SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v Deadman; Thompson v State of Queensland* [2016] QCA 218
PARTIES:	**In Appeal No 9368 of 2015:** **STATE OF QUEENSLAND** (appellant) **v** **PETER JOSEPH DEADMAN** (respondent) **In Appeal No 5534 of 2015:** **RONALD EDWARD THOMPSON** (appellant) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 9368 of 2015 Appeal No 5534 of 2015 SC No 3530 of 2015 SC No 3531 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Miscellaneous Application – Civil
ORIGINATING COURTS:	Supreme Court at Brisbane – [2015] QSC 241 Supreme Court at Brisbane – Unreported, 8 May 2015
DELIVERED ON:	1 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	23 March 2016
JUDGES:	Philippides JA and Boddice and Burns JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In Appeal No 9368 of 2015:** **1. The appeal is dismissed with costs.** **In Appeal No 5534 of 2015:** **1. Leave to adduce further evidence is granted.** **2. Paragraph 4 of the order made by the primary judge on 8 May 2015 is set aside.** **3. Pursuant to s 93ZZF(2) of the *Criminal Proceeds Confiscation Act* 2002 (Qld), all property of the appellant is excluded from paragraph 3 of the order made by the primary judge on 8 May 2015, except $5,000 of the**

money standing to the credit of the appellant in the account as identified in the draft order provided.

4. **The respondent pay the appellant's costs of the appeal.**

5. **Paragraph 5 of the order made by the primary judge on 8 May 2015 is set aside.**

CATCHWORDS: CRIMINAL LAW – PROCEDURE – CONFISCATION OF PROCEEDS OF CRIME AND RELATED MATTERS – FORFEITURE OR CONFISCATION – DISCRETION TO MAKE ORDER – where the State of Queensland applied for a serious drug offender confiscation order under Ch 2A of the *Criminal Proceeds Confiscation Act* 2002 (Qld) – where, in the *Deadman* appeal, the primary judge had regard to the personal circumstances of the respondent as part of the public interest for the purpose of determining whether to exercise the discretion in s 93ZZB(2) to decline to make a serious drug offender confiscation order – whether the primary judge erred in considering the personal circumstances of the respondent as part of the public interest under s 93ZZB(2) – whether the primary judge had proceeded on an erroneous interpretation of the objects of the Act – where, in the *Thompson* appeal, the appellant contended that if the *Deadman* appeal was allowed, and further evidence was admitted, it was not in the public interest to make a serious drug offender confiscation order against the appellant – whether personal circumstances could be considered as part of the public interest for the purpose of whether to exercise the discretion in s 93ZZB(2) to decline to make a serious drug offender confiscation order

Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013 (Qld), s 42
Criminal Proceeds Confiscation Act 2002 (Qld), s 4, s 9, s 14, s 15, s 16, s 17, s 18, s 62, s 89A, s 89Q, s 93A, s 93E, s 93F, s 93G, s 93M, s 93O, s 93Q, s 93T, s 93V, s 93ZK, s 93ZL, s 93ZM, s 93ZN, s 93ZY, s 93ZZ, s 93ZZA, s 93ZZB, s 93ZZC, s 93ZZF, s 93ZZN, s 93ZZO, s 93ZZQ, s 99, s 139, Sch 6
Drugs Misuse Act 1986 (Qld), s 5(1)(b)
Penalties and Sentences Act 1992, s 9(1)(c), s 161F, s 161G, s 161H, s 161I, s 161J, s 161K, s 161L, s 161M, Sch 1B
Uniform Civil Procedure Rules 1999 (Qld), r 766

Attorney-General (NSW) v Quin (1990) 170 CLR 1; [1990] HCA 21, cited
Attorney-General (NT) v Emmerson (2014) 253 CLR 393; [2014] HCA 13, considered
Courtenay Investments Ltd v Director of Public Prosecutions (Cth) [2012] WASCA 121, cited
Hogan v Hinch (2011) 243 CLR 506; [2011] HCA 4, cited
McCloy v New South Wales (2015) 89 ALJR 857; [2015] HCA 34, cited

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18, cited
O'Sullivan v Farrer (1989) 168 CLR 210; [1989] HCA 61, considered
Osland v Secretary, Department of Justice (2008) 234 CLR 275; [2008] HCA 37, considered
Osland v Secretary, Department of Justice [No 2] (2010) 241 CLR 320; [2010] HCA 24, considered
State of Queensland v Deadman [2015] QSC 241, approved
Wong v The Queen (2001) 207 CLR 587; [2001] HCA 64, cited

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[1] **PHILIPPIDES JA:** The two appeals (*State of Queensland v Deadman* Appeal No 9368 of 2015 and *Thompson v The State of Queensland* Appeal No 5534 of 2015) were heard concurrently, given that the outcome in *Deadman* was relevant to the appeal in *Thompson*.

STATE OF QUEENSLAND v DEADMAN Appeal No 9368 of 2015

[2] In this appeal, the State of Queensland appeals against the dismissal of its application for a serious drug offender confiscation order in respect of the property of the respondent, Peter Deadman, pursuant to Ch 2A of the *Criminal Proceeds Confiscation Act* 2002 (the Act). Chapter 2A of the Act allows for forfeiture of property of persons convicted of a "qualifying offence" and for which a "serious drug offence certificate" has been issued.

[3] The appeal turns on the meaning of the expression "public interest" in s 93ZZB(2) of the Act, which permits a court to refuse to make a serious drug offender confiscation order if the court is satisfied that it is not in the public interest to make the order, and the application of that provision in the present case.[1]

[4] The crux of the appellant's complaint was that the primary judge erred in having regard to the personal circumstances of the offender as part of the public interest under s 93ZZB(2). The particular personal circumstances to which regard was had in the

[1] At first instance, no issue arose as to s 93ZZB(1), nor was an order was an order had been made of the kind described in s 93ZZB(3).

appellant's application against the respondent, Mr Deadman, were the age, health and financial circumstances of the respondent.

[5] For the reasons that follow, I do not consider that the appellant has demonstrated error by the primary judge in exercising the discretion to refuse to make the order sought as the order would not be in the public interest. The appeal should be dismissed.

Grounds of appeal

[6] The grounds as stated in the Notice of Appeal are that the primary judge erred in:

1. Considering the personal circumstances of the respondent as part of the public interest under s 93ZZB(2) of the Act.

2. Treating as a matter of public interest an increase in the State's wealth from a forfeiture order.

3. Concluding that, apart from increasing the wealth of the State, it is difficult to discern objects of the Act which are not connected with depriving offenders of property obtained from or used in criminal activities.

4. Not giving any weight to the object of the Act stated in s 4(2)(e) of forfeiting property in recognition of the impact of qualifying offences on the community and the justice system.

5. Seeking a legislative object served by the s 4(1) object of increasing the financial loss associated with illegal activity when increasing such loss was itself an object of the Act.

6. Alternatively to ground 5 (if it was permissible to identify some other object served by the s 4(1) object), in:

   (a) not identifying the specific object in s 4(2)(e) relating to the serious drug offender confiscation order scheme in Part 2A of the Act as the relevant object, or the most relevant object;

   (b) not giving weight to the additional deterrent effect sought to be achieved by s 4(2)(b), additional to any deterrent effect of punishment for an offence; and

   (c) considering whether any personal or general deterrence would be effectively achieved by making an order against the respondent.

Legislative scheme

The objects of the Act

[7] The objects of the Act are set out at s 4:

> "(1) The main object of this Act is to remove the financial gain and increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an offence because of the activity.
>
> (2) It is also an important object of this Act—
>
> (a) to deprive persons of the following—

(i) illegally acquired property, tainted property and benefits derived from the commission of offences;

(ii) the benefits derived from contracts about confiscation offences;

(iii) wealth that persons can not satisfy a court was lawfully acquired; and

(b) to deter persons from committing serious criminal offences, including by increasing the financial risk associated with committing serious criminal offences; and

(c) to prevent the reinvestment of financial gain from illegal activity in further illegal activity; and

(d) to assist law enforcement agencies to effectively trace—

(i) property acquired by persons who engage in illegal activity; and

(ii) tainted property; and

(iii) benefits derived from the commission of offences; and

(iv) amounts of unexplained wealth; and

(e) to forfeit to the State property of, or associated with, persons who commit qualifying offences, and against whom serious drug offender confiscation orders are made, in recognition of the impact of qualifying offences on the community and the justice system; and

(f) to ensure orders of other States restraining or forfeiting property under corresponding laws may be enforced in Queensland; and

(g) to protect property honestly acquired for sufficient consideration by persons innocent of illegal activity from forfeiture and other orders affecting property."

The various schemes provided for under the Act

[8] The appellant's application was brought pursuant to Ch 2A of the Act, which contains the serious drug offender confiscation order scheme. The scheme in Ch 2A "relates to the charge or conviction of particular serious offences involving drugs" and is administered by the Crime and Corruption Commission (the commission).[2]

[9] The Ch 2A scheme, introduced into the Act in 2012,[3] is one of three separate schemes provided for under the Act to achieve the Act's objects.[4] The other two schemes are the Ch 2 (confiscation without conviction) scheme and the Ch 3 (confiscation after conviction) scheme.

[10] The Ch 2 (confiscation without conviction) scheme, also administered by the commission, does not depend on a charge or conviction.[5] That scheme applies in

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2 s 4(5).

3 See the *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act* 2013 (Qld), s 42.

4 s 4(3).

5 s 4(4).

relation to property derived from "illegal activity" or a "serious crime related activity".[6] "Illegal activity" is relevantly defined as an activity that is "a serious crime related activity".[7] A "serious crime related activity" refers, *inter alia*, to a "serious criminal offence".[8] "Serious criminal offence" is relevantly defined as including "an indictable offence for which the maximum penalty is at least 5 years imprisonment", whether dealt with summarily or not.[9] The Ch 2 scheme provides for the making of restraining orders (Pt 3), forfeiture orders (Pt 4), proceeds assessment orders (Pt 5) and unexplained wealth orders (Pt 5A).

[11] The Ch 3 (confiscation after conviction) scheme relies on a person being charged and convicted of a "confiscation offence"[10] and is administered by the DPP.[11] A "confiscation offence" is defined in s 99 to include "a serious criminal offence" which in turn is defined as having the same meaning as in s 17. The Ch 3 scheme is concerned with the recovery of property and benefits used for or in the commission of a confiscation offence. It provides for restraining orders (Pt 3), forfeiture orders (Pt 4), automatic forfeiture (Pt 5) and pecuniary penalty orders (Pt 7).

[12] Despite the similarities between the schemes, the Act provides that each scheme is separate and none of the schemes are to be construed as limiting either of the other schemes, unless the Act otherwise expressly provides.[12]

[13] An order restraining or forfeiting property under one of the schemes is not a punishment or sentence for any offence.[13]

Chapter 2A scheme

Explanation and definitions

[14] Section 93A provides the following explanation of Ch 2A:

> "**93A Explanation of ch 2A**
>
> (1) This chapter enables proceedings to be started for the forfeiture of particular property of, or gifts given to someone else during a particular period by, a person who has been convicted of a qualifying offence for which a serious drug offence certificate has been issued.
>
> (2) It does this by enabling the Supreme Court, as a preliminary step, to make a restraining order preventing particular property being dealt with without the court's leave.
>
> (3) Also, it allows—
>
> (a) the person against whom a serious drug offender confiscation order is made to keep protected property; and

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6 s 14.
7 The s 15 definition of "illegal activity" applies to the whole Act: see Sch 6 – Dictionary.
8 s 16.
9 s 17(1)(a), s 17(2).
10 The s 99 definition of "confiscation offence" applies to the whole Act: see Sch 6 – Dictionary.
11 s 4(6).
12 s 4(7).
13 s 9.

(b) a dependant of the person against whom a serious drug offender confiscation order is made to seek relief from the Supreme Court on the basis of hardship resulting from the order."

[15] The term "qualifying offence" includes, by virtue of s 93F of the Act, category A, B or C offences under s 161F of the *Penalties and Sentences Act* 1992 (the PSA).[14] For present purposes, it is relevant to note that a Category A offence includes an offence against s 5 of the *Drugs Misuse Act* 1986 (Qld) (of which the respondent was convicted).[15]

[16] A "serious drug offence certificate" is a certificate required to be issued by a court, pursuant to s 161G of the PSA, when sentencing an offender convicted of a serious drug offence.

[17] "Protected property",[16] which is not subject to forfeiture, is relevantly defined in s 93E(1) for the purpose for Ch 2A of the Act as "property of the person of a kind mentioned in a relevant provision that would not, if the person became a bankrupt under the *Bankruptcy Act 1966* (Cwlth), be divisible amongst the person's creditors".

Restraining orders

[18] Restraining orders are dealt with in Pt 3 of Ch 2A. The Court must make a restraining order in relation to property if satisfied the application relates to a "prescribed respondent"[17] and there are reasonable grounds for the suspicions on which the application is based.[18] However, the Court "may refuse to make the order if it is satisfied in the particular circumstances it is not in the public interest to make the order".[19]

[19] Further, the Court may impose conditions in respect of the restraining order, including conditions about making payments out of restrained property for, amongst other things, the reasonable living business expenses of the prescribed respondent and the reasonable living expenses of a dependant.[20] A court may also make other orders in relation to a restraining order, including for payment of legal expenses.[21]

[20] The prescribed respondent may apply to the Court to amend the restraining order to exclude particular property from the restraining order.[22] The Court has a discretion to exclude the prescribed respondent's property "if it is satisfied it is in the public interest to amend the order in the particular circumstances".[23]

[21] Further, the Court may, on an application by another person, exclude that applicant's property from the restraining order where it is satisfied it is not under the effective control of the prescribed respondent and not a gift given within a specified period.[24]

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14 The PSA classifies offences into category A, B or C offences: see PSA, s 161F; see also PSA s 161G – s 161M and Sch 1B.

15 PSA, Sch 1B, Pt 2.

16 The "protected property" exclusion only applies to the Ch 2A scheme (see definition in Sch 6).

17 For Pt 3 purposes, a "prescribed respondent" means a person who: (a) is about to be, or has been, charged with the qualifying offence to which an application for a restraining order or a restraining order relates; or (b) has been convicted of a qualifying offence: s 93G.

18 s 93M(1).

19 s 93M(2).

20 s 93O, s 93Q.

21 s 93T, s 93V.

22 s 93ZK.

23 s 93ZL.

24 s 93ZM, s 93ZN(1).

In addition, the Court may exclude the applicant's property if it is satisfied it is in the public interest to amend the order in the particular circumstances".[25]

Serious drug offender confiscation orders

[22] Part 4 of Ch 2A deals with the making of a serious drug offender confiscation order. The State may apply for such an order against a person who is convicted of a "qualifying offence" for which a "serious drug offence certificate" has been issued and not cancelled (such a person being a "prescribed respondent" for the purpose of Pt 4).[26]

[23] A prescribed respondent may file a response to such an application, setting out details of, and reasons why, it is believed the property is "protected property" and "details of any public interest considerations the prescribed respondent will ask the Court to take into account".[27]

[24] The making of a serious drug offender confiscation order is dealt with in s 93ZZB:

> "(1) Subject to subsection (3), the Supreme Court must make a serious drug offender confiscation order against the prescribed respondent if the court is satisfied—
>
> (a) the prescribed respondent has been convicted of a qualifying offence for which a serious drug offence certificate has been issued and has not been cancelled; and
>
> (b) the application for the order was made within 6 months after the issue of the certificate.
>
> (2) However, the court may refuse to make the serious drug offender confiscation order if the court is satisfied it is not in the public interest to make the order.
>
> (3) If a proceeds assessment order, unexplained wealth order or pecuniary penalty order has been made on the basis of illegal activity constituting the qualifying offence, a serious drug offender confiscation order can not be made on the basis of the qualifying offence.
>
> (4) …
>
> (5) The serious drug offender confiscation order must contain a list of all property the court has found—
>
> (a) is the subject of the order and is forfeited to the State; or
>
> (b) is protected property and is not forfeited to the State.
>
> (6) Subsection (5) does not limit the property that is forfeited under section 93ZZF or is protected property."

[25] Section 93ZY concerns the meaning of "a serious drug offender confiscation order". It provides:

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25 s 93ZN(2).

26 s 93ZZ(1). The application must be made within six months after the issue of the certificate: s 93ZZ(3).

27 s 93ZZA.

> "(1) A ***serious drug offender confiscation order*** is an order that forfeits to the State—
>
> (a) all property, other than protected property, of the prescribed respondent; and
>
> (b) all property that was a gift given by the prescribed respondent to someone else within 6 years before the prescribed respondent was charged with the qualifying offence on which the order is based.
>
> (2) Despite subsection (1), property is not forfeited if it has been acquired by a person for sufficient consideration, without knowing, and in circumstances not likely to arouse a reasonable suspicion, that the prescribed respondent has committed a category A offence, category B offence or category C offence.
>
> (3) This section applies subject to sections 11, 93ZZC and 93ZZF.
>
> (4) For this Act, the property forfeited under the order is the property that is the subject of the order."

[26] Section 93ZY thus applies subject to s 11 (which concerns the interstate operation of particular orders), s 93ZZC (which provides that particular property; that is, property of another person that is under the prescribed respondent's effective control and gifted property within s 93Y(1)(b) is forfeited only if listed in a serious drug offender confiscation order) and s 93ZZF (which deals with the effect of a serious drug offender confiscation order).

[27] Section 93ZZF provides that the "effect" of a serious drug offender confiscation order is as follows:

> "(1) On the making of a serious drug offender confiscation order, the property the subject of the order—
>
> (a) is forfeited to the State; and
>
> (b) vests absolutely in the State.
>
> (2) However, the Supreme Court may exclude property that would otherwise be forfeited if the court is satisfied it is not in the public interest to include the property in the order.
>
> (3) Subsection (1)(b) is subject to the provisions of this Act under which the Supreme Court may make orders about the property vested or to be vested in the State…"

[28] The Ch 2A scheme does not require any of the connections between the property the subject of the order and the criminal conduct or suspicion of such conduct that Ch 2 and Ch 3 specify.[28] Accordingly, there is no corresponding provision providing for the exclusion of property that is lawfully acquired or not derived from or referrable to illegal activity from an order. The Ch 2A scheme instead requires only that there

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[28] This is reflected in the alteration to the long title of the Act, which had previously been stated to be one to provide for the confiscation of "proceeds" of crime, proceeds being defined as including property and a benefit "derived" because of, *inter alia*, serious crime related activity: see s 16, s 17, s 18.

is a connection between the property in question and the person convicted of a serious offence and against whom a serious drug offender certificate has been issued.

[29] As with the Ch 2 and Ch 3 schemes, a hardship order may be made on the application of a dependant.[29] For the purposes of Ch 2A, a hardship order may be made by the court in relation to special property on the application of a dependant where the court is satisfied that the operation of the serious drug offender confiscation order will cause hardship to the dependant.[30]

The s 93ZZ application and response

[30] The application for a serious drug offender confiscation order in this case only sought forfeiture of the respondent's interest in real property, being his residence situated at Riverview. The application was premised on the respondent's conviction in the District Court of offences of trafficking in and producing cannabis.[31] For that offending, he was sentenced on 30 January 2015 to two and a half years imprisonment with immediate parole and a serious drug offender certificate was issued in respect of the trafficking.[32]

[31] In the response filed by the respondent, it was not contended that the residence was protected property. It set out the public interest considerations the respondent sought the Court to take into account in determining the application for a forfeiture order and an affidavit as to his personal circumstances supporting his submission that it was not in the public interest to make the order.

The applicant's personal circumstances

[32] The primary judge set out the personal circumstances of the respondent, who was aged 65 years at the time of the application, as follows:[33]

> "[8] … [The respondent] was married in 1972 and divorced from his wife in 2005. The respondent and his wife purchased their Riverview home in 1977 for $27,000. They had a deposit of $1,000, and a Housing Commission loan for the remainder of the purchase price. The respondent worked as a plant operator for the same employer from June 1972 until June 2013. He and his then wife paid off their home, and the original mortgage was discharged in 1994. Consequent on the divorce, the respondent re-mortgaged the home in order to buy out his wife's interest in it. As part of the property settlement on divorce, they also sold an investment unit, which they had bought for $150,000, and in which they had $90,000 equity. In 2011 the respondent was able to access his superannuation and did so in order to pay out the new mortgage, which had increased because of his gambling debts. By May 2011 the home was again unencumbered. Having been charged with the offences which found this application, the

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29 For Ch 2 see s 62, s 89A, s 89Q; for Ch 3 see s 139(3).

30 See s 93ZZO, s 93ZZQ.

31 The details of the offending, including a transcript of the sentence proceedings, the schedule of facts tendered during those proceedings and the sentencing remarks, formed part of the material before the learned primary judge.

32 The certificate was issued on the basis that a category A offence (in contravention of s 5(1)(b) of the *Drugs Misuse Act* 1986 (Qld)) had been committed.

33 [2015] QSC 241 at [8]-[11].

> respondent borrowed, and re-mortgaged his house, to pay his legal fees and also pay off a credit card.
>
> The respondent receives the aged pension in an amount of $830 per fortnight and has no other income. He details his living expenses in his affidavit. They are modest. If the State confiscated his home, and his expenses otherwise remained constant, he would have $384 a fortnight to spend on rent and social expenses. As described, the respondent has lived in Riverview all his life and he would prefer to stay there. His searches reveal only one unit currently listed for rent in that area. It is a one bedroom unit and is listed for $390 per fortnight, with a $980 bond.
>
> The respondent deposes that he suffers from diabetes, arthritis, high blood pressure and depression, and he takes medication for all those conditions. He deposes to having a problem with gambling, which he says contributed in part to his criminal offending and the breakdown of his marriage. He deposes to having had counselling to assist him with his gambling problem. The respondent has no assets of any value, other than his home, his car which he puts at $3,000, and his personal effects. He has no further superannuation and no further investments. His home is valued at approximately $255,000. He estimates he made $9,000 from selling cannabis. That conviction was his only criminal conviction apart from a conviction for driving under the influence of liquor in 2010.
>
> The respondent says on the application before me that he is remorseful for his criminal offending. The remarks of the sentencing judge in the District Court show that he made admissions to police and that the trafficking charge could not have been brought against him without those admissions. The District Court judge accepted that the offending was small-scale commercial offending at a time when the respondent had a serious gambling addiction and noted that, to his credit, he had received specialist counselling for that addiction. He pled guilty at an early stage. In other words, the sentencing remarks are consistent with the respondent being remorseful and exhibiting that remorse from the time he was charged."

The primary judge's reasons

[33] In respect of the appellant's submission that the respondent's personal circumstances could not be relevant to the consideration of what is in the public interest, the primary judge noted the reliance placed on dicta in *Hogan v Hinch*[34] that, when used in a statute, the term "public interest" derives its content from "the subject matter and the scope and purpose" of the enactment in which it appears.[35]

[34] Her Honour noted the appellant's submissions particularly relied on s 4(1) and s 4(2)(e), observing:[36]

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34 (2011) 243 CLR 506; [2011] HCA 4 at 536 [31] per French CJ; at 551 [80] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

35 [2015] QSC 241 at [12]-[13].

36 [2015] QSC 241 at [15].

> "…It was said, I think correctly, that because of the language used in s 4(2)(e) that particular object was particularly relevant to the chapter 2A scheme pursuant to which this application is made. The Crown also relied on the fact that the Act is clear that, under the chapter 2A scheme, all property of an offender is liable to confiscation, not just property which is purchased with illegal gains, or which has been used in committing the offences."

[35] Her Honour reasoned as follows in exercising her discretion to refuse to make the order:[37]

> "To some extent, forfeiture of property to the State will always be in the public interest insofar as it increases the State's wealth. But if that were the only matter to be considered in an assessment of the public interest, there would be no need for a provision such as s 93ZZB(2).
>
> …
>
> …by including the provision at s 93ZZB(2), it must be accepted that the legislature contemplated there would arise factual circumstances where, notwithstanding the offender was liable to have their property confiscated, and that that confiscation would be of financial benefit to the State, it would not be in the public interest to make a confiscation order. Those factual circumstances are not to be confined by reading the recitation of the objects of the Act as if they were a definition. The wide words 'public interest' take their context from the objects, scope and purpose of the Act. The relevant principle is no more than that.
>
> Looking at s 4(1) of the Act, the main object of the Act is expressed to be twofold. In this case, the first limb is inapplicable – confiscating the respondent's property will not remove financial gain associated with illegal activity. Depending on how the second limb of s 4(1) is interpreted, the factual circumstances here may fall within it: confiscating the respondent's property would cause him financial loss and that loss would be imposed because he has undertaken illegal activity. Section 9 of the Act compels the conclusion that the legislature had no object of imposing financial loss on the respondent as a punishment for his offending (although in real terms it undoubtedly would be). Looking to identify a legislative object, the object of the imposition of that loss would apparently be to deter crime – see s 4(2)(b), for, apart from increasing the wealth of the State, it is difficult to discern objects of the Act which are not connected with depriving offenders of property obtained from, or used in, criminal activities.
>
> Preventing the respondent committing crime seems unlikely to be achieved by confiscating his home. It seems to me not in the public interest to render the respondent financially and socially vulnerable, so that he no longer has the security of owning his home, but must enter the rental market, which must be particularly uncertain for him, given his limited financial means. Given his age, health and gambling problems, it seems to me that if he were rendered financially vulnerable and socially unstable, it would likely increase the chances that he might once again turn to crime, given the psychological and emotional stress he would experience. It must also increase the

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37 [2015] QSC 241 at [17], [20]-[24].

> chances that his health would deteriorate and that, in many ways short of returning to criminal activity, the respondent might cease to live independently and care for himself. One can imagine that he may be put in a position where he needs medical or other assistance from the State. None of this could be in the public interest.
>
> While I cannot see that confiscating the respondent's home would deter him from committing crime in the future, I would allow that there is a possibility that, should other people come to hear of the respondent's treatment by the State, they may be deterred from trafficking in illegal drugs. Given that trafficking in drugs is already punishable by condign sentences, having regard to the Court's cognisance of the great damage drug dealing does in our society, I do not know how real that possible general deterrence would be. There was certainly no material before me from which I could form any conclusions as to this matter.
>
> In those circumstances, and in circumstances where there is no suggestion that the respondent's criminal activity was in any way associated with the home the State seeks to confiscate; where the respondent has made little profit from his offending, is remorseful and seeking to rehabilitate himself, particularly so far as his gambling addiction is concerned, it seems to me not at all in the public interest to confiscate his home and thus render him financially and socially vulnerable. I therefore dismiss the application made by the State because I am satisfied it is not in the public interest to make the order sought."

The appellant's submissions

[36] Citing *Hogan v Hinch*,[38] it was submitted that the expression "in the public interest" derives its content from the purposes of the Act and that, in exercising its powers under s 93ZZB, the Court must assess the public interest by reference to the place of s 93ZZB in the statutory scheme, the purpose of the Act as a whole and the purposes of serious drug offender confiscation orders.[39] The appellant submitted that "public interest" is a confined concept, and relied on authority that it is confined by reference to the scope and purpose of the statute.[40] The public interest considerations were limited to those set out in the objects.[41] Those objects were not only what regard was to be had to but were the only relevant considerations for defining the public interest.[42]

[37] A serious drug offender confiscation order is not a punishment or sentence for any offence.[43] Referring to *Attorney-General (NT) v Emmerson*,[44] it was submitted that the aim to be achieved by making a serious drug offender confiscation order was a legitimate object. The making of such an order was consistent with and addressed the public interest as expressed in the objects of the Act.

Section 4(1) object

[38] The appellant argued that the primary judge erred in seeking a legislative object served by the s 4(1) object of increasing the financial loss associated with illegal

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38 (2011) 243 CLR 506; [2011] HCA 4 at 551 [80] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
39 *Hogan and Hinch* (2011) 243 CLR 506; [2011] HCA 4 at 536 [32] per French CJ.
40 TS 6, lines 15-17.
41 *O'Sullivan v Farrer* (1989) 168 CLR 210; [1989] HCA 61 at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ.
42 TS 14, lines 37-46.
43 s 9.
44 (2014) 253 CLR 393; [2014] HCA 13.

activity when increasing such loss was itself an object of the Act. It was unnecessary to find some further purpose served by a main purpose of the Act. The primary judge also erred in treating as a matter of public interest an increase in the State's wealth from a confiscation order. Such an increase is not an object of the Act but is the consequence of an order being made. The purpose served by making an order is the removal of financial gain or increasing financial loss associated with illegal activity.

[39] The learned primary judge was said to have erred in concluding that, apart from increasing the wealth of the State, it was difficult to discern objects of the Act which were not connected with depriving offenders of property obtained from or used in criminal activities. It was submitted that while the removal of financial gain and increasing the financial loss associated with illegal activity identified in s 4(1) were the main objects of the Act, depriving offenders of property obtained from or used in illegal activity did not exhaust the objects of the Act. Increasing financial risk "associated with committing serious criminal offences", referred to in s 4(2)(b), and forfeiture of property where a serious drug offender confiscation order was made, in recognition of the impact of qualifying offences on the community and the justice system as referred to in s 4(2)(e), are also objects of the Act.[45]

Section 4(2)(b) object

[40] As to the s 4(2)(b) object of deterring persons from committing "serious criminal offences", including by increasing the financial risk associated with committing serious criminal offences, it was submitted that "serious criminal offence" as defined by s 17 included the offence of which the respondent was convicted and for which a serious drug offence certificate was issued. The deterrence referred to in s 4(2)(b) was that described in *Emmerson* as a strong and drastic sanction vindicating a law and encouraging its observance.[46] Given that an order under the Act is not a punishment or sentence for an offence, the deterrence referred to in s 4(2)(b) was different from, and additional to, the deterrence referred to in s 9(1)(c) of the PSA. The making of an order under Ch 2A of the Act thus served a deterrent purpose additional to any deterrent purpose served by a sentence imposed for the qualifying offence. The s 4(2)(b) object of deterrence was directed to general deterrence rather than personal deterrence. The vindication of the law and encouragement of observance of the law were achieved by giving effect to the s 4(2)(b) object. Declining to make an order because of doubts about the deterrent effect of an order subverted that object and its achievement.

Section 4(2)(e) object

[41] It was submitted that the primary judge erred in not giving any weight to the s 4(2)(e) object, although her Honour accepted the particular relevance of that object. The s 4(2)(e) object is not concerned with the source of property sought to be confiscated and was specific to the Ch 2A scheme. Rather, the object of forfeiture under the scheme is recognition of the impact of qualifying offences generally (not only the respondent's offending) on the community and the justice system.

Public interest

[42] It was submitted that the primary judge erred in considering the personal circumstances of the respondent as part of her consideration of the public interest under s 93ZZB(2).

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45 See s 4(2)(b), s 4(2)(e).

46 (2014) 253 CLR 393; [2014] HCA 13 at [15].

There was nothing in the objects of the Act which suggested that it was in the public interest to make an order to protect the respondent's private interests. The primary judge ought to have concluded that there was no reason in the public interest not to make the order sought. The personal circumstances of the respondent were not an aspect of the public interest under s 93ZZB(2). The "public interest" in s 93ZZB(2), it was argued, was to be construed as being confined by the objects in s 4(2)(e). In oral submissions, it was accepted that would result in s 93ZZB(2) having a very narrow ambit. The appellant was able to identify only three areas where the discretion would arise for exercise, two of which had been given in submissions before the primary judge.[47] I will return to those examples later.

Authorities as to the meaning of the term "public interest"

[43] The Act does not define the term "public interest". Nor does the Act positively identify or expressly limit the range of matters relevant to the "public interest" when exercising the discretion to refuse to make a confiscation order or exclude property from the ambit of the order.

[44] In such a case, the following passage of Mason CJ, Brennan, Dawson and Gaudron JJ in *O'Sullivan v Farrer* is instructive:[48]

> "Where a power to decide is conferred by statute, a general discretion, confined only by the scope and purposes of the legislation, will ordinarily be implied if the context (including the subject-matter to be decided) provides no positive indication of the considerations by reference to which a decision is to be made. See *Water Conservation and Irrigation Commission (N.S.W) v. Browning*, per Dixon J.; *Reg. v. Australian Broadcasting Tribunal; Ex parte 2HD Pty. Ltd.*; *Murphyores Incorporated Pty. Ltd. v. The Commonwealth (II)*; *Re Coldham; Ex parte Brideson*.
>
> The public interest considerations which may ground an objection under s. 45(1)(c) are, in terms, confined to considerations 'other than the grounds specified in paragraphs (a) and (b) and subsections (2) and (3)'. But, these limits aside, the Act provides no positive indication of the considerations by reference to which a decision is to be made as to whether the grant of an application would or would not be in the public interest. Indeed, the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view': *Water Conservation and Irrigation Commission (N.S.W) v. Browning*, per Dixon J."

[45] In *Osland v Secretary, Department of Justice [No 2]*, French CJ, Gummow and Bell JJ adopted the approach of the plurality in *O'Sullivan v Farrer*, stating:[49]

> "The FOI Act neither defines nor expressly limits the range of matters relevant to the 'public interest' which may require that access should be granted. As was said in the joint judgment in this Court on the first appeal, '[t]here are obvious difficulties in giving the phrase "public

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47 TS 5-6; see also AB 23.

48 (1989) 168 CLR 210; [1989] HCA 61 at 216 (citations omitted).

49 (2010) 241 CLR 320; [2010] HCA 24 at 329 [13] (citations omitted).

> interest" as it appears in s 50(4) a fixed and precise content'. The nature of 'public interest' determinations in the exercise of statutory powers was described in *O'Sullivan v Farrer*:
>
> > 'the expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable … given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view".'"

[46] Hayne J, in *Osland v Secretary, Department of Justice*, after also citing from the passage from *O'Sullivan v Farrer*, said:[50]

> "It may also be accepted that questions about what is in 'the public interest' will ordinarily require consideration of a number of competing arguments about, or features or 'facets' of, the public interest. And as was pointed out in *McKinnon v Secretary, Department of Treasury*, 'a question about "the public interest" will seldom be properly seen as having only one dimension'."

[47] The passage from *O'Sullivan v Farrer* was reaffirmed by French CJ in *Hogan*, who observed, as to the expression "in public interest":[51]

> "When used in a statute, the term derives its content from "the subject matter and the scope and purpose" of the enactment in which it appears. The court is not free to apply idiosyncratic notions of public interest."

[48] Likewise, the plurality in *Hogan*,[52] stated that the expression "derives content from the main purpose of the Act".

[49] The public interest discretion in the Act, as explained in the Explanatory Note to the Bill[53] that introduced the Ch 2A scheme, reflect the statements of principle in *O'Sullivan*:[54]

> "The provision of a public interest discretion to the Supreme Court is used throughout the [Act]. It enables the Supreme Court to make an important value judgment with respect to the specific facts in the proceedings before them, guided by the subject matter, scope and purpose of the [Act]."

[50] Also of interest is the observation of Mason J that the public interest necessarily comprehends an element of justice to the individual.[55] Further, in *Courtenay*, Buss JA held in relation to a similarly worded discretion that "the concept of 'public interest', in this context, is sufficiently broad to include, as factors requiring consideration, any relevant prejudice or hardship".[56]

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50 (2008) 234 CLR 275; [2008] HCA 37 at 383 [137] (citations omitted).
51 (2011) 243 CLR 506; [2011] HCA 4 at 536 [31] (citations omitted).
52 (2011) 243 CLR 506; [2011] HCA 4 at 551[80] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
53 *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill* 2012 (Qld).
54 *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill* 2012 (Qld), Explanatory Notes at 3.
55 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; [1990] HCA 21 at 18 per Mason J.
56 [2012] WASCA 121 at [115].

Application of the authorities as to the meaning of the expression "public interest" in Ch 2A

[51] Given that the Act provides no positive indication of the considerations by reference to which the s 93ZZB(2) discretion to refuse to make an order is to be made, the public interest determination is to be construed as importing a discretionary value judgment to be made by reference to *undefined* factual matters.[57] While a general discretion is conferred, a court is not free to apply idiosyncratic notions of what is in the "public interest".[58] In considering whether there has been error in the exercise of the discretion, it is important to bear in mind that the s 93ZZB(2) discretion is confined only in so far as the subject matter and the scope and purpose of the Act may indicate that the given reasons for the exercise of the discretion are *definitely extraneous* to any objects that the legislature could have had in view.[59] Further, the exercise of the discretion may require "consideration of a number of competing arguments about, or features or 'facets' of the public interest" and "will seldom be properly seen as having only one dimension".[60]

[52] I note that where the term "public interest" appears in Ch 2A Pt 4 it is not accompanied by the words "in the particular circumstances" as occurs in Ch 2A Pt 3. I do not consider that anything of substance flows from that difference. Clearly, the exercise of the discretion in Pt 4 is to be made in the particular circumstances of the case the Court is considering.

Consideration of subject matter of Ch 2A and objects of the Act

[53] The subject matter of Ch 2A concerns the enabling of proceedings in relation to the confiscation of the property of a person who has committed a qualifying offence and in respect of which a serious drug offender certificate is made.

[54] As was observed in *Emmerson* there has been an "… acceptance by legislatures in Australia of the utility of the restraint and forfeiture of property, not only as a strong and drastic sanction vindicating a law and encouraging its observance, but also as a means of depriving criminals of profits and preventing the accumulation of significant assets by those involved in criminal activity, particularly in relation to drug offences".[61] The Court referred[62] to the incontestable proposition, stated in *Wong v The Queen*,[63] that the commission of serious drug crime has social consequences that might include significant social costs for a State over and above the economic costs of law enforcement.

Section 4(1) object

[55] The main object of the Act, as set out in s 4(1), focuses on increasing financial loss associated with "illegal activity".

[56] The confiscation of property derived from "illegal activity" is not specified in s 93A as an explanation for Ch 2A; rather it is the conviction for a "qualifying offence" for which a certificate has been issued. Nevertheless, the term "illegal activity", as defined in s 15 of the Act (which, by s 99, has application to the whole Act), encompasses

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57 *O'Sullivan v Farrer* (1989) 168 CLR 210; [1989] HCA 61 at 216.
58 *Hogan v Hinch* (2011) 243 CLR 506; [2011] HCA 4 at 536 [31] per French CJ.
59 *O'Sullivan v Farrer* (1989) 168 CLR 210; [1989] HCA 61 at 216.
60 *Osland v Secretary, Department of Justice* (2008) 234 CLR 275; [2008] HCA 37 at 328 [137] per Hayne J.
61 (2014) 253 CLR 393; [2014] HCA 13 at 416 [15] (citations omitted).
62 (2014) 253 CLR 393; [2014] HCA 13 at 419 [20] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.
63 (2001) 207 CLR 584; [2001] HCA 64 at 607 [64] per Gaudron, Gummow and Hayne JJ.

a "serious criminal offence". The term "serious criminal offence" includes "an indictable offence for which the maximum penalty is at least 5 years imprisonment" (and thus encompasses the offending for which the certificate was issued against the respondent). The s 4(1) object of increasing financial loss associated with "illegal activity" is thus relevant to the exercise of the s 93ZZB(2) discretion. Further, the Explanatory Notes state:[64]

> "… the Bill again provides for amendments that compulsorily acquire property without compensation. These amendments are justified because they are consistent with the stated aim of the [Act] to 'remove the financial gain and increase the final loss associated with *illegal activity*'. The amendments are further supported by the Government's policy of deterring people from becoming involved in the commercial supply of illegal drugs and recouping the cost of such offending to the community."

[57] The appellant complained that the primary judge erred in treating *as a matter of public interest "an increase in the State's wealth"* from a confiscation order. Such an increase was not an object of the Act but the consequence of an order being made. The appellant submitted that the *purpose served by making an order under Ch 2A is the "removal of financial gain or increasing financial loss* associated with *illegal activity"*. It is correct to say (as the appellant submitted) that increasing the State's wealth is not itself an express object, but a consequence, of an order. However, a confiscation order under Ch 2A is a means of increasing the State's wealth to achieve the object of recouping the cost of law enforcement. There was no material error revealed by the primary judge's remarks.

Section 4(2)(b) object

[58] As to the object in s 4(2)(b), it is directed to deterring persons "from committing serious criminal offences … by increasing the financial risk associated with committing serious criminal offences". The appellant submitted that a "serious criminal offence" as defined by s 17 included the offence of which the respondent was convicted and for which a serious drug offence certificate was issued.[65] However, s 17 defines "serious criminal offences" for Ch 2 purposes. While that definition is also captured in the definition of "confiscation offence" for Ch 3 purposes, that is not so in respect of the definition of "qualifying offence" in Ch 2A. The Ch 2A scheme is not premised on conviction for a "serious criminal offence" but rather for a "qualifying offence". A "qualifying offence" is not defined as including a "serious criminal offence" as defined in s 17 but as a "serious drug offence" for which a certificate is issued. The terms "serious crime related activity" and "serious criminal offence" are not present in Ch 2A.

[59] Even so, her Honour was alive to the issue of general deterrence. She did not decline to make the order because of doubts as to the deterrent effect of an order so much as result of having a consideration of the respondent's personal circumstances and the impact of an order in the light of those circumstances.

Section 4(2)(e) object

[60] The appellant complained that the primary judge erred in concluding that, apart from increasing the wealth of the State, it was difficult to discern objects of the Act which

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64 *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill* 2012 (Qld), Explanatory Notes at 6 (emphasis added).

65 Appellant's outline of submissions at [10] fn 11.

were not connected with depriving offenders of property obtained from or used in criminal activities. In so far as that criticism implies a failure to consider the object in s 4(2)(e), there is no merit in that complaint.

[61] The object identified in s 4(2)(e) is, as the primary judge rightly observed, the most pertinent for the purposes of forfeiture under Ch 2A, that is, the "recognition of the impact of qualifying offences on the community and justice system". That object reflects the statements made in *Emmerson*[66] to which earlier reference has been made. In that respect, the Explanatory Notes state:[67]

> "Serious drug offender confiscation orders are targeted specifically to increase the risk associated with involvement in the illicit drug market. These orders also enable the community and the justice system to seek compensation for the burden the illicit drug trade places on the community and the health and justice system."

[62] The criticism that her Honour did not have proper regard to s 4(2)(e) because it was not mentioned more extensively in her Honour's judgment is unfounded.

Construction of the term public interest in s 93ZZB(2)

[63] Coming to the crux of the appellant's case, I cannot accept the narrow construction advanced by the appellant that the term "public interest" excludes consideration of personal circumstances. As the primary judge stated, and the appellant conceded, the narrow approach advocated by the appellant would strip the s 93ZZB(2) discretion of any utility. That is evident in the very limited examples which were offered as enlivening the discretion.

[64] As the appellant frankly and properly conceded on its approach there would be virtually no scope within the objects for a prescribed respondent to argue it was not in the public interest for a forfeiture order to be made outside the three examples given.[68]

[65] The first two examples relate to the "philanthropic" offender. The first example given was a situation where a prescribed respondent had voluntarily transferred property to a drug rehabilitation service for the use of that service and that was done by way of a gift. Notwithstanding that it was given as a gift, the property might still be liable to forfeiture because of s 93ZY(1). Counsel adopted the submission made at first instance that the underlying public interest might be said to be served by refusing to make an order, because, even though the property was not acquired by the State, the purpose of s 4(2)(e) would be fulfilled. The second example was a variation on that theme. It concerned a situation where a prescribed person had made a testamentary disposition of property to a body conducting drug rehabilitation services. The third example concerned a situation where the application for forfeiture was brought in circumstances that amounted to an abuse of process.[69] In that regard, counsel relied on the case of *Courtenay Investments Ltd v Director of Public Prosecutions (Cth)*.[70] Counsel also sought to argue that that authority gave support to the proposition that personal circumstances were not a consideration relevant to the public interest.[71]

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66 (2014) 253 CLR 393; [2014] HCA 13.

67 *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill* 2012, Explanatory Notes at 2.

68 TS 15.

69 TS 6.

70 [2012] WASCA 121.

71 TS 6-7.

[66] As to the first example, the appellant's argument would have the effect that the prescribed respondent's conduct could determine whether property might be placed beyond the reach of the State. It would also have the ironic outcome that property used for rehabilitation in general would enliven the discretion but not where such property was used by the prescribed respondent for his own rehabilitation and, as counsel accepted, arguably, the second example would in any event involve a consideration of personal circumstances. As to the third example, it does not advance matters. The case of *Courtenay* is of limited assistance. It merely recognised that the concept of "public interest" is sufficiently broad to include consideration of whether there had been an abuse of process. The Court does not need to resort to a statutory discretion such as that in question here to dismiss an application where it constitutes an abuse of process.

[67] The real difficulty, however, with the narrow construction of public interest advanced by the appellant is that it is premised on a misapprehension of the principles in authorities such as *O'Sullivan*. Importantly, the effect of those principles is that the scope and objects of an Act do not limit the general discretion in a provision such as s 93ZZB(2) *beyond* indicating what is clearly extraneous to the proper exercise of the discretion. There is nothing in the subject matter, scope and purpose of Ch 2A that indicates that a consideration of a prescribed respondent's personal circumstances is "definitely extraneous" to any objects the legislature could have had in view.[72] The indications in s 4(2)(e) and s 93A are to the contrary.

[68] Firstly, it is to be noted that s 4(2)(e) does not specify as its object the confiscation or forfeiture of "all" property of the prescribed respondent. In that regard, the provision recognises that property is not subject to a forfeiture order where it is "protected property", a hardship order has been made on a defendant's application, or it is not in the public interest to make a confiscation order. Likewise, while s 93A explains Ch 2A as enabling "proceedings to be started for the forfeiture of particular property of, or gifts [made by] a person who has been convicted of a qualifying offence for which a serious drug offence certificate has been issued", it also does not describe Ch 2A as a scheme allowing proceedings to be brought for the forfeiture of "all" property. That result is the *effect* of a confiscation order being made.[73]

[69] Secondly, the appellant sought to strengthen its argument by arguing that the specific reference in s 93A(3) to protected property being outside the scope of Ch 2A reinforced that the Ch 2A scheme otherwise captures *all* property of a prescribed respondent (reflecting that the object contained in s 4(2)(e) for Ch 2A is different from that for Ch 2). However, the argument overlooks that, although the effect of a forfeiture order is that all property is forfeited, there remains a further discretion in s 93ZZF to exclude such property from the effect of an order, notwithstanding that the preconditions for making it are satisfied. This cuts across the argument sought to be made by the appellant that by virtue of the reference in s 93ZY to "all property", the term "particular property" in s 93ZY means "all property".[74] As the Explanatory Notes state in respect of Ch 2A:[75]

> "Importantly, the Bill provides the Supreme Court with the discretion to refuse to make the order if it is satisfied it is not in the public interest

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72 (1989) 168 CLR 210; [1989] HCA 61 at 216.

73 The Explanatory Notes at 5 thus state that: "The Bill provides that the effect of a serious drug offender confiscation order is that it forfeits all property of the person and all property that was gifted by the person in the six years before the person was charged with the qualifying offence, to the State".

74 TS 22.

75 *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill* 2012 (Qld), Explanatory Notes at 5.

> to so. The Bill also provides that the court may exclude property that would otherwise be forfeited under a serious drug offender confiscation order if it is satisfied it is in the public interest to do so…"

[70] Thirdly, the Ch 2A scheme specifically recognises the relevance of personal circumstances in relation to the conditions that may be imposed in respect of the restraining order, including conditions about making payments out of restrained property for, amongst other things, reasonable living business expenses of the prescribed respondent and reasonable living expenses of a dependant.[76] In those circumstances, it seems unlikely that personal circumstances would cease to be relevant when considering the making of a forfeiture order. The legislature's specific contemplation of personal circumstances as relevant to the terms of a restraining order make it unlikely that they should be considered to be clearly extraneous in relation to the exercise of the s 93ZZB(2) discretion.

[71] Fourthly, the context of s 93ZZB(2) within the statutory scheme is relevant. Unlike, the other schemes, there is no provision for exclusion of property that is lawfully acquired or not derived from illegal activity. The only basis on which a prescribed respondent may seek to limit the property subject to forfeiture is through the public interest considerations in s 93ZZB(2) and s 93ZZF(2). As the sole means by which a prescribed respondent can seek exclusion of property that is unconnected with criminal activity from confiscation, the effect of s 93ZZB(2) and s 93ZZF(2) is to provide for the protection of the prescribed respondent's private property from confiscation through the exercise of a general discretion. That necessarily imports into s 93ZZB(2) consideration of personal circumstances.

[72] Fifthly, each of the schemes under the Act is separate and none of the schemes are to be construed as limiting either of the other schemes, unless the Act otherwise expressly provides.[77] In that regard, it is to be noted that s 93ZZB(3) precludes the making of a serious drug offender confiscation order on the basis of the qualifying offence if a proceeds assessment order, unexplained wealth order or pecuniary penalty order has been made on the basis of illegal activity constituting the qualifying offence. Likewise, by s 93ZZN(4), if a serious drug offender confiscation order is made on the basis of the conviction of a person of a qualifying offence, no other order may be made under the Act on the basis of the illegal activity constituting the qualifying offence. However, if the appellant's approach were correct, it is difficult to see what attraction there would be to the Commission in proceeding under the more restrictive Ch 2 scheme, rather than the broader Ch 2A scheme, in respect of illegal activity that also constituted a qualifying offence.

[73] Senior counsel for Mr Thompson in his submissions put forward arguments based on issues to do with proportionality, that is, that in considering the public interest, the Court should ensure that any public benefit achieved by a serious drug offender confiscation order is not out of proportion to the detrimental effect of the order on the public interest. It was accepted that the concept of proportionally was rejected as a basis for constitutional invalidity of a cognate NT statutory scheme in *Emmerson*.[78] However, it was argued that the observations in *Emmerson* have no bearing on whether proportionality is a relevant consideration for the exercise of the discretion under s 93ZZB(2). Proportionality is a concept used in administrative law and has

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76 s 93O, s 93Q. A court may also make other orders in relation to a restraining order, including for payment of legal expenses: s 93T, 93V.

77 s 4(7).

78 (2014) 253 CLR 393; [2014] HCA 13 at 437-439 [80]-[85].

relevance in determining the constitutional validity of legislative enactments.[79] It is not of particular assistance in relation to the question of statutory interpretation to be determined in this case.

Conclusion

[74] As counsel for the respondent submitted, it must be accepted that parliament envisaged circumstances where, despite the preconditions of conviction of a qualifying offence and issue of a certificate, the Court would conclude that the making of the serious drug offender confiscation order would not be appropriate. The Act does not limit the matters that might be considered in assessing whether the making of the order is in the public interest. Whilst the Court must have regard to the subject matter, scope and purpose of the legislative scheme, limitation of the public interest to those objects would render the discretion created by s 93ZZB(2) redundant.

[75] The primary judge correctly identified and applied the relevant principles in determining what is meant by "public interest" in s 93ZZB(2). Her Honour was entitled to take into account matters personal to the respondent as well as the objects, scope and purpose of the Act, in determining that making the order was not in the public interest. The primary judge did not err in considering the personal circumstances of the respondent in exercising her discretion as part of the public interest under s 93ZZB(2). There is nothing in the objects of the Act which suggests her Honour's consideration of those factors was clearly extraneous. It was open to the primary judge to consider the appellant's personal circumstances in exercising the discretion conferred by s 93ZZB(2). The appellant has not demonstrated error in the exercise of the discretion.

Order

[76] In Appeal No 9368 of 2015, the appeal is dismissed with costs.

THOMPSON v STATE OF QUEENSLAND Appeal No 5534 of 2015

[77] On 12 March 2015, the appellant, Ronald Edward Thompson, was sentenced on his own plea for offences involving possession, production and trafficking of cannabis[80] and was sentenced to two years imprisonment suspended after three months.[81] The schedule of facts indicated that the appellant had grown cannabis and sold cannabis to a group of four friends for up to two years with sales of approximately $3,900 each year.[82] Thompson would use the excess income to buy alcohol or fuel.

[78] On the application of the State of Queensland, the primary judge ordered on 8 May 2015 that real property and a savings account in the name of the appellant be forfeited to the State (the forfeiture order). The real property is the appellant's residence.[83] The $14,000 in the savings account constituted the appellant's only savings.[84] His only remaining property comprised two vehicles, one of which was the subject of a chattel mortgage for about $40,000 and for which he was liable to pay $870 per month, and various items of plant and equipment related to his agricultural fencing

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79 As to the concept of proportionality, see *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18; *McCloy v New South Wales* (2015) 89 ALJR 857; [2015] HCA 34.

80 AB 28.

81 AB 21.

82 AB 23.

83 Affidavit of Ronald Edward Thompson at [12].

84 Affidavit of Ronald Edward Thompson at [9].

business.[85] He had been attempting to re-establish that business since his release from gaol on 11 June 2015.[86] It was submitted that the forfeiture of his only savings and main asset represented a real impediment to his rehabilitation.

[79] On the hearing of the appeal, the appellant sought leave to adduce further evidence about his personal and financial circumstances in order to argue, on the basis of that evidence and the decision in *State of Queensland v Deadman*,[87] that the making of the serious drug offender confiscation order against him was not in the public interest.

[80] Rule 766(1)(c) of the *Uniform Civil Procedure Rules* 1999 (Qld) permits this Court to receive further evidence on special grounds. The respondent accepted that, if the decision in *Deadman* was correct, matters relevant to the public interest (being his personal and financial circumstances) were not put before the primary judge, and were consequently not considered by his Honour. Further, it was not disputed that evidence of the appellant's personal and financial circumstances would, in that event, have an important impact on the result of the case.

[81] The respondent also conceded that if the further evidence was received, and the decision in *Deadman* was correct, it was open to the Court to be satisfied that the making of a serious drug offender confiscation order against the appellant was not in the public interest to the extent that it went beyond forfeiting the sum of $5,000 in the appellant's savings account that represented the benefit to the appellant of his offending.[88] The parties agreed that, if that conclusion were to be reached, it was open to this court pursuant to s 93ZZF(2) to exclude the property of the appellant that did not represent the proceeds of the offending.

[82] Given my view that the appeal in *Deadman* should be dismissed and that the criteria for the reception of the additional evidence are satisfied, leave ought to be given to adduce the further evidence. The primary judge having failed to have regard to the appellant's personal circumstances, the exercise of the discretion miscarried. It follows that para 4 of the order of the primary judge made on 8 May 2015 should be set aside. Bearing in mind the further evidence put before the Court, and the concessions made by the respondent, the discretion pursuant to s 93ZZF(2) should be exercised by making the following order as agreed by the parties. Pursuant to s 93ZZF(2) of the Act, all property of the appellant is to be excluded from para 3 of the order made by the primary judge on 8 May 2015, except $5,000 of the money standing to the credit of the appellant in the account as identified in the draft order provided.

Orders

[83] In Appeal No 5534 of 2015, the following orders should be made:

1. Leave to adduce further evidence is granted.

2. Paragraph 4 of the order made by the primary judge on 8 May 2015 is set aside.

3. Pursuant to s 93ZZF(2) of the *Criminal Proceeds Confiscation Act* 2002 (Qld), all property of the appellant is excluded from paragraph 3 of the order made by the primary judge on 8 May 2015, except $5,000 of the money standing to the credit of the appellant in the account as identified in the draft order provided.

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85 Affidavit of Ronald Edward Thompson at [11].
86 Affidavit of Ronald Edward Thompson at [9]-[10], [13].
87 [2015] QSC 241.
88 AB 13, line 5.

4. The respondent pay the appellant's costs of the appeal.

5. Paragraph 5 of the order made by the primary judge on 8 May 2015 is set aside.

[84] **BODDICE J:** I have read the reasons for judgment of Philippides JA. I agree with those reasons and with the proposed orders in each appeal.

[85] **BURNS J:** I agree with the reasons of, and the orders proposed by, Philippides JA.