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HOFMANN, MS: Sir, perhaps I can seek orders - now I've read the facts I can seek the orders required.

McCANN DCJ: So you seek a drug trafficker declaration?

HOFMANN, MS: I do, sir. And an order for destruction of the cannabis and cipseal bags.

McCANN DCJ: How many bags were there?

HOFMANN, MS: Look, I apologise, your Honour, I'm actually unable to discern that. There was at least one but I'm assuming there may have been more.

McCANN DCJ: Okay. Right. Thanks very much.

Now, as to the first of those, what do you say about the drug trafficker declaration, Mr Nigam?

NIGAM, MR: Can I say, your Honour, that it does seem to me to be bizarre and perverse that the State of Western Australia would be asking for a drug trafficker declaration in a matter in which they properly concede there was no trafficking and there was no commerciality to the transaction. However - - -

McCANN DCJ: Direct your correspondence to the Attorney-General of Western Australia.

NIGAM, MR: Yes. I've directed the correspondence to Mr McGrath the director and, of course, with the State - - -

McCANN DCJ: Were you here at court earlier this morning? We had a man who has been declared a drug trafficker, and he will lose \$500,000 worth of lawfully-acquired assets. And I've had to make the declaration. The legislation requires me to make an - - -

NIGAM, MR: Your Honour's hands are tied.

McCANN DCJ: - - - unjust order.

NIGAM, MR: Yes, absolutely.

McCANN DCJ: There is no justice - - -

NIGAM, MR: And I have to concede they're able to ask for it, they're able to apply for it, and I'm stuck - Mr Patten is stuck.

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McCANN DCJ: All right.

NIGAM, MR: There are - - -

HOFMANN, MS: Sir, may I say we have no discretion. The legislation requires us to make it.

McCANN DCJ: I know you don't. I know you don't. And let's just put that on the record, shall we? The executive are given no discretion.

Now, that being the case, I as a judicial officer am supposed to make a judicial decision ordering that he be declared a drug trafficker. In my respectful opinion and, with respect here as being directed to Parliament who have made these laws, I'm being required to fulfil a decision which a judge should not be required to do. These proceedings are being given the verisimilitude of a judicial hearing, when they're not.

The High Court has recently looked into this issue and although looking at legislation from a different State, made a decision that the making of orders of this kind is constitutional.

NIGAM, MR: Yes.

McCANN DCJ: So therefore, I shall make the order on the basis that there is more than three kilograms of cannabis seized. So your client is now a drug trafficker. All I am doing is what parliament has told me to do and - - -

NIGAM, MR: Yes, your Honour.

McCANN DCJ: - - - I have no discretion and this is not a judicial decision.

NIGAM, MR: Your Honour may be aware I have a bit of knowledge of criminal property confiscation - - -

McCANN DCJ: I thought you might.

NIGAM, MR: - - - matters and I accept the view, on one hand, that there is no discretion. However, because this has come up and if my friend is agreeable, I think that the correspondence I sent to the Director is probably relevant.

McCANN DCJ: Well, just before we do, is this relevant to the making of the order? In the previous case, I gave very brief reasons and I always do or want to do so in cases of

this kind because one of these days, one of these cases might find its way back to the High Court. After all, there has been no challenge from this State that I know of, has there? There was one in the system.

NIGAM, MR: Yes, there was - Emmerson went from the Northern Territory - - -

McCANN DCJ: Right.

NIGAM, MR: - - - and White and Bowers, Bowers was mine, went to the High Court. Bowers obviously was successful. White wasn't on what constitutes criminal use of crime property.

McCANN DCJ: But the legislation we're dealing with today has not been - - -

NIGAM, MR: Is drug trafficker.

McCANN DCJ: - - - has not been tested in the High Court, has it?

NIGAM, MR: No. And the issue is this, when the State say that they have no discretion, as your Honour of course will be aware, every day people are convicted in the criminal law courts of a confiscable, that's actually a word, offence which is an offence which carries a statutory penalty of two years or more imprisonment. So for example, an indecent assault does or an aggravated common assault or an unlawful fishing offence. All of those are confiscable offences.

So if the State wanted to, the State could go and do an evaluation on the property in which that crime took place and say, "The offender has now made criminal use of the crime property or the property in which the crime was committed", and therefore seek a substituted - it's called "CUPC", criminal property confiscation declaration against that person.

But the State, of course, doesn't do that. It exercises its discretion to not go and apply for criminal property confiscation declarations against certain people, even though the State could. The legislation allows them to do it because as I said, the test is whether the offence is punishable by two years or more imprisonment which is pretty close to most things.

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McCANN DCJ: That's confiscation, right? CUPC, as you call it?

NIGAM, MR: Yes.

McCANN DCJ: Here we're talking about a drug trafficker declaration - - -

NIGAM, MR: Yes, we are.

McCANN DCJ: - - - which has an automatic effect, does it not?

NIGAM, MR: It does in that it's more than three kilograms - - -

McCANN DCJ: No, no, no.

NIGAM, MR: - - - of cannabis.

McCANN DCJ: I'm not talking about how the order comes to be made. I'm talking about its consequences.

NIGAM, MR: Yes, it does.

McCANN DCJ: So you're talking about confiscation?

NIGAM, MR: Yes.

McCANN DCJ: That the State are talking about here is a drug trafficker declaration.

NIGAM, MR: Yes.

McCANN DCJ: No doubt, it will give him trouble - he'll have trouble getting into the United States with a declaration of that kind against his name.

NIGAM, MR: Yes.

McCANN DCJ: But is that the only ramification of being declared a drug trafficker? It's not, is it?

NIGAM, MR: No.

McCANN DCJ: It means that all his property lawfully obtained or otherwise is likely to forfeiture, correct?

NIGAM, MR: Anything he owns or has ever owned.

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McCANN DCJ: Correct.

NIGAM, MR: Yes, your Honour.

McCANN DCJ: Now that penalty is out of proportion to the criminality in most cases.

NIGAM, MR: Yes.

McCANN DCJ: It's certainly - but we're not allowed to take it into account. In the previous case, I gave some reasons which were to the effect that the order for him to be declared a drug trafficker was legal but unjust because I had no discretion and because the order had no bearing on the criminality or the consequences of the making of the order.

NIGAM, MR: Yes.

McCANN DCJ: So I've just put that on the record in case anyone ever wants to take one of these cases somewhere - - -

NIGAM, MR: Yes.

McCANN DCJ: - - - and the trial judge has of his own motion raised the issue. There's not much point someone taking a case to the High Court - - -

NIGAM, MR: No, of course. I - - -

McCANN DCJ: - - - if no one's ventilated in the court below.

NIGAM, MR: I've got to put this on the transcript.

McCANN DCJ: Yes. So you're putting it on the transcript in this case?

NIGAM, MR: Yes, I am.

McCANN DCJ: All right. And your argument is?

NIGAM, MR: My argument is that once they make the application, your Honour's bound.

McCANN DCJ: Yes.

NIGAM, MR: My argument is that the application in the circumstances of this particular case, notwithstanding they can make it because it's over three kilograms, but the

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manner in which they properly concede there was no commerciality - - -

McCANN DCJ: Okay, that's fine.

NIGAM, MR: - - - it would be - - -

McCANN DCJ: But once - - -

NIGAM, MR: - - - wrong.

McCANN DCJ: But one there's three kilograms - - -

NIGAM, MR: Yes.

McCANN DCJ: - - - does the State have a discretion whether or not it applies for a drug trafficker declaration?

NIGAM, MR: Yes, yes.

McCANN DCJ: And your argument is that their exercise of the discretion in this case is harsh and unconscionable.

NIGAM, MR: Yes, and it would be against the guidelines and good policy.

McCANN DCJ: All right. But that doesn't help me, does it?

NIGAM, MR: It doesn't, your Honour.

HOEMANN, MS: Sorry, sir, the State doesn't have a discretion. The State's required to seek the - - -

McCANN DCJ: Okay. Can you take me to the relevant provision, so we can get all this on the record and then move onto the sentencing?

HOEMANN, MS: Well, no, I can't, sir. But I did speak to Mr McGrath and the position is that we can't. We don't have a discretion because it would subvert the - - -

McCANN DCJ: All right.

HOEMANN, MS: - - - provisions of the Confiscations Act and that is the correct route that this matter should go. This is actually a civil application.

McCANN DCJ: Okay. The order will be made - people can argue about it in another place. I just want to place on the record my view that I am not making a judicial decision, that I'm making the order because the law requires me to make it because parliament have told me I must make it.

And in my opinion, it is unjust to make the order without a proper hearing into the merits of the making of the order. The legislation speaks of a drug trafficker. He's not to be sentenced today as a drug trafficker, so I'm being asked to use rubric and make orders which bear no relationship to the offending.

NIGAM, MR: Yes.

McCANN DCJ: So for those reasons, I make - that's obiter dicta.

NIGAM, MR: I've thought about this all night.

McCANN DCJ: My decision is based on the fact that I have no discretion. Now the matter's closed.

NIGAM, MR: Yes.

McCANN DCJ: If anyone wants to take the matter further they can, but it's been - that's on the record.

NIGAM, MR: Yes, your Honour.

McCANN DCJ: That's what the court's view is.

NIGAM, MR: Yes.

McCANN DCJ: It's not for me to criticise parliament how it goes about its business and I'm not doing so. I'm just saying parliament has given me no discretion and I've made the order.

NIGAM, MR: To close the matter, your Honour, can I say I did contemplate potentially applying to adjourn that, but I thought about it. There's no point. The state of the law allows them to do it and it's done now, so I'll move on.

McCANN DCJ: Yes, yes. It's for others to decide whether it's worth - - -

NIGAM, MR: It's for another time and another place.

McCANN DCJ: - - - taking any further and I'm not going to spend any more time on it.

NIGAM, MR: Your Honour has received my submissions as to sentence as well as the book of reports and references?

McCANN DCJ: Yes. Can we go - can you just tell me very briefly in summary what your position is as to the offending, so we get it on the record?

NIGAM, MR: The offending - and we say that we have evidence for this which is contained in the reports and the references. Mr Patten, of course, had a very, very serious cannabis addiction and the position is he's developed the addiction after he's gone to do the FIFO work up in Tom Price for three years where he developed a stress disorder and insomnia.

And erroneously, he ends up using cannabis to de-stress and help him sleep. He obviously should have gone to his general practitioner and got mirtazapine as he has done now which would help him sleep, but he didn't have the insight at the time and that developed into obviously an acute dependency.

He had five plants which were about a metre-and-a-half in height which he would strip and then smoke cannabis on his own. The cannabis in question would have lasted him about a year. He says a friend of his has previously come to his house and was going to again come in the near future and he would have shared a joint with the friend.

McCANN DCJ: Sorry, my pencil broke. I hope it didn't hit anyone.

NIGAM, MR: I might just let your Honour get another - - -

McCANN DCJ: No, no, sorry. No, everyone's looked up. It was just my pencil breaking. I'm sorry.

NIGAM, MR: So at nine point - this is quite bizarre, your Honour. Your Honour will see on the papers initially when the West Australian Police charged him, it's at 31 kilos. It's analysed down to nine kilos and then upon further analysis upon our request, it goes to 2.9 kilos.

McCANN DCJ: What does that represent? Is that all cannabis head?