

THE COMPATIBILITY OF UNEXPLAINED WEALTH PROVISIONS AND 'CIVIL' FORFEITURE REGIMES WITH *KABLE*

ANTHONY GRAY*

This paper considers the growing use of forfeiture regimes in Australian law to deal with suspected criminal offending. Increasingly, these regimes apply in the absence of a conviction against the person whose property is to be confiscated; indeed the person need not have been charged with any crime, and an actual acquittal on a charge is no bar to the proceedings being brought. These regimes include unexplained wealth provisions, which often contain a reverse onus of proof, requiring the person whose property is liable to be confiscated to prove the lawfulness by which they acquired property, rather than for the prosecutor to prove the truth of an allegation of criminality. These regimes raise the important question of where the true boundary is between proceedings that are 'criminal' in nature and proceedings that are 'civil' in nature, or whether the existing boundary lines no longer serve us well. In addition, I argue that by asking the court to make a confiscation order in the absence of any specific allegation of criminality or proof that a criminal offence has been committed, these regimes offend the Kable principle, by departing significantly from traditional judicial process, and imposing what is in essence 'punishment', a criminal response, to a proceeding that is dressed up as being 'civil' in nature.

I INTRODUCTION

In recent years, 'civil' forfeiture regimes and unexplained wealth regimes have progressively been introduced in most Australian jurisdictions, as a response to suspicion that individuals are holding property acquired other than through lawful means. These supplement confiscation of proceeds of crime legislation, usually applied after a person has been convicted of an offence, and which apply to property acquired as a result of criminal activity proven beyond reasonable doubt. The more traditional proceeds of crime legislation raises little philosophical difficulty; it is hard to argue that a person convicted of a crime should keep the rewards of their criminal activity. More difficult is the idea that the property of a person can or should be confiscated based on a suspicion by authorities that the property was acquired other than through lawful means. This is what these regimes allow. In this article, I outline aspects of the civil forfeiture/unexplained wealth regimes operating in all jurisdictions in Australia bar one, before considering how such regimes could be legally challenged. I argue in this article

* Professor Anthony Gray, Deputy Head, USQ Law School. Thanks to the anonymous referees for helpful comments on an earlier draft.

that they are offensive to the *Kable* doctrine that has been developed in a series of decisions, by asking the court to act in a manner contrary to judicial process. This doctrine was applied in the forfeiture context in the *International Finance Trust* decision. These regimes clearly inflict ‘punishment’ and are submitted to be truly criminal in nature; the High Court has found that punishment can only be inflicted after a finding of guilt at the criminal standard. These regimes do not comply.¹

Given that these regimes blur the distinction between civil and criminal proceedings,² they reflect a broader debate regarding the ongoing utility of such a distinction, whether there should be recognised a ‘third category’ of proceedings that are properly neither civil nor criminal, and the essence of what is and should be considered to be a crime. They also reflect a modern move towards preventative measures rather than dealing with behaviour after the event. Utilitarian views of criminal law compete with retributive theory. No doubt, the use of civil forfeiture measures reflect dissatisfaction with aspects of the traditional criminal justice system and the burdens it imposes on prosecutors.³ Of course, we must be wary that the government does not seek to subvert the ‘shackles’ imposed by traditional criminal law due process by unjustified description of proceedings as civil in nature.

¹ Due to word limit restrictions, I will confine my arguments to the question of the true nature of such provisions. I will not consider in detail in this article the reversal of the onus of proof, since I have considered this elsewhere (Anthony Gray ‘Constitutionally Protecting the Presumption of Innocence’ (2012) 31(1) *University of Tasmania Law Review* 131). Nor will I discuss property rights of individuals generally in Australian law and in international human rights instruments, including the right to just terms if property rights are affected.

² The law has had and continues to have some difficulty in deciding where the line is drawn between criminal and civil behaviour; some behaviour can be both, for example assault or in some cases defamation and or libel. Punitive damages are problematic in relation to the distinction. This may partly reflect some interesting historical links between criminal law and, in particular, the law of tort: see Carol Steiker ‘Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide’ (1997) 85 *Georgetown Law Journal* 775, 782-784. Recently in Australia, criminal sanctions were introduced in relation to anti-competitive behaviour that previously only attracted civil sanctions, raising this issue in another context.

³ For instance, the explanatory memorandum to the bill which introduced the unexplained wealth provisions at Commonwealth level indicates frustration with cases where ‘upper-echelon individuals’ are thought to have derived proceeds from crime, but since they stay at arms’ length from the actual criminal activity, they cannot be charged (or would not be convicted if charged) with any specific offence: *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* (Cth). Andrew Ashworth and Lucia Zedner summarise the dissatisfaction with the traditional criminal justice system to include that it is not cost effective, not preventive, not necessary, not appropriate and not effective, in ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions’ (2008) 2 *Criminal Law and Philosophy* 21, 23. See also, Andrew Ashworth ‘Social Control and Anti-Social Behaviour: The Subversion of Human Rights’ (2004) 120 *Law Quarterly Review* 263; Carol Steiker ‘Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide’ (1997) 85 *Georgetown Law Journal* 774; Kenneth Mann ‘Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law’ (1992) 101 *Yale Law Journal* 1795; Christopher Slobogin ‘The Civilisation of the Criminal Law’ (2005) 58 *Vanderbilt Law Review* 121; Issachar Rosen-Zvi and Talia Fisher ‘Overcoming Procedural Boundaries’ (1999) 2 *Buffalo Criminal Law Review* 679; Simon Hoffmann and Stuart Macdonald ‘Should ASBOs be Civilized?’ (2010) *Criminal Law Review* 457.

II OUTLINE OF REGIMES

I will deal briefly in this section with each regime.⁴ Of course, there is much overlap between them, and this will be acknowledged. There are also important aspects that are a part of only one or two regimes, and these will also be considered. These Acts are complex, running to hundreds of sections in some cases. I have left out discussion of aspects of the Acts that are not considered relevant for present discussion purposes.⁵ I will consider both so-called unexplained wealth provisions and civil forfeiture provisions separately, as most of the Acts do, though I recognise that there may well be overlap between these sets of provisions. One difference is that with respect to civil forfeiture provisions, the application will relate to specific property, and it is that property that will be the subject of any order made. In contrast, the result of an unexplained wealth order being made is that the person affected will be deemed to owe a financial amount to the government. Another is that the use of reverse onus provisions is to a large extent confined to the context of unexplained wealth provisions, rather than civil forfeiture proceedings.

A *Unexplained Wealth Provisions*

Section 179B of the *Proceeds of Crime Act 2002* (Cth) allows the court to make a preliminary unexplained wealth order requiring a person to appear before it to decide whether or not to make an unexplained wealth order. It may do so if it is satisfied that an authorised officer has reasonable grounds to suspect that the person the subject of the application has wealth exceeding that which was lawfully acquired (unexplained wealth).⁶ The application must include the reasons for the suspicions of the authorised officer.⁷ If the court makes the preliminary unexplained wealth order, notice and details of the pending application for an unexplained wealth order will be given to the person the subject of the application.⁸ The person will be required to attend at the proceeding for the final order. Section 179E then allows the court to make the final unexplained

⁴ *Proceeds of Crime Act 2002* (Cth); *Criminal Assets Recovery Act 1990* (NSW), *Confiscation Act 1997* (Vic), *Criminal Proceeds Confiscation Act 2002* (Qld), *Criminal Assets Confiscation Act 2005* (SA), *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA), *Criminal Property Confiscation Act 2000* (WA), *Criminal Property Forfeiture Act 2002* (NT), and *Confiscation of Criminal Assets Act 2003* (ACT). For recent discussion, see Sebastian De Brennan 'Freezing Notices and Confiscation Powers: New Punitive Roles for Police?' (2011) 35 *Criminal Law Journal* 345. Tasmania's regime applies only following conviction for an offence, so will not be further considered in this article: see *Crime (Confiscation of Profits) Act 1993* (Tas).

⁵ In particular, I have deliberately omitted specific reference in each of the Acts to the exact property that may be the subject of the application, hardship provisions, the fact that often a restraining and/or freezing order is sought at or near the same time as the forfeiture application etc and many other features, because they are not considered relevant to the argument I will make. Aspects of the New South Wales legislation that required the court to hear an application ex parte were recently adjudged to be constitutionally invalid in *International Finance Trust Company Limited v New South Wales Crime Commission and Another* (2009) 240 CLR 319 but that aspect of the laws is not the focus of this article.

⁶ *Proceeds of Crime Act 2002* (Cth) s179B(1)(b).

⁷ *Ibid* s179B(2).

⁸ *Ibid* s179N.

wealth order if satisfied⁹ that the person's wealth was, at least in part, derived from a crime against a law of the Commonwealth, foreign law, or state law with a federal aspect. Section 179E(3) effects a reversal of the onus of proof, requiring that the person the subject of the application to prove that their property was, in effect, acquired by lawful means.¹⁰ The court is not limited in making its application by the evidence presented by the applicant for the order.¹¹ There are provisions outlining how the unexplained amount is calculated; it includes property under the 'effective control' of a person, property that the person has disposed of or consumed, whether the property was acquired prior to the introduction of the law or not.¹²

New South Wales, Western Australia, South Australia and the Northern Territory have similar regimes. In New South Wales and Victoria, the court must make such an order if there is a reasonable suspicion that the person affected has engaged in serious crime-related activity, or acquired property derived from serious crime-related activity.¹³ In Western Australia, South Australia and the Northern Territory, the court must make the order if it is more likely than not that the person has unexplained wealth.¹⁴ In these jurisdictions, the court's finding need not be based on reasonable suspicion as to the commission of a particular offence.¹⁵ The Acts all contain a reverse onus provision,¹⁶ requiring the court to assume that the allegations by the prosecutor regarding unexplained wealth are correct, unless the person affected shows, on the balance of probabilities, otherwise. The fact that any conviction of the person is quashed or set aside does

⁹ Ibid 179E(1)(b); the provision is actually that the court is 'not satisfied that the person's wealth was not derived from at least one of these sources,' but for the sake of explaining the provision as simply as possible, I have removed the double negative, while acknowledging later the evidentiary point.

¹⁰ 'Lawful means' here is taken to refer to means other than commission of an offence against (a) Commonwealth law, (b) foreign law, or (c) an Australian State law with a federal aspect.

¹¹ *Proceeds of Crime Act 2002* (Cth) s179E(4).

¹² Ibid s179G; the New South Wales regime is also retrospective (*Criminal Assets Recovery Act 1990* s28A(5)).

¹³ *Criminal Assets Recovery Act 1990* (NSW) s28A(2). To be clear, it is not necessary that the person whose property is seized is the one who is suspected or proven to have committed the crime (*Criminal Property Confiscation Act 2000* (WA) s148(1)).

¹⁴ *Criminal Property Confiscation Act 2000* (WA) s12, *Criminal Property Forfeiture Act 2002* (NT) s71(1), *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) s9 and 41.

¹⁵ *Criminal Property Confiscation Act 2000* (WA) s106(a).

¹⁶ *Criminal Assets Recovery Act 1990* (NSW) s28B(3); of the *Criminal Property Confiscation Act 2000* (WA) s12(2) and s16(3) (respectively, unexplained wealth and criminal benefits declarations – property presumed not to have been lawfully acquired unless person proves otherwise); *Criminal Property Forfeiture Act 2002* (NT) s71(2) to like effect, *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) s9(7) to like effect. Of all of the Acts mentioned, the South Australian one is the only one to specifically recognise that the passage of time, the circumstances in which the property was acquired or other reasons may make it impractical to require the person suspected to prove the lawful means by which they acquired the relevant property (*Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) s9(11)). Section 83 of the Qld Act (*Criminal Proceeds Confiscation Act 2002*) also contains a reverse onus provision, but this is in the context of a 'proceeds assessment order' rather than unexplained wealth so-called.

not affect the validity of the forfeiture order.¹⁷ Sometimes, rules of evidence are relaxed in relation to these proceedings.¹⁸

B General Civil Forfeiture

The Commonwealth Act also contains provision for forfeiture of property the court believes (civil standard) to be the proceeds of an indictable offence, or the instrument of such an offence.¹⁹ The civil standard also applies in New South Wales,²⁰ Victoria,²¹ Queensland,²² South Australia,²³ Western Australia,²⁴ the Northern Territory,²⁵ and the Australian Capital Territory.²⁶ The court need not find that the person whose property is to be forfeited committed a specific offence,²⁷ or indeed any offence.²⁸ It is (generally) enough that there is reasonable suspicion that *someone* committed an offence, and the property is the proceeds or instrument of such an offence. Generally a reverse onus is not applied to these proceedings; however if the proceeds related to a terrorism offence and the property was in the person's possession at the time of the possible offence, then a reverse onus applies, and the person must show the property was

¹⁷ Criminal Assets Recovery Act 1990 (NSW) s28C(4); Criminal Property Confiscation Act 2000 (WA) s106(b) and (c), Criminal Property Forfeiture Act 2002 (NT) s140(b) and (c).

¹⁸ *Criminal Assets Recovery Act 1990* (NSW) s28C(12) provides that the ordinary rules of evidence do not apply in relation to police evidence regarding the market value of particular drugs. Section 109 of the *Criminal Property Confiscation Act 2000* (WA) and s143 of the *Criminal Property Forfeiture Act 2002* (NT) allow the use of hearsay evidence. Exceptionally, the Victorian Act, which allows for civil forfeiture generally but not unexplained wealth forfeiture, maintains that the rules of evidence generally are applicable to the proceedings (*Confiscation Act 1997* (Vic) s33(4)), as does the South Australian Act (*Serious and Organised Crime (Unexplained Wealth) Act 2009* s41(d)).

¹⁹ *Proceeds of Crime Act 2002* (Cth) s49(1), provided a restraining order has been in place with respect to the property for at least six months prior to the application being made.

²⁰ *Criminal Assets Recovery Act 1990* (NSW) s22(2) and s27(2), requiring a court to make the forfeiture order if it is 'more probable than not' that the person was engaged in, or has proceeds derived from, serious crime related activity involving an indictable quantity or serious crime related activity involving an offence punishable by at least five years' imprisonment; see also *Criminal Assets Recovery Act 1990* (NSW) s27(2) and (2A).

²¹ *Confiscation Act 1997* (Vic) s16(2)(a) (reasonable suspicion is sufficient: *Confiscation Act 1997* (Vic) s18(2)(b)).

²² *Criminal Proceeds Confiscation Act 2002* (Qld) s58(1), requiring the court to make an order if it is 'more probable than not' that the person whose property is to be forfeited was engaged in serious crime-related activities, or the property the subject of the application was suspected of being derived from serious crime, regardless of who might have committed that crime (if it is, in fact, crime-derived); see also *Criminal Proceeds Confiscation Act 2002* (Qld) s8. Section 9 of the *Criminal Proceeds Confiscation Act 2002* (Qld) states that any order made under the Act is not a punishment or sentence for any offence.

²³ *Criminal Assets Confiscation Act 2005* (SA) s47(1)(b): 'court is satisfied that the property is proceeds of crime'.

²⁴ *Criminal Property Confiscation Act 2000* (WA) s16 and 106; eg s16 'more likely than not'.

²⁵ *Criminal Property Forfeiture Act* (NT) s75 'more likely than not'.

²⁶ *Confiscation of Criminal Assets Act 2005* (ACT) s67 'balance of probabilities'.

²⁷ Except in the ACT, where the court must be satisfied that the person the subject of the order has committed an offence (*Confiscation of Criminal Assets Act 2003* (ACT) s67).

²⁸ *Proceeds of Crime Act 2002* (Cth) s49(2); *Criminal Assets Recovery Act 1990* (NSW) s22(3), *Criminal Proceeds Confiscation Act 2002* (Qld) s27(3), s58(5) and s78(3), *Criminal Assets Confiscation Act 2005* (SA) s47(2)(a) and (c), *Criminal Property Confiscation Act 2000* (WA) s106, *Criminal Property Forfeiture Act 2002* (NT) s12 and 140. This is perhaps implicit in the Victorian *Confiscation Act 1997* (s3 definition of tainted property).

not used in connection with the commission of the offence.²⁹ Any forfeiture in these cases is not affected by the acquittal of the person or by the quashing of any subsequent conviction.³⁰ Sometimes, it is specifically provided that the raising of a doubt regarding whether criminal activity actually occurred is not sufficient to prevent the court making the order.³¹ There is a presumption (except in the ACT) that if the property was in the person's possession at the time of any offence, that it was used in connection with the offence, unless the person adduces evidence to the contrary.³² In some jurisdictions, interim proceedings such as freezing orders, as well as the application for civil forfeiture itself,³³ can be heard in closed court.³⁴

III PROBLEMATIC ASPECTS OF THESE REGIMES

I will now discuss in more detail what I consider to be the more problematic aspects of these regimes.

A *Assertion that these Proceedings are Civil in Nature*

There is an assertion in each of these Acts that the proceedings are civil in nature. This is explained by the fact that in each case, the standard of proof is at the civil standard or near it, requiring that matters be proven on the balance of probabilities or based on reasonable suspicion. This matter requires further investigation; I do not accept the positivistic line that proceedings are, in fact, civil in nature merely because the legislature states that they are civil in nature. In my view, one must consider the substance of the proceedings, and if the substance of the proceedings is criminal in nature, difficulties arise when the civil standard is applied.

There is much support for my position that the court should be prepared to look beyond the form of the legislation and consider the substance. Much of this support appears in the constitutional law jurisprudence. One could look at the case law on how legislation should be characterised;³⁵ one could look at the

²⁹ Proceeds of Crime Act 2002 (Cth) s54.

³⁰ Ibid s80, Criminal Assets Recovery Act 1990 (NSW), s61 Criminal Proceeds Recovery Act 2002 (Qld) s6, Criminal Assets Confiscation Act 2005 (SA) s22(7) and s28C(4), s47(2)(b) and s63, Criminal Property Confiscation Act 2000 (WA) s106(b) and s148(1), Criminal Property Forfeiture Act (NT) s12 and s140, Confiscation of Criminal Assets Act 2003 (ACT) s32(2) and s67(4).

³¹ Criminal Assets Recovery Act 1990 (NSW) s22(6), Criminal Proceeds Recovery Act 2002 (Qld) s58(6), Criminal Assets Confiscation Act 2005 (SA) s47(2)(b), Confiscation of Criminal Assets Act 2003 (ACT) s32(2)(d) and s67(5)(d).

³² Criminal Assets Confiscation Act 2005 (SA) s47(5), Criminal Property Confiscation Act 2000 (WA) s16(3) and s22(4), Criminal Property Forfeiture Act 2002 (NT) s75(2).

³³ These are known as restraining orders in the NT. In the ACT, s69(1)(a) of the *Confiscation of Criminal Assets Act 2003* provides that the application for civil forfeiture itself can be heard in closed court.

³⁴ Confiscation Act 1997 (Vic) s17(3)(a) and s37(12), Criminal Property Confiscation Act 2000 (WA) s42, Criminal Property Forfeiture Act 2002 (NT) s42, Confiscation of Criminal Assets Act 2003 (ACT) s69(1).

³⁵ *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, 6-7: 'it is a question of the true nature and character of the legislation, is it in its *real substance* a law upon ... one or more of the enumerated subjects' (emphasis added).

jurisprudence on s90³⁶ or s92³⁷ or s55,³⁸ to see the debate between form and substance. In the recent *International Finance Trust* decision, in the specific context of forfeiture proceedings, there is an express reference to considering the legislation 'in substance'.³⁹ In all cases, substance has eventually won the day, as it should.

Perhaps the jurisprudence that is most relevant here, however, has involved controversial legislation that allowed a person to be further incarcerated, beyond their originally given term of imprisonment, if a court was satisfied, on the civil standard, that the person was going to re-offend.⁴⁰ While courts have reacted differently to this kind of legislation depending on its precise content,⁴¹ comments of some of the judges in the *Fardon* case are considered relevant. The *Fardon* case considered Queensland legislation allowing the Attorney-General to apply to the Supreme Court for an order for the continued incarceration of certain categories of violent offender otherwise due for release. The court could do so if there was a high degree of probability the offender would re-offend if released. While a majority of the Queensland Court of Appeal and High Court validated this legislation, comments of the dissenting judges bear some consideration here.

For instance, President McMurdo (dissenting) found that, in fact, the proceedings were not civil in nature. Part of Her Honour's reasoning was that a person further incarcerated under such regime was:

subject to substantially the same regime of detention as if convicted of a criminal offence, but without being charged with or tried for an offence against the criminal law of Queensland.⁴²

A similar view was taken by Kirby J (dissenting) in the High Court. Kirby J noted that if civil commitment were truly being envisaged, the person affected would be subject to different facilities, treatment and support.⁴³ He concluded that merely calling imprisonment by a different name did not alter its true

³⁶ This is the familiar debate between the criterion of liability and the substance approach, eventually won in favour of the latter: *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529; *Bolton v Madsen* (1963) 110 CLR 264; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599.

³⁷ This is the familiar debate between the criterion of operation test and the substance approach, again eventually won in the favour of the latter: *Wragg v New South Wales* (1953) 88 CLR 353; *North Eastern Dairy Co Ltd v Dairy Industry Authority (NSW)*(1975) 134 CLR 559; *Cole v Whitfield* (1988) 165 CLR 360.

³⁸ *Re Dymond* (1959) 101 CLR 11; *Permanent Trustee Australia Ltd v Commissioner for State Revenue (Vic)*(2004) 220 CLR 388.

³⁹ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 366 (Gummow and Bell JJ). The quote is discussed in more detail near the end of this article.

⁴⁰ For example, the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld).

⁴¹ Compare the High Court decisions in *Kable v Director of Public Prosecutions (NSW)*(1996) 189 CLR 51; *Fardon v Attorney-General (Qld)*(2004) 223 CLR 575.

⁴² *Fardon v Attorney-General (Qld)*(2004) 223 CLR 575 [90].

⁴³ *Ibid* 635; this reflects the position taken by the United States Supreme Court, which has accepted civil commitment only in circumstances where specific treatment is provided to the person affected: *Kansas v Hendricks* 521 US 346, 368 (1997); *Kansas v Crane* 534 US 407 (2002).

character or punitive effect.⁴⁴ He was aware of possible consequences if the law were otherwise:

Normally, a law providing for the deprivation of the liberty of an individual will be classified as punitive. As a safeguard against expansion of forms of administrative detention without court orders, our legal system has been at pains to insist that detention in custody must ordinarily be treated as penal or punitive; precisely because only the judiciary is authorised to adjudge and punish criminal guilt. Where it otherwise, it would be a simple matter to provide by law for various forms of administrative detention, to call such detention something other than 'punishment', and thereby to avoid the constitutional protection of independent judicial assessment before such deprivation is rendered lawful.⁴⁵

Bearing in mind then that we need to look beyond appearances to the substance of the legislation, the next question is whether confiscation of the property of an individual because of its (possible) connections to criminal activity, as the legislation discussed above contemplates is, in substance, a criminal process or, in substance, a civil process.

B The Nature of a Criminal Process and a Civil Process

If the answer does not necessarily depend on how parliament has characterised the proceedings, how does one recognise processes as being essentially criminal in nature? Some guidance can be found in case law and academic writing. This issue has been considered at some length by courts and academics, particularly overseas. Given the critical importance of this issue for present purposes, extended discussion is justified. I will refer to what the case law in North America and Europe has shown us in terms of the civil/criminal divide, before applying this learning to the Australian regimes.

The United States Supreme Court nominated several factors (the *Mendoza* factors) to assist in determining whether proceedings are in fact criminal or civil in nature: (a) whether the sanction involves an affirmative disability or restraint; (b) whether it has historically been regarded as punishment; (c) whether it comes into play only on a finding of scienter; (d) whether its operation will promote the traditional aims of punishment, such as retribution and deterrence; (e) whether the behaviour to which it applies is already a crime; (f) whether an alternative purpose to which it may rationally be connected is assignable to it; and (g) whether it is excessive in relation to the enquiry.⁴⁶

There are numerous examples where, in applying these types of principles, the United States Supreme Court has determined that civil forfeiture provisions were in substance criminal in nature. For instance, in *Caledo-Toledo v Pearson Yacht Leasing*,⁴⁷ the Court found that civil forfeiture provisions considered in that case 'fostered the purposes served by the underlying criminal statutes, both by

⁴⁴ *Fardon v Attorney-General (Qld)*(2004) 223 CLR 637; 'where a court is concerned with the constitutional character of an Act, its intention is addressed to actualities, not appearances' (634).

⁴⁵ *Ibid* 633.

⁴⁶ *Kennedy v Mendoza-Martinez* 372 US 144 (1963); *United States v Ward* 448 US 242 (1980).

⁴⁷ 416 US 663, 687 (1974).

preventing further illicit use of the (thing seized) and by imposing an economic penalty.’⁴⁸ In *Boyd v United States*, the Court was adamant:

Proceedings instituted for the purpose of declaring the forfeiture of a man’s property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal.⁴⁹

To the extent that history is relevant (in terms of (b) above), there is an extensive history of forfeiture in the common law. Forfeitures that occurred without a conviction included the deodand and forfeiture in rem, often of a ship.⁵⁰ A deodand was a thing that caused the death of a person. It was liable to be forfeited to the Crown. At this time common law damages were not available to family members of a victim of an accidental death; the deodand claim was in effect a substitute. A fiction was applied that the deodand itself was the wrongdoer. The proceeding was against the deodand itself, rather than the owner of the thing.⁵¹ These proceedings took place in a criminal court,⁵² and had punishment overtones.⁵³

Other factors that have often been considered include:

- (a) Stigma: the stigma associated with criminal proceedings as being one of its hallmarks, and the stigma associated with asset forfeiture, suggestive to other members of society that the person whose property is forfeited was involved in some kind of wrongdoing.⁵⁴
- (b) Enforcement of a law by the government, rather than a private individual, is usually seen to be a sign of a penal law, as opposed to a civil law.⁵⁵

⁴⁸ See also *United States v United States Leasehold Interest in 121 Nostrand Avenue* 760 F. Supp. 1015, where the court insisted, given the civil forfeiture was based on alleged wrongful conduct, that criminal due process principles be applied.

⁴⁹ 116 US 616 (1886).

⁵⁰ These proceedings were against the ship itself, often to deal with the reality that the owner of the ship allegedly involved in wrongdoing could not be found, or would not make themselves amenable to the jurisdiction of British courts: *Mitchell qui tam v Torup*, Parker 227, 232-233; 145 ER 764, 766 (Ex. 1766).

⁵¹ Jacob Finkelstein ‘The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty’ (1973) 46(2) *Templeton Law Quarterly* 169.

⁵² Daniel Boudreaux and A C Pritchard ‘Innocence Lost: *Bennis v Michigan* and the Forfeiture Tradition’ (1996) 61 *Missouri Law Review* 593.

⁵³ Sir William Blackstone wrote that deodands were ‘grounded [on the] additional reason that such misfortunes [accidental deaths] are in part owing to the negligence of the owner [of the thing forfeited] and he is therefore properly punished by such forfeiture’: *Commentaries on the Laws of England* 301 (1765). Deodands were abolished with the introduction of Lord Campbell’s Act in 1846.

⁵⁴ Donald Dripps ‘The Exclusivity of the Criminal Law: Toward a ‘Regulatory Model’ of, or ‘Pathological Perspective’ On, the Civil/Criminal Distinction’ (1996) 7 *Journal of Contemporary Legal Issues* 199, 218: ‘from a pathological perspective, a forfeiture proceeding ... should be classified as criminal, notwithstanding the government’s protestations. Grave injury is done to individuals, with the effect and probably purpose of stigmatizing them as (criminals)’.

⁵⁵ *Huntingdon v Attrill* [1893] AC 150 (in the context of a foreign law, and the fact that it is a principle of private international law that foreign ‘penal’ laws would not be enforced); Robin

- (c) The use of statutory assumptions in favour of the government and against the person affected is a relevant factor in deciding the proceedings are criminal in nature.⁵⁶

In Europe a three factor test (*Engels* factors) has been accepted, involving consideration of (a) the classification of the proceedings in domestic law (as a starting point only), (b) the nature of the conduct; and (c) the nature and degree of severity of the penalty that the person concerned risked incurring.⁵⁷ In terms of (a), there are precedents where, although the parliament claimed that the proceedings were of a civil nature, the court found that in substance the proceedings were criminal in nature, for the purposes of the application of the European Convention on Human Rights.⁵⁸ Relevant factors in relation to (b) include whether the provision applies broadly or by its nature to a small group⁵⁹ and whether the conduct is typically viewed by members of society as reprehensible;⁶⁰ relevant factors in relation to (c) include whether the penalty is substantial and fixed;⁶¹ and whether it is imposed to punish as well as to deter.⁶²

In terms of (c), the fact the only penalty is a financial one does not preclude a finding that the provision is punitive in nature.⁶³ Courts in the United States and Europe have considered the purpose of the legislation. If the legislation serves a remedial purpose (only), it is more likely to be truly civil in character. However, where it truly serves retributive or deterrent purposes, it is more likely to be seen as criminal in nature.⁶⁴ An important consideration here is whether the fine imposed (or confiscation of property) is done with the intended purpose of

White ‘Civil Penalties’: Oxymoron, Chimera and Stealth Sanction’ (2010) 126 *Law Quarterly Review* 593, 595.

⁵⁶ *Welch v United Kingdom* (1995) 20 EHRR 247 (this was an assets forfeiture case, but a difference was that imprisonment was also an option for default).

⁵⁷ *Engels v The Netherlands* (No1)(1976) 1 EHRR 647.

⁵⁸ *International Transport Roth GmbH and Ors v Secretary of State for the Home Department* [2002] EWCA Civ 158; *Han and Yau, Martins and Martins Morris v Commissioners of Customs and Excise* [2001] EWCA Civ 1048.

⁵⁹ *International Transport Roth*, para 91 (Laws LJ) and para 166 (Parker LJ); *Bendenoun v France* (1994) 18 EHRR 54; *Yau and Others v Customs and Excise* [2001] EWCA Civ. 1048, para 107 (Sir Martin Nourse).

⁶⁰ *International Transport Roth*, para 91 (Laws LJ).

⁶¹ *Ibid*, para 47 (Brown LJ), para 172 (Parker LJ).

⁶² *Ibid* para 91 (Laws LJ); *Georgiou v United Kingdom* (Application No. 40042/98)[2001] STC 80; *Ozturk v Germany* (1984) ECHR 409 *Yau and Others v Customs and Excise* [2001] EWCA Civ. 1048, para 105 (Sir Martin Nourse). Glanville Williams’ classic definition of crime refers to the outcome of the proceedings as including possible punishment: ‘The Definition of Crime’ (1955) CLP 107, 123.

⁶³ *International Transport Roth* para 169 (Parker LJ); *Yau and Others v Customs and Excise* [2001] EWCA Civ. 1048, para 66 (Potter LJ), para 105 (Sir Martin Nourse). The absence of any penalty indicates the proceeding is truly civil in nature: *Clingham v Royal Borough of Kensington and Chelsea* [2003] 1 AC 787. White notes that continental law is consistent here, with common terms for criminal law such as ‘strafrecht’ and ‘droit penal’ in German and French respectively translate to ‘punishment law’: Robin White ‘Civil Penalties’: Oxymoron, Chimera and Stealth Sanction’ (2010) 126 *Law Quarterly Review* 593, 595.

⁶⁴ *United States v Halper* 490 US 435 (1989). Hart refers to punishment as involving five elements: (a) pain or other consequences normally considered unpleasant; (b) for an offence against legal rules; (c) must be of an actual or supposed offender for their offence; (d) must be intentionally administered by an authority other than the offender; and (e) must be imposed and administered by an authority constituted by a legal system against which the offence is committed: HLA Hart *Punishment and Responsibility* 1 (1968) p4-5.

returning it to its rightful owner. The absence of a clear purpose to do this suggests that the law is attempting to punish a wrongdoer, giving it criminal overtones, regardless of its claimed status.⁶⁵ Sometimes a Government has argued that the laws were passed for a preventative, rather than punitive purpose.⁶⁶ The water is somewhat muddy here, given that both criminal and civil remedies can have a purpose of ‘deterrence’, and that punitive laws can often have preventive purposes, among other purposes.

Given that Australia obviously shares a common law tradition with the United Kingdom and the United States, there is no reason in my mind to doubt the usefulness of the above discussion in terms of considering in Australia whether proceedings are truly criminal or civil in nature. These are submitted to be principles of universal application.⁶⁷

How do these principles apply in the Australian context?

Given that the purpose of the legislation is seen as critical in deciding the true nature of the proceedings, let us now examine some Australian decisions that have considered the purpose of legislation containing forfeiture provisions. Comments in several Australian cases suggest that the forfeiture provisions considered there were ‘penalties’.⁶⁸ This arose squarely for the decision in *Lawler*, for instance, in the context of a constitutional challenge to a forfeiture on the basis that it breached the requirements of s51(31) of the *Constitution*, the just terms provision, and was not within a head of power.⁶⁹ The court considered that penalties were

⁶⁵ *Air Canada v United Kingdom* (1995) Eur H.R Rep. 150, where Martens and Russo JJ concluded (dissenting in the result) that the fines challenged were not reparative, but rather punishment of drug activity and truly criminal in nature; see also *Han and Yau Martins and Martins Morris v Commissioner of Customs and Excise* [2001] EWCA Civ 1048, para 66 (Lord Justice Porter) and 1070 (Lord Justice Mance); *Secretary of State for the Home Department v MB (FC)*[2007] UKHL 46; *AP, MP and TP v Switzerland* (1997) 26 Eur H.R Rep 541, para 41: ‘the penalties which ... take the form of fines, are not intended as pecuniary compensation for damage but are essentially punitive and deterrent in nature’; ‘a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment’: *United States v Halper* 490 US 435, 449 (1989).

⁶⁶ This distinction has been accepted by the courts, especially where the proceedings themselves result in no actual penalty, for example the anti-social behaviour schemes in the United Kingdom: *Clingham v Royal Borough of Kensington and Chelsea* [2003] 1 AC 787. The court has recognised, however, that the line may be a difficult one to draw, because prevention is also a recognised aim and consequence of punishment: *Secretary of State for the Home Department v MB (FC)*[2007] UKHL 46, para [23](Lord Bingham).

⁶⁷ There are numerous examples where the High Court has considered international materials to be of use in applying Australian law. Obviously, at one point the High Court was bound by decisions of the Privy Council and the House of Lords. More recent examples where members of the High Court considered international legal materials to be of use in interpreting and applying Australian law include *Al-Kateb v Godwin* (2004) 219 CLR 562; *Roach v Electoral Commissioner* (2007) 233 CLR 172; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 318.

⁶⁸ *Fishery Management Act; Re Director of Public Prosecutions; ex parte Lawler and Another* (1994) 179 CLR 278-280 (Brennan J) and 290 (Dawson J); referring to American case law including *Calero-Toledo*, to which reference has already been made.

⁶⁹ *Fishery Management Act; Re Director of Public Prosecutions; ex parte Lawler and Another* (1994) 179 CLR 270.

not subject to the just terms requirement,⁷⁰ and that the imposition of a penalty to enforce a law was incidental to the fisheries power, s51(10).⁷¹ In *Lawler*, Brennan J states expressly that the ‘forfeiture of property is a penalty exacted because the property was used in committing a breach of the law.’⁷² Deane and Gaudron JJ speak of a law ‘imposing a fine or penalty, including by way of forfeiture.’⁷³ Dawson J expressly stated that the forfeiture there was a penalty,⁷⁴ in terms with which Toohey J agreed.⁷⁵ McHugh J acknowledged that a penalty might include forfeiture, and spoke to the deterrent effect of such action.⁷⁶

The earlier High Court decision of *Cheatley v The Queen*⁷⁷ contains similar sentiments. The specific issue there was a statutory interpretation question of whether a forfeiture order could be made even though the owner of the thing had not been shown to have committed an offence.⁷⁸ The master of the boat had been convicted of a breach of fisheries legislation. That legislation provided, as one option following such a conviction, that the boat could be forfeited. The owner of the boat challenged this process, arguing he had not been convicted of any offence.⁷⁹ This case is of particular interest in the current discussion, given that the Acts in question here similarly provide that the person whose property is being forfeited under the legislation need not have been shown to have committed any offence, or to even have been charged with an offence. Any acquittal or overturning of a conviction of such a person is similarly stated to be irrelevant.

A majority of the Court found that the forfeiture of the boat against the owner was valid, although the owner had not been shown to have committed an offence.⁸⁰ In so doing, members of the court addressed the question of whether the forfeiture provisions were punitive in nature. Several comments indicate that they thought they were. McTiernan J, for instance, concluded that ‘even though the convicted person was not the owner of the boat in question, the forfeiture of it to the Crown in right of the Commonwealth was punishment of that person.’⁸¹ Mason J noted that historically forfeiture had been regarded as punishment for an offence,⁸² and

⁷⁰ See also *Burton v Honan* (1952) 86 CLR 169, 180: ‘if the purpose of the forfeiture is to bring a penalty upon the offender it could not come within s51(31)(just terms requirement)(Dixon CJ, for the court).

⁷¹ *Australian Constitution*.

⁷² *Fishery Management Act; Re Director of Public Prosecutions; ex parte Lawler and Another* (1994) 179 CLR 278.

⁷³ *Ibid* 285.

⁷⁴ *Ibid* 289: ‘the forfeiture of the *Jay Angela* ordered by the magistrate ... was by way of penalty’.

⁷⁵ *Ibid* 291.

⁷⁶ *Ibid* 294-295.

⁷⁷ (1972) 127 CLR 291.

⁷⁸ *Ibid* 298.

⁷⁹ *Ibid*.

⁸⁰ *Ibid*, Barwick CJ (298), McTiernan J (300), Menzies J (304), Mason J (310), Walsh J dissenting (307).

⁸¹ *Ibid* 300; see also Barwick CJ (297), Menzies J (304), and Walsh J (307). Walsh J dissented in the result because he found that forfeiture could not be applied to the owner of the boat in the absence of a conviction against that person, because he found it was (as did the majority) punishment.

⁸² *Ibid* 310, citing *R v The Mayor of Dover* (1835) 1 C, M and R 726, 736, 149 ER 1273, 1277.

concluded that ‘forfeiture is a penalty or consequence which attends, on some occasions at least, the illegal use or possession of goods.’⁸³

Lord Atkin in *Proprietary Articles Trade Association v Attorney-General (Canada)* stated that in determining whether an act was criminal or not, the question was whether the act was prohibited with ‘penal consequences’.⁸⁴ Put together, these decisions suggest that forfeiture proceedings are truly criminal in nature.

In the recent High Court decision *International Finance Trust Co Ltd v New South Wales Crime Commission*,⁸⁵ French CJ in dicta also suggested criminal law-type purposes behind ‘civil’ forfeiture provisions. He referred to the history forfeiture in other jurisdictions in concluding:

The preceding history is mentioned by way of acknowledgement of the widespread acceptance by governments around the world and within Australia of the utility of civil assets forfeiture laws as a means of *detering* serious criminal activity (emphasis added).⁸⁶

It is trite law to observe, of course, that deterrence and punishment are typically prime objectives of criminal processes.⁸⁷

In considering the acts in question in this article, not all of them expressly declare a purpose. All of the civil forfeiture regimes discussed here are found in legislation with ‘crime’ in the title.⁸⁸ The issue is complicated by the fact that the acts discussed contain both clearly criminal forfeiture provisions (in terms of forfeiture of property following a person’s conviction of crime in some way relating to that property), and so-called ‘civil’ forfeiture provisions, in terms of assessing the objectives of the Act. Having said that, the objectives of the Australian Capital Territory Act include to ‘deprive a person of all material advantage derived from commission of an offence,’ clearly very similar to deterrence, as is a reference to seeking to prevent the person affected from using the property to commit other offences.⁸⁹ The Victorian Act contains an express reference to the object of ‘deter(ring) persons from engaging in criminal

⁸³ Ibid 310; see also Gibbs J in *Forbes v Traders’ Finance Corporation Ltd* (1971) 126 CLR 429, 447, commenting it was as necessary today as it was in times past that customs legislation ‘should include rigorous provisions for penalty and forfeiture for the purpose of deterring and preventing smuggling and the unlawful importation and exportation of goods’.

⁸⁴ [1931] AC 310, 314.

⁸⁵ (2009) 240 CLR 319.

⁸⁶ Ibid 345.

⁸⁷ If references are needed, see stated objectives in a range of sentencing legislation, including *Crimes Act 1914* (Cth) deterrence and punishment expressly referred to at s16A(2)(j) and (k), *Crimes (Sentencing Procedure) Act 1999* (NSW) s9(1)(c) and (a) respectively, *Penalties and Sentences Act 1992* (Qld) s9(1)(a) and (c), *Sentencing Act 1991* (Vic) s5(1)(a) and (b), *Criminal Law (Sentencing) Act 1988* (SA) s10(1)(k) and (j), *Crimes (Sentencing) Act 2005* (ACT) s7(1)(a) and (b), and *Sentencing Act* (NT) s5(1)(a) and (c). The WA Act does not contain an equivalent provision (*Sentencing Act 1995* (WA)).

⁸⁸ I do not argue here that this fact means that the civil forfeiture provisions are in substance criminal in nature, because it is conceded that one of their main objectives is the confiscation of property *after* conviction.

⁸⁹ *Sentencing Act 2005* (ACT) S3(c) and (d).

behaviour.’⁹⁰ Deterrence is also alluded to in the Queensland Act, which expressly seeks to remove the financial gain associated with illegal activity.⁹¹ Section 5(a) of the *Proceeds of Crime Act 2002* (Cth), including the unexplained wealth provisions, refers expressly to punishment and deterrence.⁹² In terms of the specific bill introducing the unexplained wealth provisions, then Attorney-General McClelland spoke of their object as including to ‘remove the incentive for criminals to engage in organised criminal activity.’⁹³

We have seen that labelling something to be civil is of little importance in deciding whether proceedings are truly criminal in nature. In terms of the *Mendoza* factors mentioned earlier, these proceedings do involve affirmative disability in the way of property confiscation. I have indicated that historically there is reference to these types of proceedings as being criminal in nature. Forfeiture does promote traditional aims of punishment like retribution and deterrence. The behaviour to which the acts are directed, whether the person who owns the property is thought to have committed a crime themselves or is an accessory to a crime, or has received stolen property etc, is in many cases criminal anyway. On the other hand, scienter is not required in order that the forfeiture order can be made. On balance, most of the *Mendoza* factors indicate the proceedings are truly criminal in nature.⁹⁴

In terms of the list of three factors mentioned above, one would have thought that forfeiture of one’s property after a government-initiated proceeding in court would attract significant stigma to the person whose property was forfeited. The proceedings may well be heard in open court, and many who heard of the proceedings would assume the person whose property was forfeited was guilty of a crime. Further, in relation to (b) it is the government bringing the proceedings, not a private individual, and regarding (c), there are statutory assumptions in these provisions, as indicated, that are favourable to the government.

In terms of the *Engels* factors discussed above, the civil label is of marginal relevance as we have seen. On the nature of the conduct (b), proceedings can be taken against anyone in society, rather than being only applied to a specified category of persons. The conduct, allegedly the ownership of ill-gotten gains, would be seen as reprehensible by anyone who knew about it, and people would readily infer the guilt of the person whose property was forfeited, even in the absence of any conviction. In terms of (c), the penalty may well be substantial, and is fixed in terms of equalling the amount not proven to have been lawfully acquired. I have discussed above the purpose of the forfeiture as including purposes typically associated with the criminal law, including punishment, and

⁹⁰ *Confiscation Act 1997* (Vic) S3A.

⁹¹ Criminal Proceeds Confiscation Act 2002 (Qld) S4(1).

⁹² The explanatory memorandum to the Bill that introduced the unexplained wealth provisions doesn’t provide a detailed rationale for their inclusion. It refers to the fact that sometimes those who have gained from criminal activity are at arm’s length from the commission of an offence, the fact that such laws have apparently been effective against the mafia in Italy, and that about \$40 million has been raised since the introduction of these kinds of laws in Western Australia and the Northern Territory: *Crimes Legislation Amendment (Serious and Organised) Crime Bill 2010 Explanatory Memorandum*.

⁹³ Second Reading Speech, 24/6/2009.

⁹⁴ See for further discussion Anthony Gray ‘Forfeiture Provisions and the Criminal-Civil Divide’ (2012) 15(1) *New Criminal Law Review* 32.

note that there is nothing in the legislation which indicates an intention to seek to restore the property forfeited under this legislation to its rightful owner. This also suggests its non-civil nature.

C Conclusion – Forfeiture Provisions Are In Fact Criminal in Nature

My conclusion, having applied the principles derived from North America and Europe, and having considered relevant High Court of Australia decisions regarding forfeiture proceedings, is that such proceedings are in fact criminal in nature. I am not alone in reaching this conclusion; academic leaders in this field have made the same observation:

Non-criminal proceedings should not be used to circumvent the criminal trial if the outcome can be a significant penalty, especially (but not exclusively) if it may entail loss of liberty.⁹⁵

Civil forfeiture as generally practised today by the federal government is in fact punishment and thus cannot be imposed separately from and in addition to criminal punishment.⁹⁶

The difficulty in Australia with this conclusion, however, is that there is no express human rights instrument which can be utilised to strike out such provisions.⁹⁷ However, I believe there are some constitutional principles which can be utilised to resolve this issue, to which my concluding observations now turn.

IV HOW CAN THE AUSTRALIAN CONSTITUTION BE UTILISED HERE?

The High Court was confronted in *Kable v Director of Public Prosecutions (NSW)*⁹⁸ with legislation that bore some similarity, as well as substantial difference, to the civil forfeiture regimes considered here. The similarities involved a proceeding that might lead to what all judges would consider to be punishment (in that case, imprisonment rather than mere forfeiture of property), where the court was directed that the proceedings were to be considered to be civil in nature, with the balance of probabilities being applied, and ordinary rules of evidence being relaxed.⁹⁹

⁹⁵ Ashworth and Zedner above n3, 31.

⁹⁶ Steiker above n2, 817; Elizabeth Burney ‘Talking Tough, Acting Coy: What Happened to the Anti-Social Behaviour Order?’ (2002) 41 *The Howard Journal* 469, 483.

⁹⁷ For these purposes, and because I believe the solution is to be found in the Australian *Constitution* and should be a universal position, I leave out any discussion of the possible use of the state and territory human rights instruments here.

⁹⁸ (1996) 189 CLR 51; the decision was applied recently in *South Australia v Totani* (2010) 242 CLR 1 and *Wainohu v New South Wales* (2011) 243 CLR 181; Sebastian De Brennan ‘Freezing Notices and Confiscation Powers: New Punitive Roles for Police?’ (2011) 35 *Criminal Law Journal* 345, 357.

⁹⁹ Another difference between the law in *Kable* and that considered here was that in *Kable* the court was asked to make an assessment, on the balance of probabilities, of whether a specific named person would be more likely than not to re-offend, if released, whereas the civil forfeiture regimes considered here ask the court to make an assessment, generally on the balance of probabilities, of whether the person the subject of the proceedings has property

A majority of the Court found the legislation to be constitutionally invalid,¹⁰⁰ and some of their comments are considered to be directly relevant here, albeit in a different context. Toohey J, for instance, concluded that the legislation was invalid as being offensive to the principle of separation of powers, because the law ‘required the Supreme Court to participate in the making of a preventive detention order where no breach of the criminal law is alleged and where there is no determination of guilt.’¹⁰¹ Gaudron J stated that a central purpose of the judicial process was to ‘ensure that punishment is not inflicted and rights are not interfered with other than in consequence of the fair and impartial application of the relevant law to facts which have been properly ascertained.’¹⁰² She was not satisfied this law met the test, given that it required a finding on the civil standard of proof that someone was likely to re-offend, when the ordinary rules of evidence had been dispensed with.¹⁰³ McHugh J noted that the law dispensed with the ordinary protections inherent in the judicial process by providing for punishment, but removing the need to prove guilt beyond reasonable doubt and by discarding rules of evidence.¹⁰⁴ Perhaps most relevant of all here were the comments of Gummow J:

The Act requires the Supreme Court to inflict punishment without any anterior finding of criminal guilt by application of the law to past events, being the facts as found. Such an activity is said to be repugnant to judicial process. I agree.¹⁰⁵

These comments are equally applicable to the civil forfeiture provisions discussed in this article. I have shown that forfeiture provisions do inflict punishment – Gaudron J required that in such cases fair processes be used, and did not agree it was constitutional in such a context to use the civil standard and to discard rules of evidence. Yet this is what the civil forfeiture provisions do. Toohey J did not agree with the court being asked to inflict punishment where no breach of the criminal law was alleged and where there was no determination of guilt.¹⁰⁶ As indicated, the civil forfeiture regimes operate independently of any finding of guilt. It is not necessary that the person affected even be charged with anything; their acquittal or the overturning of a conviction against them is stated by the legislation to be irrelevant.¹⁰⁷ Gummow J stated expressly that inflicting punishment without any finding of criminal guilty is repugnant to judicial process; that is what the civil forfeiture provisions do.¹⁰⁸

acquired other than through lawful means. The legislation is of general application, not directed at one individual.

¹⁰⁰ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR, Toohey Gaudron McHugh Gummow JJ, Brennan CJ and Dawson JJ dissenting.

¹⁰¹ *Ibid* 98.

¹⁰² *Ibid* 107.

¹⁰³ *Ibid* 106.

¹⁰⁴ *Ibid* 122.

¹⁰⁵ *Ibid* 134.

¹⁰⁶ *Ibid* 98.

¹⁰⁷ Proceeds of Crime Act 2002 (Cth) s80, Criminal Assets Recovery Act 1990 (NSW), s61 Criminal Proceeds Recovery Act 2002 (Qld) s6, Criminal Assets Confiscation Act 2005 (SA) s22(7) and s28C(4), s47(2)(b) and s63, Criminal Property Confiscation Act 2000 (WA) s106(b) and s148(1), Criminal Property Forfeiture Act (NT) s12 and s140, Confiscation of Criminal Assets Act 2003 (ACT) s32(2) and s67(4).

¹⁰⁸ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 134.

These comments can be applied to the current context. For instance, if Toohey and Gummow JJ were troubled in *Kable* by punishment being inflicted without breach of the criminal law being proven,¹⁰⁹ they would presumably be troubled with unexplained wealth legislation, imposing the ‘punishment’ of taking a person’s wealth or property away when no specific allegation of wrongdoing need be made, let alone proven beyond reasonable doubt.

Gummow and Bell JJ expressed consistent views in the recent *International Finance Trust* decision.¹¹⁰ The civil forfeiture regime in the Act in question, including the reverse onus provision and civil standard of proof, clearly troubled them.¹¹¹ Though the decision related to the freezing provisions of the Act and the ex parte nature of the proceedings rather than the actual forfeiture, their comments are considered very relevant here. Gummow and Bell JJ concluded in the case:

The Supreme Court is conscripted for a process which requires in substance the mandatory ex parte sequestration of property upon suspicion of wrongdoing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure on ex parte applications. In addition the possibility of release from that sequestration is conditioned upon proof of a negative proposition of considerable legal and factual complexity. Section 10 engages the Supreme Court in activity which is repugnant in a fundamental degree to the judicial process as understood and conducted throughout Australia.¹¹²

As can be seen, Gummow and Bell JJ declared the legislation invalid in *International Finance Trust* because it offended the *Kable* principle by asking the court to act in a non-judicial manner. Partly, this was because the person affected was required to ‘pro(ve) .. a negative proposition’,¹¹³ in other words, the lawfulness by which they obtained property. Gummow and Bell JJ thought that such a requirement was antithetical to traditional judicial process, such that it infringed the *Kable* principle and the separation of powers for which the *Constitution* provides. It is argued here similarly that the unexplained wealth provisions in other Acts, by reversing the onus of proof, require the court to act in ways that are offensive to the *Kable* doctrine.

V CONCLUSION

Recent years have seen a move towards asset confiscation not connected with the proven commission of a criminal offence. The introduction of unexplained wealth provisions is the latest example. These trends reflect government dissatisfaction with traditional criminal justice processes, including presumption

¹⁰⁹ Ibid 98 and 134, respectively.

¹¹⁰ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

¹¹¹ Ibid 366-367.

¹¹² Ibid. Of the other judges in the case, only Heydon J considered this issue, agreeing that the provisions might be ‘unamiable’ but not unconstitutional (389-390); another example is *Re Criminal Proceeds Confiscation Act 2002 (Qld)*[2004] 1 Qd 40, where the Queensland Court of Appeal found that provisions requiring a court to hear a forfeiture application in the absence of the person affected were offensive to the *Kable* doctrine by requiring the court to act in a manner repugnant to or incompatible with judicial power as contemplated by Chapter III of the *Constitution*.

¹¹³ Ibid 367.

of innocence and the high criminal standard of proof. However, it is not acceptable to change the goal posts because it makes things difficult for the government. The criminal standard of proof is robust for very good reasons, including the stigma associated with suspected criminal activity, and the usually serious consequences that result from criminal behaviour. The court must stand firm and not allow the government to define proceedings so that they are most convenient for the government to collect revenue, casting aside fundamental due process along the way. The courts must consider the issue of whether proceedings are criminal or civil in substance, not form. In substance, according to the tests given by the North American and European courts, and according to the High Court of Australia's express observations of forfeiture proceedings, these proceedings must be seen as truly criminal in nature, despite the label. This means that the criminal standard of proof must apply. Although the Australian courts do not have an express bill of rights at their disposal to justify striking down legislation that dresses up what is actually criminal as civil proceedings, there are other methods at their disposal. Primarily, the court could (and should) use *Kable* reasoning to stand firm against legislation with a punishment objective but which does away with the need for the prosecution to prove guilt to a criminal standard. The reasoning in *Kable* itself, as well as the specific forfeiture case *International Finance Trust*, can be used to attack these regimes.