalo catcher. In that year, the objector entered into an oral agreement with Elva to purchase her interest in the property for \$30,000 which was to be paid over time in instalments.

- [14] In September 1995, Elva Dickfoss transferred her interest in the land to the objector. From that time on the objector and Alfred Dickfoss were the joint owners of the land.
- [15] The objector worked on the land with his father until 1991 when he obtained employment with Normandy Mining (NT Exploration). In 1992, the objector married Georgina Ganley. In June 1992, the objector and Georgina Dickfoss purchased a five-acre block of land at Humpty Doo for \$21,000. In 1993, the objector separated from his wife. The land at Humpty Doo was sold to a third party for \$68,000 and the profit on the sale evenly divided. The objector then moved back to the land to live with his father and for several years, he assisted him.
- [16] When the objector was in his early 20's he was introduced to smoking cannabis. The objector was never a heavy user but found that he enjoyed smoking it. He found that it helped him to relax. As he got older, he had developed a sleeping disorder and found that smoking cannabis assisted him to sleep.
- [17] In order to support this habit he started to grow marijuana in bushland in the Dundee area. In 1994, he was arrested and charged with producing and possession of cannabis and sentenced to a term of imprisonment for three months. In August 1994, he was released and returned to the land to live with his father whom he assisted in the market gardening business. He also worked, from time to time, on road works.

[18] In the late 1990s the objector decided to start his own business as a horse shooter. He purchased a truck and operated the business. The business was not a success. After a short period of time he returned to live and work on the land with his father again. In May 2005, he obtained employment as a trainee panel beater. He worked in this capacity until about May 2008. By this time, Alfred Dickfoss was suffering from advanced emphysema and the objector returned to work and live on the land and to look after his father.

[19] On 27 April 2009, the police executed a search warrant on the property and found some cannabis plants and some cannabis plant material. It will be necessary to go into the facts of that matter more fully later but it is not in contention that he was arrested and charged on information in relation to the unlawful possession of 1.205 kilograms of cannabis and the unlawful cultivation of 22 cannabis plants. A hand up committal occurred on 23 June 2009, as a result of which he was committed for trial in this Court.

[20] On 6 July 2009, the Director of Public Prosecutions applied for a restraining order in relation to the land on the ground that the land was crime-used property, as defined by s 11 of the Act. It is an agreed fact that the application and supporting affidavit of Mr Ward were served on the objector on 22 July 2009. On 23 July 2009, the Director of Public Prosecutions signed an indictment against the objector charging him with two counts of offences against the *Misuse of Drugs Act*, namely, aggravated unlawful possession of a commercial quantity of cannabis and aggravated cultivation of a commercial quantity of cannabis plant.

[21] On 27 July 2009, the application for the restraining order was heard by Olsson AJ. Neither the objector nor his father appeared. A restraining order was granted in relation to the land. The control and management of the land was placed in the hands of the Public Trustee pursuant to s 46(1)(c) and s 106 of the Act. The order permitted the objector and Alfred Dickfoss to reside on the land whilst the order remained in place, subject to certain conditions. The order was served on the objector on 30 July 2009. The order and the supporting affidavit were also served on the objector's father on the same date.

[22] The objector and Alfred Dickfoss filed their objections to the restraining order on 28 September 2009.

[23] On 12 August 2009, the objector pleaded guilty to the offences alleged in the indictment and was sentenced, by Olsson AJ, to a term of imprisonment for a total period of 13 months and two weeks suspended at the rising of the Court upon entering into a home detention order for a period of six months.

[24] On 24 March 2010, the objector's father, Alfred Dickfoss, passed away. Under the terms of Alfred Dickfoss' will, the objector is the sole beneficiary of his estate.

[25] Prior to Alfred Dickfoss' death, the objector was in receipt of a carer's allowance including a tax-free carer supplement. After his father's death, the objector completed successfully the home detention order and became entitled to a disability pension in lieu of his carer's allowance.

[26] As has been noted previously, the unencumbered value of the freehold estate in the land is \$330,000.

### **Was the Order defective?**

[27] It was submitted on behalf of the objector that the order made by Olsson AJ on 27 July 2009 is defective in that it fails to comply with s 45(1)(b) of the Act which it submitted was a fatal, invalidating defect which cannot be cured by amendment.

[28] Section 45 of the Act provides relevantly:

#### **45. Restraining order to specify grounds**

- (1) If an application is made under s 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.

[29] Chapter 7 of the *Supreme Court Rules*, which deals with criminal property forfeiture, does not specifically provide a form for the recording of an order.

[30] Rule 92.02(1) provides that the Rules in Chapter 1 apply to the practice and mode of procedure in relation to matters dealt with by Chapter 7, with certain exceptions not relevant to this particular matter. The form of order

used was Form 60C authorised by Rule 60.08 in Chapter 1, and is a general form of order.

[31] The only specific statutory requirement is that the order must set out “each ground that the court finds is a ground on which the order may be made”.

The order refers to the grounds in two sections. Under the heading “OTHER MATTERS” sub-paragraph (2) provides :

The Court found that there are reasonable grounds for suspecting that the property below described is crime-used property, as defined in s 11 and pursuant to s 43(2)(a) of the *Criminal Property Forfeiture Act*.

[32] The order itself states in paragraph (1):

Pursuant to s 41(2), 43(2)(a) and 51 of the *Criminal Property Forfeiture Act* (“the CPFA”) a restraining order is granted in relation to the following property for a period of six months .... ON THE GROUNDS THAT the real property is crime-used property pursuant to s 11 of the CPFA.

[33] Section 11 of the Act defines crime-used property in the following terms:

## **11. Crime-used property**

(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 forfeiture offence or in or in connection with facilitating the commission of a forfeiture offence;
- (b) the property is or was used for storing property that was acquired unlawfully in the course of the commission of a forfeiture offence; or

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

[34] The definition of forfeiture offence is contained in s 6 of the Act which provides as follows:

**6. Forfeiture offence**

For the purposes of this Act, a forfeiture offence is -

- (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 section.

[35] Section 43(2)(a) of the Act relevantly provides :

**43. Restraining order in relation to specified property**

- (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; ...

[36] Thus, what can be discerned from the terms of the order when read with the relevant provisions of the Act is that the Judge who made the order was satisfied that there were reasonable grounds for suspecting that the objector had committed a forfeiture offence, and that the property was crime-used property within the meaning of s 11.

[37] Section 140(a) of the Act provides that a finding that particular property is crime-used, or that there are reasonable grounds for suspecting that it is crime-used and any decision, declaration or order based on such a finding need not be based on a finding as to the commission of a particular forfeiture offence but may be based on a general finding that a forfeiture offence has been committed.

[38] It was submitted that the order does not comply with s 45(1)(b) because it does not identify the alleged forfeiture offence or offences. The first answer to this is in the wording of s 140(a). It was further alleged that the order was defective because it does not identify who committed the alleged forfeiture offences. The argument proceeded on the basis that crime-used property was widely defined under s 11 and under s 11(2)(c) property is crime-used whether or not any person who did or omitted to do anything that constituted all or part of the relevant forfeiture offence has been identified. Similarly, it was submitted that it was not clear which particular subparagraph of s 11(1) was relied upon and in what way, and it was put that there was no way, by reading the order, which use, act or omission was relied upon in terms of time and date, place or the event itself.

[39] In my opinion, this submission should be rejected. The order requires only the grounds for the making of the order be identified in the order and not the reasons.

[40] Mr Wyvill SC submitted that unless the grounds sufficiently identify the matters of which he complained, it will be difficult for the objector to properly establish, the burden being upon the objector, that it is more likely than not that the property is not crime-used.<sup>1</sup> Time is also critical, so it was put, particularly in relation to the innocent party provisions which require an objector who claims to be an innocent party, to establish under s 63(1)(a)(iii) and (iv) that the objector was usually resident on the property at the time the relevant forfeiture offence was committed, and at the time the objection was filed.

[41] In this particular case, at the time of service of the application for the restraining order, the objector was also served with the affidavit of Mr Ward which was relied upon by the Director of Public Prosecutions in support of the application. Therefore, the basis upon which the order was being sought, and the facts upon which the Director of Public Prosecutions relied, were fully revealed to him.

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<sup>1</sup> See s 63(1)(c)

[42] Order 92.06(3) and (4) provide:

- (3) Except as provided by the Act, when notice of an application is served on a party the notice is to be accompanied by a copy of all affidavit evidence in relation to the application.
- (4) The Judge may limit the scope of the evidence that is provided to a party if the Judge is satisfied that the protection of an ongoing investigation requires it, or for other good reason.

[43] Section 45(2) of the Act provides:

If the court that is hearing an application under s 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 the person.

[44] Mr Wyvill SC pointed to this provision in support of his argument that the order needs to specify in the grounds more particulars of the grounds relied upon by the Judge making the order than was apparent in this case.

[45] In *Burnett v Director of Public Prosecutions*,<sup>2</sup> the Court of Appeal held that where an application for a restraining order proceeds *ex parte* on the basis of a supporting affidavit the contents of which the Judge who made the restraining order has ordered not to be disclosed or served upon any person, it was incumbent upon the Judge to provide reasons.<sup>3</sup>

[46] An application for a restraining order is an interlocutory application.<sup>4</sup> It is akin to an application for an interim or interlocutory injunction. The

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<sup>2</sup> (2007) 21 NTLR 39.

<sup>3</sup> See pars 168, 250 and 269.

<sup>4</sup> *Burnett v Director of Public Prosecutions* (2007) 21 NTLR 39.

procedure to be followed is very similar. In this case, it was made on notice so that the objector was aware that the application was going to be made, when it was going to be made and the material relied upon in support of the application. In my view, the order complied with the requirement to provide the grounds upon which the order was made. The objector's father was served with the order and the supporting affidavit. It was not necessary to do anything more. That is not to say that in some cases it may be necessary to do more, particularly if the application is made *ex parte* and not all of the material upon which the applicant relies is to be served upon the respondent to the application or some other person with an interest in the property. In such a case, the grounds set out in the order may need to be more specific, and in any event reasons need to be given, even if what is said in the reasons is somewhat circumspect. I would dismiss this argument.

**Is the objector entitled to rely upon his late father's objection on innocent party grounds?**

[47] Section 163 of the Act makes specific provision in the case of the property of deceased persons. Sub-sections 163(3) and (4) provide:

- (3) If a person who owns property that is subject to a restraining order dies, this Act continues to apply to the property in all respects as if the person had not died, regardless of whether the administrator of the person's estate or any other person in whom the property vests as a result of the death is an innocent party in relation to the property.
- (4) Without limiting this section, if a person who is a joint tenant of property that is subject to a restraining order dies:

- (a) the person's death does not operate to vest the property in the surviving joint tenant or tenants; and
- (b) the restraining order continues to apply to the property as if the person had not died.

[48] It follows that, whilst the order continues to operate, because the father's interest in the property has not vested in the objector and notwithstanding that the Act continues as if the deceased were still alive, the administrator or executor of the deceased's estate would ordinarily have the right, if not the duty, to pursue the deceased's objection. The executor named in the deceased's will is the deceased's stepson, Rodney Williams. Rodney Williams has not appeared to defend the deceased's interest; that has been left to the objector who is in any event the deceased's sole beneficiary, as well as the only surviving joint tenant. No objection was taken by Mr Jobson to this course. To the extent that leave may be required to facilitate this course, it is granted.

[49] Mr Jobson conceded that, on the evidence, the deceased was an innocent party, and that his objection must be upheld. He submitted that the effect of upholding the deceased's objection is that if the objector's objection (i.e. Mark Dickfoss' objection) fails, and a forfeiture order is made, the estate of the deceased objector is to be paid an amount from the proceeds of the sale of the property that is in proportion to the deceased objector's share of the property, citing s 63(2)(a) of the Act. Mr Wyvill SC submitted that the respondent, i.e. Mark Dickfoss, was entitled to the order under that

provision. In my opinion the submission of Mr Jobson is correct. Section 163(3) has the effect that the deceased is presumed to be still alive, and the Act continues to have effect as if the deceased had not died. The order under s 63(2)(a) must be made in favour of the objector, who in this case would be the deceased. The purpose and effect of these provisions, when read together, is to sever the joint tenancy, so that the proceeds arising from the sale would go to the deceased's estate, rather than the surviving joint tenant under the general law. This would flow in any event from the forfeiture order. The form of the order to be made will ultimately depend upon whether Mark Dickfoss' objection is also upheld. If that occurs, the restraining order "may" be set aside (s 63), but in my opinion there is no discretion if the Court were to find in terms of s 63(1)(c) that the property is not "crime-used". Should the restraining order be set aside, one would expect to find in the Act a clear statement to the effect that a forfeiture order is no longer possible, but there is nothing in the Act that states this in so many words. Section 82(b) provides that crime-used property is not available for forfeiture if a restraining order "has been or is to be" set aside under s 63(1)(a) in favour of a spouse or de facto partner, but is silent on what happens in cases which fall under s 63(1)(b) or 63(1)(c). Despite that difficulty, before a forfeiture order can be made, s 95(1) requires proof that "the property restrained" is more likely than not "crime-used property". It therefore follows that if the restraining order is set aside, a forfeiture order is not possible.

[50] In the circumstances I am satisfied that the deceased's objection must be upheld, and I so declare.

### **The interest of the ANZ Bank**

[51] I note that notice of the restraining order was also served on the Australia and New Zealand Banking Group Limited (the bank) (see Exhibit B3). I am not aware of any objection being filed by the bank. The search of the certificate of title shows that the bank is registered as a mortgagee. A statutory declaration from the bank deposes to a small loan which is still (apparently) secured by the mortgage (see tab 11 in Exhibit A2). That statutory declaration has not been tendered by any of the parties. Depending on the outcome of these proceedings, it may be that the bank will lose its security. However, it is clear that whatever debt is owing to the bank will be discharged out of the proceeds of sale if a forfeiture order is made: s 103(1)(d). The bank's interest in this case is sufficiently protected.

### **Was the land "crime-used property"?**

[52] The Act provides that, at the objection stage of the proceedings, the burden of proving that the property was not "crime-used property" rests on the objector: s 63(1)(c). The standard of proof is the normal civil standard. However, all parties submitted that at the time of hearing the forfeiture application, the burden of proof shifts to the Director of Public Prosecutions according to the same civil standard. If this is correct, there is a possibility that the objection may fail, and the application for forfeiture may also fail if

the Court is left in a position that it is unable to make a finding one way or the other.

[53] It is now necessary to deal with the facts upon which the objector relies to show that the property is not crime-used property. At 11:10 am on 27 April 2009, police executed a search warrant on the land. There was a green coloured residence situated on the land about 140 metres from the Darwin River Road with a caravan adjacent thereto. The residence was occupied by the objector and his father. According to the sketch plan of the residence, it comprised one bedroom, a kitchen, and a dining and lounge room area. The bathroom and toilet was situated off a veranda.

[54] The cannabis plants were all growing in pots located on the ground near the residence in the open. There was one plant approximately 180 cm in height in a pot in the garden outside the bedroom. There were eight plants up to 100 cm in height in another pot next to the first pot. There were 83 cannabis seedlings in an oil drum located at the rear of the block, and 41 seedlings in another oil drum also located at the rear of the block. Finally, there were 14 seedlings inside a pot sitting on top of a 44 gallon drum located towards the side of the house. Most of the seedlings as depicted in the photographs taken were very small.

[55] Inside the house, police located 599 grams of cannabis scattered on the floor and located under the deceased's bed. Two lots of cannabis weighing a total of 578.2 grams were found spread out in some cupboard drawers in the

bedroom. Two glad clip seal bags containing a total of 27.5 grams of cannabis were located on a kitchen shelf; 1.97 grams of cannabis material was found in a Bushell's tea tin on a kitchen shelf; 5.5 grams of cannabis material was located within a cupboard in the caravan; and 3.98 grams of cannabis seeds in a clip seal bag and film canister was located in the refrigerator.

[56] During a record of interview conducted by the police the objector admitted to cultivating the larger cannabis plant located near the bedroom by watering it once a week and fertilising it. Olsson AJ found that the property was not connected to Darwin's water supply, so the objector had to obtain the water himself. The other plants and seedlings he claimed had self propagated from previous plants he had grown.

[57] At the time of sentence, Olsson AJ accepted that the cannabis was essentially for the objector's personal use, apart from occasionally supplying a visitor with an occasional smoke for social purposes. His Honour accepted that the objector used the cannabis to obtain a good nights' sleep. It was conceded by the Crown that the offending was at the bottom end of the range of seriousness. The objector was sentenced to imprisonment for 13 months and two weeks suspended on the rising of the court upon the objector entering into a 6 months home detention order. There was no suggestion that the cannabis was intended for commercial gain.

[58] Mr Wyvill SC pointed out that no fixtures were used to support the growing of the plants, such as a garden shed, or cover, nor were hoses used to water the plants from water supplied to the land from a water supply provided to the land. As to the cannabis material, it was stored in chattels such as cupboards, plastic containers, a tin, the refrigerator etc. It was submitted that the land itself was not used to grow the plants, store the material or even to conceal it or the plants. No part of the interest in the land was used to fund the enterprise. The relationship between the land and the offending was happenstance, depending only on where the objector was living at the time.

[59] Mr Jobson submitted that there was some evidence that cultivation of the largest plant had gone on for some three to four months. The plants were not merely present on the land, and the relevant connection with the land was established by the fact that the largest plant was watered. The house was a convenient place to store the material. It offered privacy and control because other members of the public did not have access to the house. He submitted that the house was used, not just the furniture inside. The quantity of the drugs was not relevant, nor is the purpose for which the drugs were in the objector's possession. The relevant question is whether the land was crime-used, not just the freehold interest in the land. 'Land' means the physical land. It was conceded that the mere presence of the drugs on the land was not enough. There needed to be a connection with the land, but it did not need to be a substantial connection.

[60] Mr Wyvill SC referred me to *Director of Public Prosecutions v Green*<sup>5</sup> in support of his argument that “property” in s 11 of the Act means the interest in land held by the objector. The nub of this submission was that the objector did not use his interest in the land in connection with a forfeiture offence because there was no evidence that the objector had mortgaged or otherwise dealt with his interest in the land in connection with a forfeiture offence. Mr Jobson submitted that this case was distinguishable because it dealt with the meaning of “own” in relation to the crime-used property substitution provisions. In fact *Director of Public Prosecutions v Green* established that the meaning of the word “property” depends upon the context in which it is found in a provision of the Act. It may appear to be clear that it refers to the physical land, or it may refer to an interest in land, or it may refer to both.<sup>6</sup> For the purposes of s 11(1), in my opinion it refers to the physical land. Whether it could refer also to an interest in the land is not necessary to decide.

[61] I was referred by both counsel to three decisions which have discussed what is meant by crime-used property in other jurisdictions. In *Director of Public Prosecutions (WA) v White*,<sup>7</sup> an application was made for a property substitution order, because a property leased by the accused as his residence was crime-used but not available for forfeiture. The accused was convicted of the murder of one Tapley whom he had shot a number of times whilst

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<sup>5</sup> (2010) 239 FLR 278.

<sup>6</sup> *DPP v Green* at [32].

<sup>7</sup> (2009) 194 A.Crim.R. 192.

within the boundaries of the property. In an effort to escape, Tapley climbed the front gates and fell to the ground outside the property. The accused opened the gates and shot Tapley at close range. Tapley died almost immediately from the last shot. It was contended that the residential property was crime-used. Section 146(1) of the *Criminal Property Confiscation Act 2000* (WA) defines “crime-used property” in terms which are, for all intents and purposes, *in para materia* to s 11(1)(a) and (b) of the Act. Jenkins J held that whilst the accused had locked the gates, not for the purpose of committing the murder, the locked gates assisted him to commit the murder because they prevented Tapley from leaving the verge of the premises when the fatal shot was fired. Her Honour, after deciding that the relevant forfeiture offence was murder, held that on the true construction of the equivalent to s 11(1)(a) of the Act, “there was no warrant for requiring that the use of the property ... must have a real or substantial connection with the commission of the confiscation offence”.<sup>8</sup> Her Honour held that “used” did not include an unintended use,<sup>9</sup> but did include an incidental use, in the sense that the use was “subordinate to other acts constituting the commission of the offence”,<sup>10</sup> although she held that the mere fact that an item inside a house was used did not necessarily result in the land being so used.<sup>11</sup> As to the phrase “in connection with”, her Honour held that “there must be a nexus, attachment or link to connect the use with the commission

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<sup>8</sup> At para [73].

<sup>9</sup> At para [80].

<sup>10</sup> At para [85].

<sup>11</sup> At para [86].

of the offence” but there need not be a temporal connection.<sup>12</sup> As to the expression “using property in connection with facilitating an offence”, her Honour held that it means “to employ property in a manner that is connected to making the commission of the offence easier or less difficult”.<sup>13</sup> As to the equivalent of s 11(c) of the Act,<sup>14</sup> she held that this provision avoids the requirement for there to be use of the property; all that needed to be proved was that the *actus reus* of the offence was done or facilitated on the property.<sup>15</sup> She concluded that the property was “crime-used” as defined by the equivalent of s 11(c) because the acts of shooting on the property were in connection with the ultimate fatal shot, and also because the offender fired the fatal shot whilst still on the property.<sup>16</sup> She made a finding that the property was not crime-used as defined by the equivalent of s 11(a),<sup>17</sup> and that therefore a property substitution order under the equivalent to s 81(2)(a) and 84 of the Act was not available and dismissed the application.

[62] An appeal by the Director of Public Prosecutions was upheld, the Court of Appeal taking a different view of the facts as to whether or not the property was crime-used within the meaning of the equivalent to s 11(a) of the Act. McLure P, with whom Owen and Buss JJA agreed, basically supported the construction of the Act arrived at by Jenkins J. McLure P held that use of a

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<sup>12</sup> At para [89].

<sup>13</sup> At para [90].

<sup>14</sup> The Western Australian provision is narrower and different in material respects from s 11(1)(c) of the Act.

<sup>15</sup> At para [92] – [96].

<sup>16</sup> At para [99].

<sup>17</sup> At para [108].

fixture constitutes the use of the land of which it forms part. The selling of prohibited drugs in a public place is a use of the land. He doubted whether access across land or mere presence on land to commit an offence is by itself enough to bring the conduct under the equivalent to s 11(a) or (c). He said that the activity of supplying, selling, preparation or storing of prohibited drugs on land over which a person had factual possession or control goes beyond mere presence on the land, because the offender has exercised control over the land, and the involvement of the land is not merely incidental to the unlawful activity.<sup>18</sup> The expression “in connection with”, he said, “requires a link between the relevant use of, or act or omission on, the property on the one hand and the commission or facilitating the commission of a confiscation offence on the other”.<sup>19</sup> However, it is insufficient if the relationship is merely tenuous or remote. This is a matter of judgment and degree where the purpose and effect of the conduct would be relevant considerations.<sup>20</sup>

[63] The third case to which I was referred was the decision of the Full Court of the Supreme Court of South Australia in *Director of Public Prosecutions v George*.<sup>21</sup> In that case the respondent had been found to have grown 12 mature cannabis plants and 20 seedlings hydroponically in a shed at the rear of his residence. He pleaded guilty to one count of producing a controlled substance, contrary to s 32(1)(a) of the *Controlled Substances Act 1984* (SA)

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<sup>18</sup> *Director of Public Prosecutions (WA) v White* [2010] WASCA 47 at [29] – [31].

<sup>19</sup> At para [31].

<sup>20</sup> At para [33].

and one count of knowingly extracting electricity from a power system without proper authority, contrary to s 85(1)(a) of the *Electricity Act 1996* (SA). He was unlawfully using the electricity to grow cannabis. He was fined \$2,500. An application was then made to the Magistrates Court under the *Criminal Assets Confiscation Act 2005* (SA) (the CAC Act). The Magistrate made an order the effect of which was to prevent forfeiture of the defendant's home. The Director of Public Prosecutions appealed to the Supreme Court. The provisions of the CAC Act are markedly different from the Act. As Vanstone J said:<sup>22</sup>

I note that in proposing the current legislation, the South Australian Attorney-General eschewed 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.

[64] One question which arose in that case which has relevance to this case is the meaning given by the Court to 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, after referring to a number of authorities which discussed that expression in connection with forfeiture legislation, said that:

... the definition refers to a use of property that facilitates, assists or contributes to the commission of an offence. That is a starting point, not a conclusion. The use of the property must be sufficiently significant (I realise that this is question begging) to warrant a

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<sup>21</sup> (2008) 102 SASR 246.

<sup>22</sup> At para [140].

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.<sup>23</sup>

[65] Vanstone J dissented. She said:<sup>24</sup>

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 ...

[66] The conclusion reached by the majority was that on the facts, the land was used in connection with the offence of producing cannabis. The factors identified in support of this conclusion indicated that the shed provided a convenient and safe place to grow the cannabis, in particular, because the use of the shed and the land enabled access to electricity and water. The use of the shed involved not a trifling or insignificant part of the land. The use was temporary, but not momentary. The shed was chosen as a suitable place to grow the cannabis. The use of the land facilitated and contributed to the commission of the offence; it was not just the place where the offence was

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<sup>23</sup> At para [65]. White J agreed at para [177].

committed. Doyle CJ said that although on the scant facts the case lay close to the limits of the reach of the definition, the case fell within it.<sup>25</sup>

[67] Although the definition of “instrument” is not identical to the definition of crime-used property contained in s 11(a) of the Act, I think that the approach of Doyle CJ is not inconsistent with the reasoning in *Director of Public Prosecutions (WA) v White*, both at first instance and on appeal, although s 11(a) refers also to an indirect as well as a direct use. Mr Wyvill SC submitted that the plants were not grown on the land but in pots which are removable chattels, not in any way fixtures. I agree. He submitted that the land was not used indirectly to grow the cannabis. The evidence does not support a conclusion that water supplied to the land was used to water the largest plant, and the other plants relied only on the rain. I accept that submission. The plants were in the open. There was no shed, such as in *George’s* case, used to hide, protect or assist directly or indirectly in growing the cannabis. He is correct. There were only four or five pots employed which occupied only a miniscule proportion of the total surface of a large property. This is also correct. The objector told the police he did not plant the seedlings which he thought must have been self-sown. He nevertheless pleaded guilty to the cultivation of 22 plants. Obviously this could not have included any of the 83 seedlings in the oil drum at the rear of the property or the 41 seedlings in the other oil drum also at the rear of the property, which he professed to be unaware of. I find that the plants he

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<sup>24</sup> At para [167], page 281.

admitted to cultivating by his plea included the 180 cm plant, the eight plants up to 100 cm in height, and 13 seedlings in the pot sitting on top of the 44 gallon drum.<sup>26</sup> In my opinion the property was not crime-used within the meaning of s 11(a) of the Act in relation to this offence.

[68] Neither party addressed the question of whether the property was used for storing the plants in terms of s 11(b). There is no evidence from which a conclusion could be drawn adversely to the objector so far as s 11(b) is concerned in connection with the offence of cultivation. I find that the property was not crime-used for the purposes of s 11(b) of the Act.

[69] The question remains if the case falls within s 11(c) of the Act. As noted before, Jenkins J held that all that needs to be proved is that the *actus reus* of the offence was committed or facilitated in or on the property. The offence against s 7(1) of the *Misuse of Drugs Act* is committed by unlawfully cultivating a prohibited plant. The word “cultivate” is defined by s (1) of the *Misuse of Drugs Act* to include “grow, sow or scatter the seed produced by and plant, nurture, tend or harvest the prohibited plant”. What is it that the objector did in this case which amounted to “cultivate”? The Crown facts as read to the Court and which the objector admitted were that he sowed the seed for the largest plant and nurtured it for four or five months with water and fertiliser to aid its growth, and that he planted the

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<sup>25</sup> At paras [76] to [78]; [177].

<sup>26</sup> See the transcript of the proceedings 12/8/10, p 3, before Olsson AJ.

remaining 21 plants in the pots.<sup>27</sup> The facts do not assert where or when it was that the cultivation took place, except that the indictment charged that it took place at Darwin River on 27 April 2009. There is nothing in the record of interview to indicate that any of this activity took place on the property. The burden of proving, at this stage of the proceedings, that the plants were cultivated elsewhere than on the property rests with the objector, and there is no evidence that this had occurred.

[70] Nevertheless, not every act done on the property is necessarily “in connection with the commission of a forfeiture offence”. Jenkins J accepted that an unintended act, would not fall within that provision.<sup>28</sup> McLure P accepted that it would be sufficient if the connection was direct and immediate, but not if it was merely tenuous and remote, and that considering where the facts fall between these extremes required matters of judgment and degree,<sup>29</sup> and mere presence on the land to commit the offence was insufficient.<sup>30</sup> Mr Wyvill SC submitted that on the facts of this case, the connection was tenuous and remote; that this was a case where the cultivation could have occurred anywhere. There was no necessary connection with the property and the cultivation. Mr Jobson submitted that the connection was direct and immediate because the acts of cultivation, particularly the watering and nurturing of the largest plant, were all done by the objector whilst he was physically on the land.

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<sup>27</sup> Transcript 12/8/2010, p 3.

<sup>28</sup> *Director of Public Prosecutions (WA) v White* (2009) 194 A Crim R. 192 at [96].

[71] As the objector has not proved otherwise, I will assume that the acts were done on the land in the sense that the objector planted the seeds and watered and cultivated the large plant in pots situated on the land in the places where those pots were found by the police. The weight of the authorities suggest that the acts done in connection with the commission of the offence does not have to be “substantially” connected with it.<sup>31</sup> Mr Wyvill SC submitted that I should follow the dissenting opinion of Vanstone J in *Director of Public Prosecutions v George*,<sup>32</sup> and find that there must be a substantial connection between the property and the *actus reus* of the offence. The difficulty with this submission is that *Director of Public Prosecutions v George* was concerned with the use of the property. This has a bearing on the meaning of s 11(1)(a) but not on s 11(1)(c), and is therefore not relevant.

[72] The question, I think, is best answered by asking whether the connection between the land and the forfeiture offence was direct and immediate. As Mr Wyvill SC correctly submitted, the definition of “forfeiture offence” in s 6 is extremely broad. In *Director of Public Prosecutions v Green*<sup>33</sup> the Full Court described the width of the definition as “breathtaking,” as it included literally hundreds of offences a good many of which were only triable summarily, and gave rise to the possibility of forfeiture for a

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<sup>29</sup> *Director of Public Prosecutions (WA) v White* [2010] WASCA 47 at [33].

<sup>30</sup> *Ibid* at [29].

<sup>31</sup> *Rintel v The Queen* (1991) 3 WAR 527; *Director of Public Prosecutions (WA) v White* (2009) 194 A Crim R 192; *Director of Public Prosecutions v George* (2008) 102 SASR 246; *R v Hadad* (1989) 16 NSWLR 476; contra *R v Ward, Marles and Graham* (1989) 1 Qd. R.194.

<sup>32</sup> *Director of Public Prosecutions v George* (2008) 102 SASR 246 at 277-282; paras [153] – [170].

<sup>33</sup> (2010) 239 FLR 278 at [21].

relatively trivial offence. In that case I said that I doubted whether even Dracos himself could have conceived of a law so wide-reaching.<sup>34</sup> It is to be noted that in dealing with an application under s 96 to forfeit crime-used property, the Court has no discretion. There is no requirement of proportionality between the forfeiture offence and the value of the property to be forfeited. There is no power to take into account hardship, except for the very limited purposes of s 63(1)(a) of the Act which requires proof, amongst a host of other things, that the objector is either an innocent party or less than 18 years of age, and is a spouse, de facto partner or dependant of the owner of the property. If the property has sentimental value, the Court has a limited power to set aside the restraining order if it orders the objector to pay the value of the property to the Territory.<sup>35</sup> There is no power to order forfeiture of only a part of the property. Thus if only a tiny fraction of the property is crime-used, the forfeiture order, if it is made at all, applies to the whole property or to its full value. Accordingly, the Court is bound not to give s 11 an expansive meaning beyond that which the words of the section require. An intention to abrogate fundamental property rights without compensation requires unmistakable and unambiguous language, and is not to be inferred by general words.<sup>36</sup>

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<sup>34</sup> At [22]; see also the comment of Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ in *Mansfield v Director of Public Prosecutions for Western Australia* (2006) 226 CLR 486 at 503 para [50] in relation to the Western Australian Act.

<sup>35</sup> Section 63(4).

<sup>36</sup> *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)

[73] On the facts of this case, the connection between the forfeiture offence and the land was not direct and immediate. The objector watered and fertilised one plant once a week. There is no evidence that he did more than plant the remaining seedlings. The water was not from a public water system. No buildings on the land were used to hide the pots which were in the open. Of the 22 plants, 9 were in pots sitting directly on the ground and 13 were in a pot sitting on top of a 44 gallon drum. None were directly in the soil. There is no evidence whether or not the plants in the pots were growing in soil taken from the land. It is equally possible that the growing medium used was a commercial product. Only one plant was any where near maturity. The others were seedlings. There was no specific need for the land to be involved in the commission of the offence other than convenience, which is a factor pointing towards a connection. However looking at all of the factors as a whole, I consider that the connection between the offence and the land was minimal. I therefore find that the offence of cultivation does not fall within s 11(c) of the Act.

[74] I turn now to consider the position with respect to the cannabis plant material and seeds found in various locations inside the dwelling situated on the land. The relevant forfeiture offence to which the objector pleaded guilty was the unlawful possession of a commercial quantity of cannabis, totalling 1.205 kilograms, contrary to s 9(1)(2)(d) of the *Misuse of Drugs Act*. The maximum penalty for that offence is imprisonment for 14 years.

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171 CLR 1 at 17-18; *Director of Public Prosecutions (WA) v White* (2009) 194 A Crim R 192 at [50];

There is no doubt that this is a forfeiture offence within the meaning of s 6 of the Act.

[75] Mr Wyvill SC submitted that the plant material was all located in chattels found inside the house or located on the floor of the bedroom. This is an answer to s 11(1)(a) of the Act, in so far as it may be said that the land was not used in connection with the offence: *R v Rintel*.<sup>37</sup> However, Mr Jobson relied on s 11(1)(b), i.e. that the land was used to store the cannabis. The question then arises whether the land was so used, or a chattel on the land which is not a fixture was so used, and whether this makes any difference. Clearly if the cannabis had been stored in a fixture, the land would have been so used.<sup>38</sup>

[76] In *R v Rintel*<sup>39</sup> the question arose whether a person convicted of possession of amphetamines and heroin with intent to sell or supply, had used the property in question “in, or in connection with, the commission of the offence”. The facts were that the police located the majority of the drugs concealed in a camera and hidden underneath a wardrobe. He also prepared the drugs for sale on the premises and intended to supply the drugs to others from the premises. The judge at first instance found that the property had been so used because the preparation for supply and the intent to supply in the house were all made less clearly detectable by the use of the house.

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*Murphy v Farmer* (1988) 165 CLR 19 at 28-29.

<sup>37</sup> (1990) 3 WAR 527.

<sup>38</sup> *Director of Public Prosecutions (WA) v White* (2010) WASCA 47 at [29].

<sup>39</sup> (1990) 3 WAR 527.

Malcolm CJ held that “the use of the house as a place to store, prepare and sell or supply drugs represented a state of affairs which ... constituted a use of the house”.<sup>40</sup> Wallace J held that there was no substantial connection between the property and its use in connection with the forfeiture offence.<sup>41</sup> Pidgeon J held that the land was not used in connection with the offence. He held that whilst there did not have to be a substantial connection between the land and the use, in ordinary language one would not conclude that weighing the drugs in the house, for example, was a use of the land although it was a use of the scales:

If it could be said that the land is also being used, then it would follow that the land must be used in respect of every act performed by mankind, unless the act was performed at sea or in the air.<sup>42</sup>

[77] Pidgeon J drew a distinction between land or a house being used as a warehouse or a “safe house”, and in his opinion drugs kept under a cupboard was not a use of the land.

[78] What must be considered, in the context of s 11(1)(b) are:

- (1) Was there property (i.e. the cannabis) acquired unlawfully in the course of the commission of an offence?
  
- (2) Was there land used for storing that property?

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<sup>40</sup> At 529.

<sup>41</sup> At 539.

<sup>42</sup> At 542.

[79] As to the first question, the fact is that the objector was in possession of the drugs. Mere possession is not enough to establish that the cannabis was acquired in the course of the commission of a forfeiture offence. The word “acquired” looks to the source of the possession; how did the objector “acquire” the cannabis? He may have acquired it himself from cultivating a single plant, or perhaps even two plants. In either case, the number of plants is not a traffickable quantity, but the maximum penalty is 40 penalty units or imprisonment for two years,<sup>43</sup> and hence is a forfeiture offence. He may have been given the cannabis by someone else, which by itself, is not necessarily an offence by the recipient other than the offence of possession.

[80] The objector was not charged with or convicted of cultivating the cannabis plants from which the plant material was obtained. However, this may not matter, because s 11(2)(d) provides that property described as crime-used in s 11(1) is still crime-used whether or not any person has been charged with or convicted of the relevant forfeiture offence.

[81] The only evidence as to how the objector came to be in possession of the cannabis is contained in the record of interview. As to the seeds contained in the refrigerator in the kitchen, he claimed he was given them by other people. He claimed not to know about two clip seal bags of cannabis located on a kitchen shelf. He said that some loose cannabis found in a tin was probably left there by his daughter. He was not asked about how he acquired the rest of the cannabis. That being the state of evidence, there is

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<sup>43</sup> Section 7(2)(c) of the *Misuse of Drugs Act*.

simply nothing to show that the cannabis was acquired in the course of a forfeiture offence. Although the burden of proof is on the objector, it was not suggested that he grew the plants himself from which this cannabis was obtained. In those circumstances, the objector was not put on notice that he was obliged to account for how he obtained the plant material, and it would be unfair to draw any adverse inference against him. I am satisfied that s 11(1)(b) of the Act does not apply. It is therefore not necessary to find whether or not the land was used for storing the cannabis.

[82] The final question is whether the objector has established that “an act or omission was not done, omitted to be done or facilitated in or on the property in connection with the commission of a forfeiture offence”, the relevant offence being possession of the cannabis: see s 11(1)(c). If a person had cannabis in his pocket when he was on the land it would be stretching the language of s 11(1)(c) to find that his possession was an act done on the property in connection with the offence. He may have been on the property, but the act of possession has little or no connection with the land. Similarly, a person may be in possession of drugs even if they are not on the land at all. Clearly this would not come within the sub-section as it applies to the relevant land. At the other extreme, if the cannabis in his possession was buried in the ground, or hidden in a fixture to the land in question, I think it clearly would be an act done in connection with the land. In this case, the cannabis was found either inside chattels which were not fixtures or loose on the floor under the bed in an attempt to hide it from

view. However the objector was able, as the owner of the land to exercise control over his possession because he was able to control who may come inside the house, and therefore it may be said that there is, in that sense, a connection between the land and the act of possession. Is this a sufficient connection for the purposes of s 11(1)(c)?

[83] Not every act of possession of a prohibited drug is a forfeiture offence.

Possession of a small quantity of cannabis, not amounting to a traffickable quantity, is punishable, if it is not in a public place, only with a fine under s 9(2)(f)(ii) of the *Misuse of Drugs Act*. If the person is in possession of even a very small quantity of it in a public place it is punishable by imprisonment for two years and is therefore a forfeiture offence.<sup>44</sup> In such a case, if s 11(1)(c) is given a broad meaning, even though the offence was committed in a public place, it is feasible that a crime-used property substitution declaration could be sought under s 81(1) of the Act, having regard to s 82(1) of the Act. This result could have bizarre consequences. For example, if the public place was a large shopping centre, the value of which was many millions of dollars, the result could be a debt which only multi-millionaires could afford to pay, even though the quantity of the drug was very small. It is difficult to believe that the Legislative Assembly intended to go that far, and therefore applying the principles of construction referred to in paragraph [72] above, mere possession by a person physically

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<sup>44</sup> *Misuse of Drugs Act*, s 9(2)(f)(i).

standing on the land is not enough.

[84] But the problem does not stop with the man with a few grams of cannabis in his pocket at a large shopping centre. Let us assume that the same man has buried a small tin containing a few grams of cannabis plant material in Kakadu National Park. Of course, he does not own the park, but he may be in possession of it in a public place even though he buried it. The park, no doubt, has a very high value. Is he to be met with a crime-used property substitution declaration resulting in a monstrous debt? Apart from bankruptcy, what would that achieve? Nevertheless, the conventional wisdom is that proportionality has little or nothing to do with forfeiture offences and the resultant forfeiture orders, so it seems that such a result is a possible outcome. Bizarre outcomes aside, the Court must apply the law as expressed by the clear language of the Act.

[85] The facts of this case do not fall within either extreme. In Western Australia, mere commission of the offence on or in the property is enough,<sup>45</sup> but the wording of s 146(3) of the Western Australian Act is quite different from s 11(1)(c) of the Act, and therefore *Director of Public Prosecutions (WA) v White* is distinguishable on this point. The question resolves itself into whether or not there was a direct and immediate connection with the land. Because the objector had control of the land and the house on it, which in the ordinary course would be locked to prevent intruders at night

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<sup>45</sup> *Director of Public Prosecutions v White* [2010] WASCA 47 at [34].

and at times when the occupants were absent, I think there was a direct and immediate connection bearing in mind that the connection does not have to be substantial. I therefore find that the objector has failed to show that the forfeiture offence of possession fell outside s 11(1)(c) of the Act. That being so, subject to the constitutional challenge which I will consider below, the objection must be dismissed.

### **The application for forfeiture**

[86] Section 95(2) of the Act permits the applicant to apply for a forfeiture order in this Court once the objections have been dealt with.<sup>46</sup> Section 96 of the Act provides:

- (1) A court that is hearing an application under s 95 in relation to property restrained on suspicion the property was crime-used must order that the property is forfeit to the Territory if the court is satisfied that it is more likely than not that the property is crime-used.
- (2) A court must order forfeiture under sub-section (1) despite that no person has been identified as the owner or controller of the property.

[87] Mr Wyvill SC submitted that “must” in s 95 means “may” and the Court has a discretion whether or not to make a forfeiture order. Prima facie, the word “must,” like the word “shall,” does not confer a discretion on the Court but is used to indicate an imperative; a command, obligation, duty, necessity or inevitability. However, whether or not it is used in this sense depends upon

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<sup>46</sup> Section 95(4).

the context. If the imperative sense leads to absurdity and inconvenient consequences, the Court may conclude that a discretion is nevertheless conferred.<sup>47</sup> Another well-known consideration is whether such an interpretation is inconsistent with the purpose and objects of the legislation.<sup>48</sup> Recent examples of the application of these principles in relation to the word “must” are *Director of Public Prosecutions v George*<sup>49</sup> and *Howie v Youth Justice Court*.<sup>50</sup> In both of those decisions the courts concluded that “must” was not used in an imperative sense.

[88] Although s 62A of the *Interpretation Act* requires a court to prefer a construction that promotes the purpose or object underlying an Act to one that does not, focus on the supposed purposes or objects thought to be underlying the Act, particularly if not expressly stated, can be something of an unruly horse. Care must be taken to ensure that a general legislative purpose (such as raising revenue) does not detract from giving the attention to the text which it deserves.<sup>51</sup> Nevertheless, it is important to consider the stated purposes of the Act. Section 3 of the Act provides:

The objective of this 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.

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<sup>47</sup> *Re Davis* (1947) 75 CLR 409 at 424-425 per Dixon J; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

<sup>48</sup> *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297.

<sup>49</sup> *Director of Public Prosecutions v George* (2008) 102 SASR 246 at [185] – [196].

<sup>50</sup> (2010) 27 NTLR 132 at 140-141; [26] – [29].

<sup>51</sup> *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27.

[89] Other general purposes appear from s 10(2) and (3) which provide:

- (1) The property (real and personal) of a person who is involved or taken to be involved in criminal activities is forfeit to the Territory to the extent provided in this Act to compensate the Territory community for the costs of deterring, detecting and dealing with criminal activities.
- (2) Crime-used or crime-derived property (real or personal) is forfeit to the Territory to deter criminal activity and prevent the unjust enrichment of persons involved in criminal activities.

[90] Another indicator to be considered is whether the draftsman has used “may” or other words indicating a discretion and “must” or “shall” with any degree of particularity. If so, this *prima facie* points to the word “must” as bearing an imperative meaning.<sup>52</sup> Mr Jobson submitted that in this Act, the draftsman used “may” when it was intended to confer a power or a discretion, and “must” when the intention was an imperative. There is substance to this submission. “May” is to be found in numerous sections of the Act.<sup>53</sup> In most cases, the word “may” clearly confers a discretion or power. On the other hand, the word “must” also is found in numerous

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<sup>52</sup> *Commissioner of Superannuation v Hastings* (1986) 70 ALR 625 at 631.

<sup>53</sup> See the following provisions: ss 7, 9(1), 13, 14(1), 14(4), 17(1), 17(2), 18(1), 18(2), 22(1) and (2), 24(1), 26(1) and (2), 28(1) and (2), 29(1), (2) and (3), 32, 33, 34, 36(1); 37, 39, 40, 41, 42, 43(1) and (2), 44, 46, 49(3), 50(3), 51(2) and (3), 54(1), 59(1), 60(3), 62(1), 63(1) and (2), 64(1), (2) and (4), 65(1) and (2), 67, 71(3), 73, 78(3), 80(2), 81(1), (2), (3) and (6), 87(3), 88(1), 89, 91, 92(1) and (3), 94(3), 95(1) and (2), 98, 99, 100, 101, 104, 106(3), 109(1) and (2), 111, 112(1), (2) and (3), 113, 114, 116, 119(1), 121(1), (6) and (7), 122(1) and (2), 123(1), (3) and (4), 124(1), 126(1) and (2), 127(1), (3) and (4), 128(1), 130(1) and (2), 137, 139(1), 140(b) and (c), 141, 146, 148(2), 154(4) and (5), 157(1), (2) and (3), 159, 163(2) and 166.

provisions in the Act,<sup>54</sup> and in most (if not all) cases it is used in an imperative sense.

[91] In *Burnett and Others v Director of Public Prosecutions and Another*<sup>55</sup> the Court of Appeal held that the Court has a discretion whether or not to make a restraining order. Perhaps the discretion is not entirely unfettered because s 44(3) of the Act prevents the Court from refusing to make an order if the *only* reason is because the value of the property exceeds, or could exceed, the amount that the person could be liable to pay to the Territory if the relevant declaration is made. However, if another reason or reasons exist, s 44(3) does not operate. This provision appears to have limited application to property in which others (who are not the subject of the order) have an interest.<sup>56</sup> Otherwise the discretion is unfettered. Because this Court is a court of equity, and the legislature must have intended to take the Court as it finds it<sup>57</sup> the Court may, at the time it makes a freezing order, exempt certain property for the purposes of legal expenses; set aside an order without waiting for an objector to file an objection for reasons such as absence of jurisdiction, material non-disclosure and changed circumstances,<sup>58</sup> or grant a stay for abuse of process at any stage of the

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<sup>54</sup> See the following provisions: ss 9(3), 14(2), 23(1), 24(2), 31(1), 32(5) and (6), 35(1), 44(3), 45(1), 47(1), (2), (3) and (6), 48, 50(1), (2) and (4), 51(4), 53(1) and (2), 55(1), 63(3) and (5), 64(3), 69(2)(c), 71(1) and (4), 72(1), 75(1), 76(1), 78(1) and (2), 80(1), 81(4), 86(1), 96, 97, 102, 107(2), 110, 113(b), 118, 119(2), 121(4), 123(6), 127(5) and (6), 131(1), 132 and 134.

<sup>55</sup> (2007) 21 NTLR 39 at 76 [73] – [74]; 112 [227]; 125 [280].

<sup>56</sup> See s 103(1)(d) and (2), s 63(2)(a) for example.

<sup>57</sup> *Mansfield v Director of Public Prosecutions (Western Australia)* (2006) 226 CLR 486 at 491 [7]; *Burnett v Director of Public Prosecutions* (2007) 21 NTLR 39.

<sup>58</sup> *Mansfield v Director of Public Prosecutions (Western Australia)* at 491-492 [8].

proceedings.<sup>59</sup> The relevant powers include in my opinion, all and any of the remedies available to the Court when considering whether, in its discretion, it should grant a freezing order, and if so, on what terms, to avoid unfairness and injustice in the administration of the powers conferred on the Court by s 43(2) of the Act. A court of equity has the power to refuse injunctive relief if that would result in substantial hardship and disproportionate prejudice to the defendant,<sup>60</sup> or if the order would affect innocent third parties, particularly if there has been delay bringing the application.<sup>61</sup> Indeed delay, or laches, may in itself be sufficient to refuse an application in certain circumstances. Bearing in mind that the Act is particularly draconian, and complex in its various provisions, in my opinion it would be open to the Court to refuse an application where the forfeiture offence was minor, technical or trivial, and the value of the crime-used property was substantial so that there was significant disproportionality between the remedy sought and the purposes which the remedy sought to achieve, particularly if there would be significant hardship to the defendant or others with an interest in the property. Similarly it would be open to be refused, or limited in its application, if the connection between the forfeiture offence and the property is clearly not likely to result in a forfeiture order. Furthermore, there are no fixed categories of circumstances where the Court might be persuaded that it is not in the interests of justice to grant the relief

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<sup>59</sup> *Burnett v Director of Public Prosecutions* (2007) 21 NTLR 39 at 90-93 [133] – [139]; 111 [232]; 124 [277].

<sup>60</sup> Spry, *Equitable Remedies*, 6<sup>th</sup> Edn, para 21-380; Meagher, Gummow & Lehane, *Equitable Doctrines and Remedies* 4<sup>th</sup> Edn., para 21-380.

sought. These factors are also relevant to the construction to be given to s 95 of the Act, and whether or not the Court has a discretion to refuse to make a forfeiture order.

[92] As noted earlier, one begins with the text of s 95. What must be proved, and by whom? First, the application is by the Director of Public Prosecutions, and it is not in doubt that the applicant bears the onus of proof to the civil standard. Because the legislation is draconian and penal in its operation, the principles in *Briginshaw v Briginshaw*<sup>62</sup> apply and “weight to the presumption of innocence and exactness of proof is expected”. It also follows that the rejection of an objector’s objection is not determinative. The objection may have failed because, the burden of proof being on the objector, he failed to satisfy the court, as happened in this case, that the property was not crime-used. Once the burden shifts, the onus is on the applicant to prove it was, and the applicant may fail to do so.

[93] The matters to be proved are (1) that the property was, and still is at the time that the court makes the forfeiture order, restrained on suspicion that the property was crime-used; (2) the court is satisfied that it is more likely than not that the property is crime-used. The second limb requires a consideration of the facts, whether they amounted to a forfeiture offence, and if so what offence, and whether the applicant can demonstrate in

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<sup>61</sup> Meagher, Gummow & Lehane, *supra* at para [21-365].

<sup>62</sup> (1938) 60 CLR 336 at 363 per Dixon J.

accordance with the *Briginshaw* test that the property was crime-used within the meaning of s 11 of the Act. If these matters are proved to the relevant standard, s 96(1) provides that the Court “must” order that the property is forfeit to the Territory.

[94] As noted already, the Court retains an inherent power to set aside the restraining order at any time, if there are proper grounds for doing so. Alternatively, a late objection by a person not served with the order might arise. In such a case, the Court could extend time under s 60(2)(b) of the Act, and stay or adjourn the hearing under s 95(4) of the Act. But these considerations aside, the natural and ordinary meaning of the text is that, once the applicant has proved its case, the Court has no discretion to refuse the order.

[95] In my opinion there are no indications from the language and structure of the Act read as a whole which support the conclusion that the Court has a discretion. Although the Act is draconian, the Court has the power to refuse to make a restraining order where the justice of the case requires it, for the reasons I have already expressed, and in certain circumstances, could set it aside in the exercise of its inherent jurisdiction, as well as, or alternatively on, the statutory grounds. These considerations do not detract from the ordinary meaning of the text, but rather support it. The intention, by giving the Court a discretion and taking the Court as it finds it, is to ensure that, by the time the statutory objection procedure is over, most if not all of the contentious issues will be practically resolved. It makes some sense that the

Legislature has seen fit not to put the parties through these procedures, at considerable cost and using considerable resources, both of the Court and of the parties and yet still leave, at the end of the day the Court with a discretion. This conclusion is strongly supported by the way in which the draftsman has used “may” to confer a power or discretion, whilst ‘must’ appears to have the purpose of an imperative.

[96] I have already found during the objection hearing that the property was not crime-used for the purposes of s 11, except in respect of the cannabis plant material. If I am wrong in the conclusions I have reached so far which favoured the objector, the shifting of the burden of proof and the necessity to bear in mind the clarity of proof required by the *Briginshaw* test reinforces those conclusions. I would not, for instance, find that the objector planted the seedlings or watered and fertilised the large plant whilst they were physically situated pots on the land. There is no evidence to prove this. They may have been brought onto the land shortly before the police searched the property. Moreover, there is no evidence that the land, as opposed to the house, was fenced or had locked gates so as to prevent intruders, so I would not infer that the objector used the land by exercising control over it in any meaningful way. However, the findings I have made in relation to the plant material, and the connection with it to the land for the purposes of possessing it remain unaltered regardless of where the burden of proof lies. I am satisfied therefore that the applicant has proved that the land was crime-used within the meaning of s 11(1)(c) of the Act.

As the land is still the subject of a restraining order, subject to the constitutional objection, there must be an order for forfeiture.

### **Valuation of the share of the deceased**

[97] Bearing in mind that the deceased is an innocent party, s 63(2)(a) of the Act requires me to order that an amount be paid from the proceeds of sale that is in proportion to the deceased's share. The unencumbered value of the property has been agreed at \$330,000. Bearing in mind that the objector and the deceased were formerly joint owners, I consider that the proportion of the deceased's share in the property is 50% of the proceeds of sale, and that I should order that this sum be paid to the executor of the deceased's estate. Alternatively, if the executor so wishes, I would order that the executor pay to the Territory the sum of \$165,000, and set aside the restraining order pursuant to s 63(2) of the Act. I will give the parties an opportunity to be heard before making any final orders. I will need to hear also whether the proper order applies to the gross or net proceeds of the sale after deduction of the items referred to in s 103(1) of the Act.

### **Constitutional objection**

[98] Mr Wyvill SC advanced two arguments in support of his submission that s 96 of the Act is invalid. The first limb was that a forfeiture order was an acquisition of property otherwise than on just terms. The second limb was based on the *Kable* principle; i.e. that the Act and s 96 in particular effect "impermissible intrusions upon the manner and outcome of the Court's

exercise of jurisdiction”<sup>63</sup> and “is repugnant in a fundamental degree to the judicial process as understood and conducted throughout Australia”.<sup>64</sup> Both submissions were premised to a large degree on the assumption that s 96 of the Act does not confer a discretion on the Court to refuse to order forfeiture if the relevant criteria were met.

### **An acquisition of property?**

[99] Section 50(1) of the *Northern Territory (Self-Government) Act 1978* (Cth) (the Self-Government Act) provides that “the power of the Legislative Assembly conferred by s 6 in relation to the making of laws does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms”. Mr Wyvill SC contrasted this provision with s 51(xxxi) of the Constitution which provides that “the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to ... the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws”.

[100] The essence of the distinction sought to be drawn is that s 51(xxxi) of the Constitution is a grant of power in relation to particular matters (excluding grants of power outside s 51) whilst s 50(1) of the *Self-Government Act* is an express prohibition on the exercise of a plenary power. This was said to

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<sup>63</sup> *International Finance Trust Company Limited v NSW Crime Commission* (2009) 240 CLR 319 at [50] per French CJ.

<sup>64</sup> *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [98] per Kirby J.

render inapposite in the Territory those authorities which found in other heads of power enumerated in s 51 a contrary indicator to the provision of just terms. This point was referred to, but not decided, by Dowsett J in *Australian Capital Territory v Pinter*<sup>65</sup> and by Gleeson CJ, Gummow, Hayne & Crennan JJ in *Attorney-General for the Northern Territory v Chaffey*.<sup>66</sup> The result was, so it was submitted, that it is not relevant to consider whether certain kinds of acquisitions are “incongruous” or “antithetical” to the notion of just terms, but to consider whether the law is a law with respect to the acquisition of property. If so, it was submitted that s 50(1) of the *Self-Government Act* is engaged and the law would have to provide for just terms.

[101] This submission must be rejected. To accept Mr Wyvill SC’s submission, the result would be that the Territory would have no power to make laws with respect to such matters as taxation or the recovery of fines for the commission of offences,<sup>67</sup> nor would it be able to pass a law providing for the forfeiture of property used in or derived from criminal activity. It is well established that laws relating to the forfeiture of property in connection with the breaches of the criminal law are not caught by s 51(xxxi) of the Constitution because the effect in the circumstances is such that, by its very

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<sup>65</sup> (2002) 121 FCR 509 at [267] – [269].

<sup>66</sup> (2007) 231 CLR 651 at [4].

<sup>67</sup> *Australian Capital Territory v Pinter* (2002) 121 FCR 509 at [93], [99], [201], [250] and [269].

nature and object, concepts of compensation are irrelevant, incongruous, or absurd.<sup>68</sup>

[102] Section 6 of the *Self-Government Act* confers on the Legislative Assembly power to make laws for the peace, order and good Government of the Territory. That power is subject to other provisions in the *Self-Government Act*, including s 50(1). Subject to one exception discussed below, s 50(1) is to be construed and applied in the same way as s 51(xxxi) of the Constitution.<sup>69</sup> The exception to which I have referred is that there is no need to find a reasonable connection between the law and some head of legislative power as is necessary under Commonwealth legislation, because subject to the limits provided by the *Self-Government Act* the grant of power to the Territory is a plenary grant of power,<sup>70</sup> unlike the powers conferred by the Constitution to the Federal Parliament where it is necessary to find a head of power to support the validity of its legislation. Plainly the Legislative Assembly has power to make laws declaring conduct subject to the sanctions of the criminal law, and to provide for forfeiture of property, whether the processes used are described as “criminal assets forfeiture”

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<sup>68</sup> *Airservices Australia v Canadian Airlines International Limited* (2001) 202 CLR 133 at [157] – [158]; [253]; [486] – [487]; [516] and cases therein cited. See also *Re Director of Public Prosecutions ex parte Lawler and Another* (1993-1994) 179 CLR 270 at 276; 277-278; 285; 288-289; 292; 293.

<sup>69</sup> *Attorney-General for the Northern Territory v Chaffey* (2007) 231 CLR 651 at [3].

<sup>70</sup> *Wake v Northern Territory of Australia* (1996) 5 NTLR 170 at 177-178.

following conviction or “civil assets forfeiture” following proof of unlawful conduct.<sup>71</sup>

[103] That is not to say that the Legislative Assembly could itself validly pass a law to acquire property without just terms by declaring it a forfeiture law without any connection between the property acquired and proof either of a breach of the criminal law or of unlawful conduct. In this case, in order to be subject to forfeiture, there must be proof that the property was “crime-used” within the meaning of s 11 of the Act. Section 11(1)(a) of the Act requires proof of the commission of a forfeiture offence and that the property was either used in or in connection with the commission of the forfeiture offence, or in connection with facilitating of such an offence. Section 11(1)(c) requires proof of an act or omission on or in the property in connection with the commission of such an offence. Section 11(1)(b) requires proof that the property was used to store property unlawfully acquired in the commission of such an offence. In each case, there must be proof of both a forfeiture offence and a connection with the property. Clearly the definition of “crime-used property” provides the necessary connection between the forfeiture offence and the property so as to enable it to be characterised as a forfeiture law which falls outside of the requirement for just terms.<sup>72</sup>

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<sup>71</sup> See *International Finance Trust Company & Another v New South Wales Crime Commission and Others* (2009) 240 CLR 319 at [25] – [29] per French CJ.

<sup>72</sup> See *Della Patrona v Director of Public Prosecutions (Cth) No. 2* (1993) 38 NSWLR 257 at 271-272.

[104] Furthermore, under s 5(4)(a) of the Sentencing Act, the Court is expressly empowered to take into account any co-operation by an offender in resolving any action taken against him or her under the Act in relation to the offence for which the court is required to pass sentence, as well as any forfeiture order made under the Act in relation to crime-used property. The connection between this provision and the objects of the Act, to which reference was made earlier, is plain. It was submitted that this provision was of little value because of the risk of double jeopardy, e.g. the sentence may be passed before the property is ordered to be forfeited. I do not accept this criticism for several reasons. First, there is no reason why a sentencer could not adjourn a sentencing hearing to enable a forfeiture application to be heard first. Secondly, if both parties accept that forfeiture is inevitable, I see no reason why the court could not take it into account. Thirdly, it would be open to appeal a sentence where the court declined to take it into account, if ultimately a forfeiture order was made. Whilst it is true that the definition of “forfeiture offence” is far reaching, (and the legislation is draconian), and there need not be a connection between the seriousness of the offence and the value of the property forfeited, the existence of a discretion whether or not to make a restraining order, the existence of which is a necessary pre-requisite for the making of a forfeiture order, is a safeguard against abuse and injustice, as I have already explained.

[105] Mr Wyvill SC submitted that there was no rational connection, let alone a reasonable connection, between the offending which is the supposed object

of the crime-used provisions of the Act to deter crime and to punish offenders and the forfeiture which the Act effects. He submitted that the offending was an excuse rather than a reason for triggering the provisions of the Act, and that in substance the Act is directed at revenue-raising by taking lawfully acquired assets, liquidating them and paying them to the Territory. It was the ‘acquisition of property for its own sake,’ and was therefore a law for the acquisition of property. This submission must be rejected. The Act specifically protects “innocent parties”.<sup>73</sup> I have already dealt with the need for there to be a connection between a forfeiture offence and the property in question, and the issue of double jeopardy, and the power of the court to prevent injustice. In my opinion there is no substance to this submission. In my opinion, the argument that an order for forfeiture under s 96 of the Act amounts to an acquisition of property otherwise than on just terms must be rejected.

### **The *Kable* principle**

[106] The principle for which *Kable v Director of Public Prosecutions (NSW)*<sup>74</sup> is authority is that, since the Constitution established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer powers and functions which substantially impairs the institutional integrity of its courts, and which is therefore incompatible with its role as a repository of federal

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<sup>73</sup> See ss 63 and 66.

<sup>74</sup> (1996) 189 CLR 51.

jurisdiction is invalid.<sup>75</sup> The relevant principle is one which hinges upon the maintenance of the defining characteristics of a Supreme Court. If the institutional integrity of a court is distorted, it is because that court no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.<sup>76</sup> The institutional integrity of a court requires both the reality and appearance of independence and impartiality.<sup>77</sup>

[107] The principle applies also to this Court.<sup>78</sup>

[108] Mr Wyvill SC submitted that the practical effect of the Act is to require the Court to effect a forfeiture of innocently generated property where, in the vast majority of cases, because of the breadth of its provisions, the Court will have no choice but to order forfeiture, regardless of whether or not the forfeiture will be manifestly unjust. He submitted that in reality, the operative decision to order forfeiture was made by the executive and not by the court.

[109] In support of this submission, Mr Wyvill SC pointed to the following features of the Act:

1. the extremely wide definition of what is a forfeiture offence;

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<sup>75</sup> *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [40] and [63].

<sup>76</sup> *Ibid*, at [63].

<sup>77</sup> *South Australia v Totani* (2010) 271 ALR 662 at [69]; [149]; [427] and [443].

<sup>78</sup> *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [28] – [29]; *Burnett v Director of Public Prosecutions* (2007) 21 NTLR 39 at [43]; [209] and [257].

2. the procedures of the Act functioning entirely independently of, and apart from the sentencing of offenders;
3. the risk of double jeopardy in sentencing;
4. the very broad definition of “crime-used” property;
5. the crime-used property provisions have practical relevance only where the subject property was lawfully acquired and reflect wealth lawfully generated;
6. the defences available to individuals with an interest in the crime-used property are severely restricted both procedurally and substantively;
7. there is no discretion to ameliorate disproportionality or other unfairness;
8. the decision to seek a forfeiture order lies with the Director of Public Prosecutions who will only proceed under the Act where there is a net return to the Territory on a cost benefit analysis.

[110] I accept that the definition of what is a forfeiture offence is extremely wide. It is not even limited to crimes, but includes simple offences punishable only in the Court of Summary Jurisdiction. However, that does not mean that the *Kable* principle is necessarily breached. Harsh results often flow from forfeiture orders. Harshness is not in itself an indication of invalidity,

even if the court must impose only one penalty, or a mandatory minimum penalty upon a finding of guilt.<sup>79</sup>

[111] Nor is there anything unusual in the fact that the legislation can operate outside of a sentencing hearing upon a finding of guilt in the exercise of the court's criminal jurisdiction. Civil assets forfeiture legislation is not invalid merely because the procedures used invoke the court's civil jurisdiction. In *International Finance Trust Company Limited and Another v New South Wales Crime Commission and Others*<sup>80</sup> the High Court had occasion to consider civil assets forfeiture legislation, the history of which was referred to by French CJ.<sup>81</sup> No member of the court thought that the legislation was invalid on this ground.

[112] The risk of double jeopardy has already been discussed. In my opinion, there is no double jeopardy. In any event, the liability for forfeiture arises at the time of the commission of the forfeiture offence. Even removal of double jeopardy as a factor to be taken into consideration on re-sentencing has been held not to infringe the *Kable* principle.<sup>82</sup> Moreover, in *Fardon v Attorney-General (Qld)*<sup>83</sup> only Kirby J, who was in dissent, held that legislation enabling double punishment by a court invoked the *Kable* principle.

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<sup>79</sup> *Palling v Corfield* (1970) 123 CLR 52; *Wynbyne v Marshall* (1997) 7 NTLR 97 at 99-100; 111-112.

<sup>80</sup> (2009) 240 CLR 319.

<sup>81</sup> At paras [25] – [29].

<sup>82</sup> *R v Carroll* (2010) 267 ALR 57.

<sup>83</sup> (2004) 223 CLR 575.

[113] I accept that the definition of “crime-used property” in s 11 of the Act is very broad, perhaps unjustifiably so. But it is still subject to limitations which I have discussed previously.

[114] In my opinion it is not to the point that the crime-used property was lawfully acquired from assets lawfully obtained. As I have previously demonstrated, forfeiture legislation has never been held invalid merely on this basis. The importance of crime-used property is the relationship between the forfeiture offence and the property.

[115] As to the defences available, it is true that the Act can effect forfeiture of property owned by persons other than the offender, but only if the property is directly or indirectly subject to the offender’s control, or is held for his ultimate benefit.<sup>84</sup> The object of these provisions is to prevent offenders escaping forfeiture by relying on trusts, company ownership and the like. Innocent parties are protected as I have previously noted. It is also open to an objector to prove that the property was not crime-used at the objection stage, and even if that fails, an objector may still avoid forfeiture if the Director for Public Prosecutions does not prove that the property was crime-used at the hearing of the forfeiture application.

[116] Some other matters referred to by Mr Wyvill SC need to be mentioned briefly. He submitted that resort to the asset restrained was not available to pay legal fees, but the decision of the Court of Appeal in *Burnett v Director*

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<sup>84</sup> Section 7(1), ss 91, 92 and 93.

*of Public Prosecutions*<sup>85</sup> is to the contrary. It was put that hearsay evidence was admissible, but in truth s 143 of the Act, which permits hearsay evidence to be taken into account “about the existence of grounds for doing anything or suspecting anything” is of limited application. First, it does not apply to decisions under Part 5 of the Act which deal with objections. Obviously it has application for a restraining order under s 43(2). It is not clear to me, despite Mr Wyvill’s submissions, that s 143 applies only in favour of the Director of Public Prosecutions. “Doing anything” presumably refers to physical activities and therefore may be relied upon to prove the physical elements involved in the commission of a forfeiture offence or for that matter, to disprove it, as well as perhaps other physical acts. The weight to be attached to hearsay evidence is a matter for the Court. Otherwise the rules of evidence in civil proceedings apply.<sup>86</sup>

[117] I have previously referred to the powers of the courts to prevent unfairness, both at the stage of considering whether to grant a restraining order and subsequently. Restraining orders may be made only for a limited period.<sup>87</sup> Each time the court is asked to extend the period of the restraining order, the Director of Public Prosecutions must re-establish its case. The opportunity to oppose the making of a restraining order can arise more than once. It is not the practice of this court to make restraining orders until further order unless there is no contest that the order should be so enlarged.

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<sup>85</sup> (2007) 21 NTLR 39.

<sup>86</sup> Section 136(2)(b).

<sup>87</sup> Section 51.

[118] In my opinion the submission based on the *Kable* principle must be rejected.

The court, throughout the processes leading up to an order for forfeiture, acts in a matter consistent with its judicial character. It is important to recognise that the key to obtaining a forfeiture order is the requirement for there to be in existence a restraining order at the time the forfeiture order is called upon to be made, and the court's unfettered discretion to either grant or refuse the restraining order, or to enlarge it under s 51 of the Act. Even when the application for forfeiture is made, the Director of Public Prosecutions must prove that a forfeiture offence was committed, that it was the defendant who committed it, and that the property was crime-used. It is no answer to say that at this final stage of the process that the court does not have a discretion. Hearings are in public, except where the court uses its powers under s 42 of the Act, a power which is used in practice in rare circumstances. There are rights of appeal at each level of the process. There is, in my opinion, nothing to suggest that this Court is to act as a mere instrument of Government policy. In conclusion, s 96(1) of the Act does not, by itself or in concert with the other provisions of the Act, infringe the *Kable* principle. So far as s 43(2)(a) of the Act is concerned, its validity was upheld by the Court of Appeal in *Burnett v Director of Public Prosecutions*<sup>88</sup> and is binding on me. The decision of the High Court in *International Finance Trust Company Limited and Another v New South Wales Crimes Commission and Others*,<sup>89</sup> which held that s 10 of the

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<sup>88</sup> (2007) 21 NTLR 39.

<sup>89</sup> (2009) 240 CLR 319

*Criminal Assets Recovery Act 1990 (NSW)* was invalid, is distinguishable, because in that case the legislation was different in that the Court had no discretion to refuse to make a restraining order, and was required to proceed *ex parte*.

### **Conclusion**

[119] I will hear the parties as to the form of the orders to be made in accordance with these reasons, and as to costs.