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# Criminal property forfeiture scheme valid – no acquisition of property on unjust terms

**In Attorney-General *(NT)* v Emmerson [2014] HCA 13 (*Emmerson)* a majority of the High Court upheld the validity of a Northern Territory scheme under which the property of a person declared to be a drug trafficker can be forfeited. Under the scheme, all of a drug trafficker's property may be forfeited even if the property is not crime-used or crime-derived. The High Court's finding that the scheme did not acquire property otherwise than on just terms may have implications for the validity of Commonwealth forfeiture schemes.**

## *Background*

### The forfeiture scheme

The NT forfeiture scheme is established by the *Misuse of Drugs Act* (NT) (MoD Act) and the *Criminal Property Forfeiture Act* (NT) (CPF Act). Under s 36A(3) of the MoD Act, the NT Supreme Court (on the application of the NT Director of Public Prosecutions) must declare a person to be a 'drug trafficker' if they have 3 or more convictions for offences of a specified kind in the previous 10 years. Before a person is declared a drug trafficker, the Supreme Court may make a restraining order over all or any of the person's property, including property acquired after the restraining order is issued (CPF Act, s 44). If the person is then declared to be a drug trafficker, all property subject to the restraining order (including property that was given away) is forfeited to the NT (CPF Act, s 94(1)).

### The scheme's application to Mr Emmerson

In 2012, the NT Supreme Court declared Mr Emmerson a drug trafficker. As a consequence of that declaration, all of Mr Emmerson's property (the majority of which was not related to his criminal conduct), which had been restrained under the CPF Act, was forfeited to the NT.

Mr Emmerson challenged the constitutional validity of the NT forfeiture scheme in the NT Supreme Court and then the NT Court of Appeal. The NT Court of Appeal declared the scheme invalid and the NT Attorney-General appealed that decision to the High Court.

## *The High Court's decision*

A majority of the High Court (Gageler J dissenting) allowed the NT's appeal, holding that the scheme:

- does not undermine the institutional integrity of the NT Supreme Court contrary to the principle established in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*)
- does not acquire property other than on just terms contrary to s 50(1) of the *Northern Territory Self-Government Act 1978* (Cth) (NTSG Act) (the acquisition argument). (Section 50(1) is in similar terms to s 51(xxxi) of the Constitution and limits the legislative power of the NT legislature by preventing the making of laws that acquire property other than on just terms.)

**Judgments**

***The Kable argument***

The principle established in *Kable* and derived from Ch III of the Constitution prevents State or Territory laws from conferring on a court a function that 'substantially impairs the court's institutional integrity' by depriving the court of its 'independence and institutional impartiality'. The majority (Gageler J not deciding) held that the NT forfeiture scheme was compatible with the *Kable* principle because it did not require the NT Supreme Court to give effect to any decision made by the executive (here the DPP); nor did the scheme confer an impermissible discretion on the DPP to apply for a restraining order or forfeiture order. Furthermore, whether the offences leading to a person being declared a 'drug trafficker' included offences that would not commonly be understood to be drug trafficking offences did not affect the scheme's validity.

***The acquisition argument***

The majority also held that the NT forfeiture scheme did not effect an acquisition of property on unjust terms. This was because the scheme imposed forfeiture as punishment for crime and 'whether that punishment fits the crime' was a matter for the legislature, not the courts (at [75]).

The majority further held that the NT forfeiture scheme was 'a law with respect to forfeiture, that is, a law which exacts or imposes a penalty or sanction for breach of provisions which prescribe a rule of conduct' (at [80]). It followed that the requirement of just terms is '"incompatible with the very nature of the exaction", being a punishment for crime' (at [84]).

The majority concluded that the NT forfeiture scheme does not cease to be a '[law] with respect to the punishment of crime because some may hold a view that civil forfeiture of legally acquired assets is a harsh or draconian punishment' (at [81]). A legislative purpose of protecting society by incapacitating a drug trafficker through forfeiture or confiscation of their assets was a method of deterring and dealing with criminal activities.

Justice Gageler dissented and held that the NT forfeiture scheme was contrary to s 50(1) of the NTSG Act. In reaching this conclusion, his Honour held that a law that acquires property (such as a law for the forfeiture of property) will escape the just terms condition in s 51(xxxi) if:

- the objective of the law is within power
- the acquisition is a necessary or characteristic feature of the means the law selects to achieve that objective
- the means are appropriate and adapted to achieving that objective.

AGS acted for the Commonwealth Attorney-General, who intervened in the matter pursuant to s 78A of the *Judiciary Act 1903* (Cth) to argue that the NT forfeiture scheme was not invalid on the basis of the acquisition argument.

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