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

B E T W E E N:

ATTORNEY GENERAL FOR THE NORTHERN TERRITORY
First Appellant

And

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THE NORTHERN TERRITORY OF AUSTRALIA
Second Appellant

And

REGINALD WILLIAM EMMERSON
First Respondent

20 **And**

THE DIRECTOR OF PUBLIC PROSECUTIONS
Second Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

30 1. This submission is in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. Section 78A of the *Judiciary Act 1903* (Cth) in support of the Appellant.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

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Filed on behalf of the Attorney General for Western Australia by:

STATE SOLICITOR FOR WESTERN AUSTRALIA
LEVEL 16, WESTRALIA SQUARE
141 ST GEORGES TERRACE
PERTH WA 6000
SOLICITOR FOR THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA

TEL: (08) 9264 1888
FAX: (08) 9264 1812
SSO REF: 4346-13
EMAIL: k.mcdonald@sso.wa.gov.au

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. See Part VI of the Appellant's Written Submissions.

PART V: SUBMISSIONS

5. Western Australia intervenes to support the Appellants and to contend that s.36A of the *Misuse of Drugs Act* and s.94 of the *Criminal Property Forfeiture Act* are valid.

Construction of the *Misuse of Drugs Act* and the *Criminal Property Forfeiture Act*

6. No complex issues of construction arise with this legislative scheme. Section 36A(1) and (3) of the *Misuse of Drugs Act* are clear in their terms and effect.

7. The Supreme Court can only exercise the power under s.36A(1) if the facts in s.36A(3) are found. If these facts are found the Court is required to make the declaration sought.

8. The property forfeited in this matter is property in terms of s.94(1)(a) of the *Forfeiture Act*[1]. This engages the restraining order provisions of the *Forfeiture Act,* relevantly Part 4 (and in particular Division 2) and Part 5, dealing with objections to restraint of property. The restraining order process is illustrated by the circumstances of this matter. Shortly after charging Mr Emmerson with various drug offences, the DPP filed an application for restraining orders under s.41(2) of the *Forfeiture Act,* on the grounds of s.44(1)(a); that is, if convicted of the matters recently charged, he could be declared a drug trafficker under s.36A(3) of the *Misuse of Drugs Act.* Although s.41(3) of the *Forfeiture Act* permits the making of such an application *ex parte,* the Court is clearly not required to deal with the application *ex parte.* The Court could require that a respondent be heard, and in this matter Mr Emmerson was heard. No doubt, this would be the usual course. The Court has further power under s.42, although the section does nothing more than re-state what would inevitably inhere to the Supreme Court.

9. All of ss.43(2), 44 and 46 of the *Forfeiture Act* confer power on the Supreme Court to make restraining orders. Section 49 states the (restraining) effect of such orders. Section 45, in effect, requires the Court to give reasons for its decision to grant an order.

10. Section 44(1)(a) is was engaged in this matter. It gives rise to an issue of construction - identification of the matters to which the Court can lawfully have regard in exercising the discretion to make or refuse to make an order.

11. The discretion is to be understood having regard to the requirement that only the DPP can make an application under s.44, and the DPP knows and would present evidence to the Court, in terms of s.44(1)(a), that the respondent had been charged with offences that would engage or satisfy the requirements of s.36A(3) of the *Misuse of Drugs Act* or the DPP intended to so charge the respondent. Again,

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[1] *Emmerson v Director of Public Prosecutions & Ors* [2013] NTCA 4; (2013) 33 NTLR 1 at 9 [4] (Riley CJ). It is unnecessary to consider any issue of construction in respect of s.94(1)(b).

evidence of this intention would have to be led and a finding made[2]. It is difficult to conceive of a circumstance in which the Court would refuse to make the order under s.44(1) if it is found that a respondent has been or will shortly be charged with an offence referred to in s.36A(6) of the *Misuse of Drugs Act*[3] and had been found guilty of 2 or more such offences within 10 years, in terms of s.36A(3)(b). So, the discretion is limited.

12. In this matter, an interim order, *inter partes,* was made, and shortly afterward a series of objections under s 59 of the *Forfeiture Act* filed. An order under s.44, on the same bases as the interim order, was made by consent. Further objections were made by Mr Emmerson and by third parties.

13. In respect of the property the subject of this appeal[4], by reason of ss.62(1) and 65(1) of the *Forfeiture Act,* the only grounds upon which the restraining order could be set aside are those in s.65(1), though Mr Emmerson raised, as a further objection, the constitutional issues now before this Court[5].

14. Section 94(1)(a) of the *Forfeiture Act* requires, prior to forfeiture, a further deliberative process in addition to the making of a restraining order; that is, a finding by the Court that the forfeited property is owned or effectively controlled[6] by the respondent.

The grounds of invalidity

15. The bases of invalidity of "the legislative scheme"[7] are variously expressed in the judgments of the majority in the Court of Appeal. The order of the Court of Appeal made on 19 April 2013 reflects the concluding observations of Barr J. Whether the order reflects the reasons of Kelly J is less obvious. It seems that no declaration of the invalidity of particular legislative provisions was made by the Court. Indeed, it is odd that the order, dismissing the application, was made, if the provision pursuant to which the order can be made is invalid.

16. In any event, the issues on appeal are as to the validity of s.36A of the *Misuse of Drugs Act* and s.94 of the *Forfeiture Act.* In the Court of Appeal, the validity of s.36A was considered on a standalone ground, and both s.36A of the *Misuse of Drugs Act* and s.94 of the *Forfeiture Act* together, or as a scheme.

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2 It must be supposed that applications by the DPP prior to a respondent actually being charged would be rare.

3 See s.36A(3)(a) of the *Misuse of Drugs Act.*

4 Neither crime used property nor crime derived property.

5 Mr Emmerson also contended that s.52(3) of the *Forfeiture Act* had been engaged. See, *Director of Public Prosecutions v Emmerson & Anor* [2012] NTSC 60; (2012) 32 NTLR 180 at 196-198 [27]-[39] (Southwood J).

6 Defined in s.7 of the *Forfeiture Act.*

7 *Emmerson v Director of Public Prosecutions & Ors* [2013] NTCA 4; (2013) 33 NTLR 1 at 34 [95] (Kelly J).

The standalone contention of invalidity of s.36A(1) of the *Misuse of Drugs Act*

17. This is the contention that s.36A is invalid because it may require a Chapter III court to declare facts which might not be true[8]. It was also found that s.36A is invalid because it may require a court to declare facts that are true but which would "stigmatise" a person. Section 36A does not provide for the keeping of a register of drug traffickers or any such thing. The only reason for such a declaration is to engage s.94 of the *Forfeiture Act.*

18. What or who is a drug trafficker and the appropriate definition of drug trafficker may be topics for an etymologist, but their resolution are not defining characteristics of judicial power, and use of the term is not relevant to judicial power. Any word or phrase could operate effectively for this scheme.

19. As to the stigmatisation proposition, there are countless epithets used in the course of the judicial process that are or can be stigmatic; defendant, struck off, accused person, fit and proper, dangerous driver, child sex offender[9].

20. Some terms that might appear benign are, in particular contexts, highly stigmatic. For instance, the legislation considered in *Fardon*[10] involved orders being made under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld). A person ordered to be detained under that legislation would be stigmatised. The equivalent Western Australian legislation provides for the making of a supervision order under the *Dangerous Sexual Offenders Act 2006* (WA)[11]. Section 19 of the *Sentencing Act 1997* (Tas) empowers the Supreme Court to declare an offender to be "a dangerous criminal". *Pompano*[12] considered the validity of s.10 of the *Criminal Organisation Act 2009* (Qld), pursuant to which a group could be declared a "criminal organisation". No member of the Court in *Pompano* was troubled by this nomenclature, or the issue of nomenclature.

The *Kable* objection to the scheme of s.36A of the *Misuse of Drugs Act* and s.94 of the *Forfeiture Act*

21. The repugnancy notion of Kelly J is that the scheme of s.36A of the *Misuse of Drugs Act* with s.94 of the *Forfeiture Act* constitutes a direction by the executive to a Court as to the exercise by the Court of judicial power, or the Court's "decision-making role"[13]. This is premised upon her Honour's characterisation of the forfeiture order ultimately made as one "of the DPP"[14] to which the imprimatur of the Court is given. It is not entirely clear whether the role of the Court under s.94 alone is said to be repugnant, or only when considered having regard to s.36A.

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8 See - *Emmerson v Director of Public Prosecutions & Ors* [2013] NTCA 4; (2013) 33 NTLR 1. This reasoning is of Kelly J at 33-34 [90]-[92] and 34 [94] and by Barr J at 38-40 [108]-[114], 47 [131]-[133].

9 See s.557K of the *Criminal Code Act Compilation Act 1913* (WA) for instance.

10 *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 223 CLR 575.

11 Referred to in *Yates v The Queen* [2013] HCA 8; (2013) 247 CLR 328 at 340 [34] (French CJ, Hayne, Crennan and Bell JJ).

12 *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7; (2013) 295 ALR 638.

13 See *Emmerson v Director of Public Prosecutions & Ors* [2013] NTCA 4; (2013) 33 NTLR 1 commencing at 26 [71] (Kelly J).

14 *Emmerson v Director of Public Prosecutions & Ors* [2013] NTCA 4; (2013) 33 NTLR 1 at 32 [84(c)] (Kelly J).

22. A number of matters can be observed about the scheme or process created by s.36A of the *Misuse of Drugs Act* and s.94 of the *Forfeiture Act.*

23. *First,* the power exercised by the Court under s.94 is statutory, and judicial power – or what judges can do – is often times truncated by legislation conferring jurisdiction. Limitations on the power to sentence convicted persons are an obvious example. Statutory conferral of jurisdiction on a Court is commonly accompanied by statutory limitations on the exercise of judicial power when exercising the jurisdiction.

24. *Second,* the exercise of judicial power, under both s.36A of the *Misuse of Drugs Act* and s.94 of the *Forfeiture Act,* must be preceded by a party or putative party making an application to the Court. Under both, the commencement of a proceeding by the DPP is, simply enough, an executive act that engages the jurisdiction and the exercise of judicial power. The DPP is simply provided with a statutory power to bring applications under both sections.

25. *Third,* as a general proposition, it is not beyond the power of an Australian Parliament to require a Chapter III court to make a specified order if stated conditions are satisfied. This was recognised, *inter alia,* in *Palling v Corfield*[15], *International Finance Trust Company Limited v New South Wales Crime Commission*[16], *Totani*[17], *DPP v George*[18]; *King v Automotive, Food, Metals Engineering, Printing and Kindred Industries Union,*[19] *DPP v Toro-Martinez*[20] and *Campbell v Metway Leasing Ltd*[21].

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15 *Palling v Corfield* [1970] HCA 53; (1970) 123 CLR 52 at 58-59 (Barwick CJ), 62-63 (McTiernan J), 64 (Menzies J), 67 (Owen J), 68 (Walsh J).

16 *International Finance Trust Company Limited & Anor v New South Wales Crime Commission & Ors* [2009] HCA 49; (2009) 240 CLR 319 at 352 [49] (French CJ), 360 [77] (Gummow J), 372-373 [120]-[121] (Hayne, Crennan and Kiefel JJ).

17 *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 48-49 [71] (French CJ), 154 [420] (Crennan and Bell JJ).

18 *Director of Public Prosecutions (SA) v George* [2008] SASC 330; (2008) 102 SASR 246 at 270 [112]-[113] (Doyle CJ).

19 *King v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2000] FCA 1900; (2000) 109 FCR 447. The Full Court of the Federal Court relied on *Palling v Corfield* [1970] HCA 53; (1970) 123 CLR 52 in upholding the validity of the *Workplace Relations Act 1996* (Cth) insofar as it obliged the court, on the satisfaction of certain statutory conditions, to order a ballot to decide whether a constituent part of an 'amalgamated organisation' should withdraw from the organisation.

20 *Director of Public Prosecutions v Toro-Martinez & Ors* (1993) 33 NSWLR 82 at 100 (Handley JA, Mahoney JA agreeing).

21 *Campbell v Metway Leasing Ltd* [2010] FCA 1311; (2001) 188 ALR 100. In this case, Katz J considered whether s.60(3) of the *Bankruptcy Act 1966* (Cth) – which *deemed* an action to be abandoned by the trustee in certain circumstances – was within the competence of the Commonwealth Parliament. His Honour said at 111 [60]:

> If it were an impermissible interference with the exercise of judicial power to create an entitlement to an order in the circumstances defined in s 60(3) of the Act, then I am unable to see how the Commonwealth Parliament would be acting constitutionally in any case in which it purported to entitle a party to a particular judicial order in a defined set of circumstances, rather than conferring on the court concerned a discretion whether or not to make the order in those circumstances. Such a proposition only has to be stated for its unarguability to be recognised. Not only does it find no support in *Kable*, but it is inconsistent with the approach taken by Emmett and Branson JJ in *Hi-Fert*. Furthermore, it is inconsistent with the approach which was taken by the High Court (admittedly in a criminal law context) in *Palling v Corfield* (1970) 123 CLR 52 (Barwick CJ and

26. *Fourth,* although issues of invalidity may arise if legislation requires a Chapter III Court to order certain things, the actual order required to be made by the Court under s.94 of the *Forfeiture Act* is of a kind or nature order commonly made by Courts. Forfeiture of property is a common and uncontroversial exercise of judicial power[22]. Further to this, the kind of orders made pursuant to the restraining order provisions of the *Forfeiture Act* are commonly made by Courts; temporary restraint of the use of property and restraint of the right of an interest holder in property to deal with the interest. So, there is nothing in the nature of the order made under s.94 of the *Forfeiture Act* that is problematic.

27. *Fifth,* following from the proposition that legislation can require a Chapter III court to make a specified order if stated conditions are satisfied; the exercise of judicial power does not transmogrify into executive power, and no issue of invalidity arises, simply because the condition to be satisfied is or depends upon a decision made by the Executive[23]. This general proposition was recently affirmed in *Magaming*[24], and in particular the approval by six justices[25] of *Fraser Henleins Pty Ltd v Cody*[26] and the rejection of the reasoning of Jordan CJ in *Ex parte Coorey.*[27]

28. *Sixth,* once the fifth proposition is accepted, that a Court can make a specified order even if a precedent condition of the making of the order is a decision of the Executive, the true basis of limitation on legislative power becomes clearer. It is illustrated by *International Finance Trust Company Limited v New South Wales Crime Commission.* Although legislation can validly require a Chapter III court to make a specified order if stated conditions are satisfied, legislation cannot require a Court, in exercising judicial power in this jurisdiction, to do so in a manner inimical

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McTiernan, Menzies, Windeyer, Owen, Walsh and Gibbs JJ); and see also *King v Automotive, Food, Engineering, Printing & Kindred Industries Union* (2000) 109 FCR 447 ; 183 ALR 213 (Branson, Finkelstein and Gyles JJ) at [62] (Gyles J) and at [43] (Finkelstein J, agreeing with Gyles J).

Examples abound in other legislation: *Electoral Act 2004* (NT) s.246(3) provides that the Court must make a declaration under subs.(2)(a) if it finds the candidate returned as elected has, in relation to the election at which the candidate was elected, committed or attempted to commit an offence against Part IV, Division 3 of the Criminal Code; the *Corporations Act 2001* (Cth) s.1317E provides that if a court is satisfied a civil penalty provision had been contravened, the court must make a declaration of contravention; the *Workers' Compensation and Injury Management Act 1981* (WA) s.170(2) requires the Court on convicting a person of an offence of failing to insure, in addition to any sentence for the offence, to repay the insurance premiums avoided; the *Fish Resources Management Act 1994* (WA) s.222 (additional mandatory penalty); the *Road Traffic Act 1974* (WA) s.106A (mandatory disqualification); the *Wildlife Conservation Act 1950* (WA), s.27 (forfeiture).

22 See, for instance, *International Finance Trust Company Limited & Anor v New South Wales Crime Commission & Ors* [2009] HCA 49; (2009) 240 CLR 319 at 344-345 [25]-[29] (French CJ).

23 *International Finance Trust Company Limited & Anor v New South Wales Crime Commission & Ors* [2009] HCA 49; (2009) 240 CLR 319 at 352 [49] (French CJ), 360 [77] (Gummow and Bell JJ); *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 63 [133] (Gummow J).

24 *Magaming v R* [2013] HCA 40; (2013) 302 ALR 461.

25 *Magaming v R* [2013] HCA 40; (2013) 302 ALR 461 at 469 [37] (French CJ, Hayne, Crennan, Kiefel and Bell JJ, and Keane J agreeing).

26 *Fraser Henleins Proprietary Limited v Cody* (1945) 70 CLR 100 at 118-119 (Latham CJ), 121-122 (Starke J), 124 (where Dixon J adopts the reasoning of the majority in *Ex Parte Coorey* (1944) 45 SR (NSW) 287. His Honour was doubtless referring to the reasoning of Davidson J at 314, and of Nicholas CJ in Eq. at 318-319). See also 131-132 (McTiernan J), 139 (Williams J). *International Finance Trust Company Limited & Anor v New South Wales Crime Commission & Ors* [2009] HCA 49; (2009) 240 CLR 319 at 344 [25] (French CJ).

27 (1944) 45 SR (NSW) 287.

to the processes of a Court, or to follow processes that are inconsistent with the exercise of judicial power. So, legislation cannot preclude a Court from providing reasons[28] or require a court to exclude an affected party from being heard[29], or preclude a court from sitting openly[30]. The Legislature cannot direct a Court as to the manner in which it exercises the power conferred on it. But, the distinction between the impermissible legislative prescription of the manner of exercise of judicial power and the permissible statutorily prescribed power to make a specified order if certain conditions are proved, is clear as a matter of principle.

29. *Seventh,* this understanding explains the observation of Brennan, Deane and Dawson JJ in *Chu Kheng Lim*[31], that the Legislature cannot, having conferred a statutory jurisdiction on a Chapter III court, direct the "outcome" of the exercise of this jurisdiction[32]. "Outcome" is to be understood having regard to the impugned section in *Chu Kheng Lim,* being, in essence, an ouster provision[33]; that is, the court could not make a particular order. This is to be contrasted with the valid legislative power to require a Chapter III court to make a specified order if stated conditions are satisfied. This is not the impermissible direction of an "outcome", or an "excessively directive statute"[34] so long as the order to be made is one that a Court can or has typically make, and any prescribed process does not require the Court to not act like a Court.[35]

30. *Eighth,* just as legislation can require a Chapter III court to make a specified order if stated conditions are satisfied, legislation can truncate discretion. The exercise of judicial power does not require unlimited judicial discretion. The ancient prerogative Writ of Habeas Corpus was (and is) of right.[36] In *Ruddock v Vardalis*[37] Black CJ observed that:

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28 *Wainohu v New South Wales* [2011] HCA 24; (2011) 243 CLR 181 at 215, 219 [57]-[59], [68] (French CJ and Kiefel J), 227-228 [98]-[104] (Gummow, Hayne, Crennan and Bell JJ).

29 *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 43 [62] (French CJ); *International Finance Trust Company Limited & Anor v New South Wales Crime Commission & Ors* [2009] HCA 49; (2009) 240 CLR 319 at 354 [54] (French CJ).

30 *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7; (2013) 295 ALR 638 at 659 [67] (French CJ).

31 *Chu Kheng Lim & Ors v Minister for Immigration, Local Government and Ethnic Affairs & Anor* [1992] HCA 64; (1992) 176 CLR 1.

32 *Chu Kheng Lim & Ors v Minister for Immigration, Local Government and Ethnic Affairs & Anor* [1992] HCA 64; (1992) 176 CLR 1 at 36-37 (Brennan, Deane and Dawson JJ).

33 Section 54R of the *Migration Act 1958* (Cth) provided that "a court is not to order the release from custody of a designated person."

34 *K-Generation Pty Limited & Anor v Liquor Licensing Court & Anor* [2009] HCA 4; (2009) 237 CLR 501 at 526 [72] (French CJ).

35 An observation to similar effect was made in *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532 at 560 [39] (Kirby J), citing *Chu Kheng Lim & Ors v Minister for Immigration, Local Government and Ethnic Affairs & Anor* [1992] HCA 64; (1992) 176 CLR 1 at 36-37 (Brennan, Deane and Dawson JJ) and *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14; (2007) 228 CLR 651 at 669-670 [47]-[48] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ), which also concerned purported ouster of jurisdiction.

36 Lord Bingham "Should Public Law Remedies be Discretionary?" in *The Business of Judging: Selected Essays and Speeches* (2000, Oxford University Press). His Lordship notes that: *habeas corpus* is not discretionary; *certiorari* is "largely discretionary but it is not clear that the remedy is or ever has been discretionary in all circumstances"; *prohibition* is discretionary; *mandamus* is "pre-eminently" discretionary; *declaration* and *injunction* are "truly discretionary".

"It is clear that there is no discretion to refuse relief once the grounds for the issue of the writ of habeas corpus have been made out, and the appellants did not submit otherwise: see *Somerset v Stewart* (1772) 98 ER 499; *R v Langdon; Ex parte Langdon* (1953) 88 CLR 158 per Taylor J."

What this means here

31. Having regard to these matters, there is nothing problematic with either s.36A of the *Misuse of Drugs Act* or s.94 of the *Forfeiture Act*. The power of the Court to make a declaration under s.36A is enlivened by the bringing of proceedings by the DPP. This is an executive decision, which the DPP is at liberty to make.[38] The making of the application does not dictate the outcome of the exercise of judicial power. The Court, exercising its power pursuant to s.36A, is to consider and determine whether the person the subject of the application meets the criteria of s.36A(3)[39]. Those criteria are plain and transparent. The declaration sought can only be made after, and upon, findings of guilt made by courts. The application of s.94 of the *Forfeiture Act* to a particular person arises out of past criminal conduct. No new or *sui generis* norm of conduct is engaged by, or conditions the operation of, either s.36A of the *Misuse of Drugs Act* or s.94 of the *Forfeiture Act*.

32. The hearings of the s.36A and s.94 applications are characteristically judicial. They are heard in open court, though the Court could make certain orders restricting this if the Court consdiered it appropriate to do so. The respondent is given notice of the applications and has a right to be heard. The onus of proof for both applications is on the applicant DPP. The rules of evidence apply. The Court retains its inherent powers to ensure fairness and prevent injustice in the conduct of its proceedings, and the respondent has a right of appeal.[40]

33. That the Court must make the declaration once the relevant criteria are proved is not novel, and it is not a direction of the outcome of an exercise of judicial power.[41]

PART VI: LENGTH OF ORAL ARGUMENT

34. It is estimated that the oral argument for the Attorney General for Western Australia will take 20 minutes.

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37 *Ruddock & Ors v Vadarlis & Ors* [2001] FCA 1329; (2001) 110 FCR 491 at 514 [91] (Black CJ). See also *Antunovic v Dawson & Anor* [2010] VSC 377; (2010) 30 VR 355 at 383-384 [129]-[134] (Bell J) which contains discussion of the non-discretionary nature of habeas corpus.

38 Akin to a decision to prosecute, as to which, see *Magaming v R* [2013] HCA 40; (2013) 302 ALR 461 at 466 [20] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

39 Namely, that a person has been found guilty of three offences described in s.36A(6) within the 10 year period, provided that the third offence is committed after the commencement of the section.

40 See paragraph [25] of the Appellant's submissions. Also see *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 223 CLR 575 at 592 [19] (Gleeson CJ).

41 *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 48-49 [71] (French CJ), *Baker v The Queen* [2004] HCA 45; (2004) 223 CLR 513 at 532 [43] (McHugh, Gummow, Hayne and Heydon JJ); *Director of Public Prosecutions (SA) v George* [2008] SASC 330; (2008) 102 SASR 246 at 270 [112]-[113] (Doyle CJ).

Dated: 22 November 2013

G R Donaldson SC
Solicitor General for Western Australia
Telephone: (08) 9264 1806
Facsimile: (08) 9321 1385
Email: grant.donaldson@sg.wa.gov.au

K E McDonald
State Solicitor's Office
Telephone: (08) 9264 1655
Facsimile: (08) 9264 1812
Email: k.mcdonald@sso.wa.gov.au