IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No. M45 of 2015**
BETWEEN:

NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LIMITED (ACN 118 017 842)
First Plaintiff

MIRANDA MARIA BOWDEN
Second Plaintiff

AND

NORTHERN TERRITORY OF AUSTRALIA
Defendant

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

PART I: SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: BASIS OF INTERVENTION

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

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. See Part VII of the Plaintiffs' submissions.

PART V: SUBMISSIONS

5. The Attorney General for Western Australia intervenes to address the following matters. *First*, whether the impugned provisions and aspect of Division 4AA

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confers on the Northern Territory executive government an exclusively judicial power to detain and is thereby invalid[1]. *Second*, whether Division 4AA offends the principle in *Kable* by "intruding on" the institutional integrity of a Ch III court by "usurping or undermining" such court and is thereby invalid[2]. No submissions are put in respect of the following: the First Plaintiff's standing; whether "the separation of powers enshrined in Ch III of the *Constitution* limits the legislative power of the [Commonwealth] Parliament under s.122 of the *Constitution*"[3]; whether, if the answer to this is yes, the legislative power of the Northern Territory is thereby, and co-extensively, limited[4].

10 6. The validity of Division 4AA of Part VII of the *Police Administration Act* (NT) can only be considered once the legal and practical operation of its provisions are understood, which requires an appreciation of the operation of Divisions 3 and 6 of the *Police Administration Act*. Division 4AA operates, in effect, as a subset of Divisions 3 and 6.

Divisions 3 and 6 of Part VII of the *Police Administration Act*

7. Division 3 of Part VII of the *Police Administration Act* operates with Division 6. There is no challenge in this matter to the validity of any of the provisions of Divisions 3 or 6.

8. Section 123 (in Division 3) empowers a police officer to arrest and take into
20 custody, without the need for a warrant, any person who the officer believes on reasonable grounds has committed, is committing or is about to commit an offence.

9. For the purpose of s.123 "offence" is defined in s.116(6), and includes all offences, indictable and otherwise[5]. As will come to be explained, when considering Division 4AA, an infringement notice offence, which is the integer of operation of that Division, is an offence for the purpose of s.123.

10. In the circumstance of an arrest and custody under s.123, the notification type provisions of s.127 are to be complied with and thereafter, the process prescribed by Division 6, and in particular ss.137-138A, is to be followed.

11. The principal operative provision of Division 6 is s.137(2), but central is s.137(1).
30 Overarching all of Division 6 is the requirement of s.137(1); to bring a person arrested and detained before a justice or a court "as soon as is practicable after being taken into custody" unless sooner bailed or released.

12. Section 137(2) empowers police to detain a person arrested under s.123 for a reasonable period (determined having regard to s.138) for questioning or to enable

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[1] Plaintiffs' Submissions at [41].
[2] Plaintiffs' Submissions at [54].
[3] See Plaintiffs' Submissions at [2(a)].
[4] See Plaintiffs' Submissions at [2(a)].
[5] "A reference in this Part to an offence shall, unless the contrary intention appears, include a reference to a crime, a felony, a misdemeanour and any offence triable summarily and shall include an offence against a law of the Commonwealth or of the Territory".

further investigation in order to obtain evidence in relation to an offence[6]. An offence for the purpose of s.137(2) includes an infringement notice offence, but s.137(2) applies to all offences.

13. Section 137(2) is subject to s.137(3), which limits the power under s.137(2) to detain to the following two circumstances. *First*, where evidence is sought in relation to the offence for which the person was arrested, that offence must carry a maximum penalty of imprisonment[7]. *Second*, where evidence is sought in relation to an offence for which the person was not arrested, that offence must carry a maximum penalty of 5 years imprisonment or more[8].

14. As will come to be explained, some infringement notice offences carry a maximum penalty of imprisonment, in terms of s.137(3)(a) and so detention following arrest for an infringement notice offence can, *prima facie*, be detention pursuant to s.137 (in Division 6) or detention pursuant to s.133AB (in Division 4AA). This interaction between Divisions 3 and 6, on the one hand, and Divisions 4AA and 3 and 6, on the other, is explained below[9].

Division 4AA (and 3 and 6) of Part VII of the *Police Administration Act*

15. Division 4AA commences its operation following arrest and detention under s.123. This is the only relevance of Division 3 to the Division 4AA regime.

16. Division 4AA operates with, or within the rubric of, Division 6.

17. Section 133AB(1) conditions the operation of Division 4AA. The Division only applies to those arrested in respect of an infringement notice offence. Section 133AB(1) also makes plain the purpose of Division 4AA. Division 4AA qualifies the operation of s.137 (in respect of those arrested and detained under s.123) where the offence is an infringement notice offence. So, Divisions 3 and 6 operate wholly separately from Division 4AA - in respect of offences that are not infringement notice offences.

18. The operation of s.133AB with s.137 (in Division 6) is best understood by first appreciating the different operation of s.137 in respect of offences that are not

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[6] This power is not novel. Legislation in other Australian jurisdictions empowers detention of arrested persons for questioning or investigation. See *Crimes Act 1914* (Cth) ss.23C-23DA; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss.114-121; *Police Powers and Responsibilities Act 1997* (Qld) ss.398-411; *Summary Offences Act 1953* (SA) s.78; *Criminal Law (Detention and Interrogation) Act* 1995 (Tas) s.4; *Crimes Act 1958* (Vic) ss.464A-464B; *Criminal Investigation Act 2006* (WA) ss.140-143.

[7] Section 137(3)(a).

[8] Section 137(3)(b).

[9] Section 138A might also be noted. There is some unhappy imprecision in the interaction between s.138A and s.137. It must be supposed, by the use of the words in s.138A "despite s.137", that s.138A is an exception to s.137, or operates in a field distinct from that of s.137. It must also be supposed that, although s.138A is expressed to apply to person "under arrest", it applies to a person arrested and taken into custody under s.123 who is intoxicated. Section 138A(2) provides that a person arrested and taken into custody under s.123 who is intoxicated can be held without charge until they 'sober up'. There are likely some complexities to the interaction between s.138A and Division 4 of Part VII of the Act, but these complexities are not relevant to this matter.

infringement notice offences and then comparing this to the operation of s.133AB *re* infringement notice offences.

19. A person arrested and detained *re* an offence that is not an infringement notice offence must be either: released or bailed as contemplated by s.137(1); or, brought before a justice or a court, as required by s.137(1) as soon as is practicable. Either of these courses could take longer than 4 hours. In places like the Northern Territory (and Western Australia), the period of lawful detention under s.137(1) will often depend on the time and location of arrest and the next available court sitting dates. In *R v Collett*[10], it was held that to take a person arrested at 6:45am on a Saturday before a magistrate on the following Tuesday morning (after a Monday public holiday) was to do so "as soon as practicable". In *R v Jako*[11] it was held that a person arrested at 6:40am on Thursday morning should have been taken before a court at 10:00am that day. This was "as soon as practicable" because the court was sitting and located next to the police station.

20. By reason of s.137(2) and (3), if the (non-infringement notice) offence for which the person is arrested carries a maximum penalty of imprisonment, or police believe on reasonable grounds that the person is involved in any other offence that carries a maximum penalty of 5 years imprisonment or more, then the person can be detained for a reasonable period to be questioned or to allow further investigation of such an offence. At the end of this reasonable period, determined having regard to s.138, they must be brought before a justice or a court, released or bailed. Again, this period could be longer than 4 hours. In *R v CS*[12] the Court found a period of 15 hours 20 minutes would have been a "reasonable period". In *R v Grimley*[13] the Court found a period of 18 hours to be a "reasonable period".

21. *Prima facie*, a person arrested and detained *re* an offence that is an infringement notice offence – within 4 hours (unless intoxicated[14]) must be either: released unconditionally; released and issued with the infringement notice; released on bail; or (under s.137) be the subject of a decision to bring the person before a justice or a court[15]. This final aspect of s.133AB(3)(d) requires an understanding that, if a person is to be brought before a justice or a court, then within the 4 hour period the police officer must have decided to not release and not to bail and not to issue an infringement notice and to bring the person before a justice. The person need not be brought before a justice within 4 hours, but a decision must be made to do this within the 4 hour period.

22. As with the operation of s.137(1) in respect of those arrested and detained *re* offences that are not infringement notice offences, central to the combined operation of Division 4AA and Division 6 is s.133AB(3)(d) which involves the bringing of a person before a justice or a court.

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[10] *R v Collett* [2011] NTSC 87 at [27].
[11] *R v Jako* [1999] NTSC 46 at [43].
[12] *R v* CS [2012] NTSC 94 at [39], with reference to the chronology at [8].
[13] *R v Grimley* [1994] NTSC 64; (1994) 121 FLR 236 at 255.
[14] Section 133AB(2)(b).
[15] Section 133AB(3)(a)-(d).

23. This *prima facie* position noted at [21], and the 4 hour time limit, 'can only be exceeded' *re* an infringement notice offence in two circumstances.

24. *First*, some infringement notice offences carry a maximum penalty of imprisonment[16], others do not. If a person is arrested and detained under s.123 *re* an infringement notice offence that carries a maximum penalty of imprisonment, ss.133AB(2) and (3) and ss.137(2) and (3)(a) interact. Sections 137(2) and (3)(a) empower a police officer to hold a person for a reasonable period (which might be longer than 4 hours) to enable questioning or further investigation where the infringement notice offence for which the person was arrested carries a maximum penalty of imprisonment.

25. *Second*, if a person is arrested for an infringement notice offence (whether it carries a maximum penalty of imprisonment or not), they may be held for a reasonable period to enable questioning or further investigation in relation to another offence, where that offence carries a maximum penalty of 5 years imprisonment or more. This is by reason of ss.137(2) and 137(3)(b).

The effect of this

26. So (properly) understood, Division 4AA interacts with Division 6, after arrest, to the following effect. When a person arrested for an infringement notice offence is detained as contemplated by s.137(3)(a) or (b), the person is not detained pursuant to s.133AB(2). Rather, the person is held pursuant to s.137(2), by reason of s.137(3)(a) or (b). The detention is, in reality and effect, pursuant to s.137. It is not detention pursuant to Division 4AA. Such detention takes place within the context of the requirement of s.137(1) that the person be brought before a justice or a court of competent jurisdiction as soon as is practicable (unless sooner bailed or released).

27. Detention pursuant to Division 4AA only occurs where a person is arrested and detained for an infringement notice offence and they are not required for questioning or to allow further investigation under s.137(2) for either of the purposes prescribed by s.137(3)(a) or (b).

The purpose of detention where it is pursuant to Division 4AA

28. As noted, when a person arrested for an infringement notice offence is detained for a purpose stated in s.137(3)(a) or (b), the person is not detained pursuant to s.133AB(2). When a person is detained solely pursuant to s.133AB(2), s.133AB(4) empowers a police officer to question the person about the infringement notice offence or any other offence (irrespective of whether the maximum penalty includes imprisonment), but only for the purpose of deciding how to deal with the person under s.133AB(3).

29. Even though a person detained pursuant to s.133AB(2) may be questioned, the person can only be questioned and detained to enable a police officer to determine

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[16] See SCB Attachment E at 164-166: *Summary Offences Act* ss.47, 53(1)(a), 53(7), 55, 82(1) and 82(2); *Liquor Act* ss.75(1) and 101AE(1); *Misuse of Drugs Act* ss.7(1)&(2)(c) and 9(1) & (2)(f)(i).

which of the four options available in s.133AB(3) will be exercised. One such option is, of course, that in s.133AB(3)(d).

The relevant purpose of Division 4AA having regard to the purpose of any detention and the 4 hour time limit

30. From this, it emerges that the purpose of Division 4AA is to require police officers, who arrest people for infringement notice offences, who are otherwise not detained under s.137(2), to either; decide to bring the person before a justice or a court for that offence or another offence, issue an infringement notice for it, or release the person (on bail or unconditionally) - within 4 hours.

31. The purpose of all of this is to expedite the time required to make one of the decisions required by s.133AB(3) in respect of those arrested for infringement notice offences[17]. This must all happen within 4 hours.

32. This purpose of Division 4AA is confirmed by the relevant parliamentary debate and the reference to the desire to provide for a faster, more efficient means of dealing with people arrested and detained for minor, primarily 'public order' type, offences[18].

A false issue

33. It is helpful to note and address a false issue in all of this. Assume that a person is arrested and detained for an infringement notice offence that does not carry a penalty of imprisonment. So, detention under s.137(2) for the reason of s.137(3)(a) is not open. After 1 hour of detention the officer knows that the person is not required for questioning in relation to another 'serious offence'[19]; and so detention under s.137(2) for the reason of s.137(3)(b) is not open. At the same time, after such 1 hour of detention, the officer resolves to (say) release the person unconditionally, in terms of s.133AB(3)(a), but instead of releasing the person, continues detention for a further three hours.

34. An issue would arise if Division 4AA were construed so as to permit the continued detention of a person for up to four hours, notwithstanding that a police officer has already made a decision in terms of s.133AB(3).

35. Division 4AA, properly construed, does not permit ongoing detention in this circumstance. It is not doubted (by the Intervener) that the principle of legality is relevant to construction of Division 4AA; that it compels that Division 4AA be construed to avoid or minimise encroachment upon important common law rights and freedoms[20], and that personal liberty is one such important common law right

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[17] Or, strictly, for those arrested for infringement notice offences that do not carry a term of imprisonment (s.137(3)(a)), or where the person is not required for questioning in respect of other serious offences (s.137(3)(b)).

[18] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 2014 at 12.

[19] This is shorthand for an offence described in s.137(3)(b).

[20] *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1 at 46-47 (French CJ); *WBM v Chief Commissioner of Police (Vic)* [2012] VSCA 159; (2012) 230 A Crim R 322 at 345 [97] (Warren CJ, with Hansen JA agreeing at 352 [133]); cf *Lee v New South Wales Crime Commission* [2013] HCA 39; (2013) 251 CLR 196 at 310-311 [314] where Gageler and Keane JJ note that the principle at most can have

and freedom[21]. It is not doubted (by the Intervener) that it follows from this that Division 4AA is to be construed to permit nothing more than is required by effecting its statutory purpose[22]. In respect of detention only under s.133AB(2) (and not s.137), the purpose of Division 4AA is to empower detention so as to enable a decision to be made as to how the person detained is to be dealt with under s.133AB(3) - and to so deal with that person. The power to detain under s.133AB(2) only extends to the time necessary to effect that purpose. Any further detention is unlawful. So, in the circumstance stated at [34], the further 3 hours detention would be unlawful.

10 **The issue**

36. There is no challenge in this matter to the validity of s.123; that is, the power to arrest without warrant. Similarly, there is no challenge to the validity of Divisions 3 or 6, or to the operation of Division 6 other than in its operation with Division 4AA.

37. As explained above, when a person arrested under s.123 for an infringement notice offence is detained as contemplated by s.137(2) for a purpose set out in s.137(3)(a) or (b), the person is not detained pursuant to s.133AB(2). Rather, the person is held pursuant to s.137(2), by reason of s.137(3)(a) or (b). The detention is, in reality and effect, pursuant to s.137(2), and it is not detention pursuant to Division 4AA.

20 38. As is explained above, the purpose of Division 4AA is to require police officers, who arrest people for infringement notice offences that do not carry a term of imprisonment (s.137(3)(a)), and where the person is not required for questioning in respect of other serious offences (s.137(3)(b)) to expedite, by putting a maximum limit of 4 hours on, the time that they can take to do one of the four things in s.133AB(3), on an understanding that the thing to be done in respect of s.133AB(3)(d) is to decide whether to bring the person before a justice rather than actually bring them..

39. On this understanding, the Plaintiffs' challenge is to the validity of provisions of the *Police Administration Act* that limit a more extensive, unchallenged power of
30 detention exercisable under the Act.

40. The Plaintiffs' contentions are likely (with respect) premised upon a misunderstanding of the actual operation of Division 4AA. Section 133AB compels either release or bail or the issue of an infringement notice or the making of a decision to bring a person before a justice, for less important infringement notice offences, within the prescribed time. The only circumstance in which a

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limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked.

[21] See for example *Minister for Immigration and Multicultural Affairs v Al Masri* [2003] FCAFC 70; (2003) 126 FCR 54 at 76-77 [86], citing *Williams v The Queen* [1986] HCA 88; (1986) 161 CLR 278 at 292 (Mason and Brennan J).

[22] *Mastwyk v Director of Public Prosecutions* [2010] VSCA 111; (2010) 27 VR 92 at 103 [45] (Nettle JA); see also *Bales v Parmeter* (1935) 35 SR (NSW) 182 at 188-189 (Jordan CJ); *Williams v The Queen* [1986] HCA 88; (1986) 161 CLR 278 at 307 (Wilson and Dawson JJ).

person cannot be released from detention (either unconditionally or bailed or with an infringement notice) within 4 hours is if an actual decision has been made to actually bring the person before a justice. If this decision has been made, the person must be brought before the justice as soon as practicable.

The contended for bases of invalidity

41. Invalidity is contended for by the Plaintiffs on a number of bases. The (only) two bases addressed (by the Intervener) are; that the challenged aspect of Division 4AA confers on the Northern Territory executive government an exclusively judicial power to detain and is thereby invalid[23]; and that Division 4AA offends the principle in *Kable* by "intruding on" the institutional integrity of a Ch III court by "usurping or undermining" such court and is thereby invalid[24].

42. The Intervener submits that both contentions should be rejected.

The Plaintiffs' first contention

43. This contention can be disposed of without traversing with any elaboration the rather complex terrain that is the decisions of this Court that have followed *Chu Kheng Lim*[25].

44. Detention in the manner and for the purpose of Division 4AA is neither penal nor punitive[26]. Similarly, to the extent that the power in s.133AB(4) has the potential to give the purpose of detention the character of assisting with criminal investigation, such a purpose also cannot be said to be penal or punitive. That issue was considered in *R v McKay*[27] where Crispin J held that the power in s.23C of the *Crimes Act 1914* (Cth) to detain a person for 4 hours (or 2 hours in the case of a minor or Aboriginal person or Torres Strait Island person) for the purpose of investigation was constitutionally permissible and consistent with the principle in *Chu Kheng Lim*. Detention in the manner and for the purpose of Division 4AA is

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[23] Plaintiffs' Submissions at [41].
[24] Plaintiffs' Submissions at [54].
[25] *Chu Kheng Lim v Minister for Immigration* [1992] HCA 64; (1992) 176 CLR 1. Subsequent decisions considering this issue are *Kruger v Commonwealth* [1997] HCA 27; (1997) 190 CLR 1 at 110 (Gaudron J); *Re Woolley; Ex parte Applicants M276/2003* [2004] HCA 49; (2004) 225 CLR 1 at 24-26 [57]-[60] (McHugh J); *Al-Kateb v Goodwin* [2004] HCA 37; (2004) 219 CLR 562 at 648 [257]-[258] (Hayne J); *Plaintiff M76 v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] HCA 53; (2013) 251 CLR 322 at 370 [140]-[141] (Crennan, Bell and Gageler JJ). See generally, James Renwick, 'The Constitutional Validity of Preventive Detention' in Andrew Lynch, Edwina MacDonald and George Williams (eds) *Law and Liberty in the War on Terror* (The Federation Press, 2007) 127-135; Stephen McDonald, 'Involuntary Detention and the Separation of Judicial Power' (2007) 35(1) *Federal Law Review* 25; Rebecca Ananian-Walsh, 'Preventative Detention Orders and the Separation of Judicial Power' (2015) 38 *University of New South Wales Law Journal* 756; Jeffrey Steven Gordon, 'Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-Criminal Detention' (2012) 36 *Melbourne University Law Review* 41.
[26] *Chu Kheng Lim v Minister for Immigration* [1992] HCA 64; (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).
[27] *R v McKay* [1998] ACTSC 128; (1998) 148 FLR 212 at 216.

properly characterised as that "of a person accused of crime to ensure that he or she is available to be dealt with by the courts"[28].

45. Detention to so ensure does not require that a person be, in fact, brought before a justice or a court. If a person is arrested and detained for the purpose of charging the person and bringing them before a justice, but, after arrest, it is decided to not charge, the detention is not *ipso facto* unlawful. A regime of arrest and detention that logically permits such a result is not, by reason of such possibility, penal or punitive. It is difficult to imagine a regime of arrest and detention that prohibits release without charge.

46. Detention of a person, after a lawful arrest, for a time (that is expressly limited and has a maximum duration) during which a police officer is to determine whether the person is to be brought before a justice or issued with an infringement notice or released, is properly characterised as detention of the person "to ensure that he or she is available to be dealt with by the courts"[29]. This must be so, unless the requirement for validity that detention be "to ensure that a person is available to be dealt with by the courts" means that, unless a person is actually brought before a court, any detention is unlawful.

47. The Defendant addresses the operation of the *Fines and Penalties (Recovery) Act* (NT)[30]. As it is understood, every infringement notice offence, for the purpose of Division 4AA of the *Police Administration Act*, can be commenced by either an infringement notice, under s.9 of the *Fines And Penalties (Recovery) Act*, or by a "notice requiring the person to appear before the Court in respect of the offence", in terms of s.133B of the *Police Administration Act*. Even where a police officer issues an infringement notice under s.9 of the *Fines and Penalties (Recovery) Act* the defendant can elect to have the matter the subject of the notice dealt with by a court[31].

48. Where a person is detained, and notice in terms of s.133B of the *Police Administration Act* is issued, such detention is *prima facie*, though almost certainly, within the *Chu Kheng Lim* exception[32].

49. Where a person is arrested lawfully and an infringement notice (as opposed to notice in terms of s.133B of the *Police Administration Act*) is then issued, detention prior to a decision being made to issue the infringement notice is likewise, and for the same reason, within this same *Chu Kheng Lim* exception.

50. The only qualification to this is that acknowledged above as deriving from the principle of legality. Detention "to ensure" that a person "is available to be dealt with by the courts" is only lawful until it is decided that a person is to be dealt with by the courts or not. In this way, to the extent that a test of proportionality applies

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[28] *Chu Kheng Lim v Minister for Immigration* [1992] HCA 64; (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ).
[29] *Chu Kheng Lim v Minister for Immigration* [1992] HCA 64; (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ).
[30] See, Defendant's Submissions at [33].
[31] *Fines And Penalties (Recovery) Act* s.21; Defendant's Submissions at [33].
[32] That is, "to ensure that he or she is available to be dealt with by the courts"; *Chu Kheng Lim v Minister for Immigration* [1992] HCA 64; (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ).

to the *Chu Kheng Lim* exceptions[33], the detention in s.133AB(2) is 'reasonably capable of being seen as necessary' to achieve the purpose of the detention.

51. On this understanding, and also for the reasons advanced by the Defendant[34], the contention that Division 4AA confers on the Northern Territory executive government an exclusively judicial power of detention should be rejected.

The Plaintiffs' second contention

52. This contention is that Division 4AA offends the principle in *Kable* by compromising the institutional integrity of the Supreme Court of the Northern Territory by "usurping or undermining" it. The usurpation is contended to be that Division 4AA precludes the real possibility of a person detained from approaching the court during the period of detention.

53. To the submissions of the Defendant in response to this can be added one further. For this submission it can be accepted that Division 4AA does preclude the real possibility of a person detained from approaching the Supreme Court of the Northern Territory during the period of detention to seek (presumably) an order for release or a mandamus to compel the police to exercise power under s.133AB and do one or other of the things in s.133AB(3)(a)-(d), or some similar type relief.

54. The reason why Division 4AA realistically precludes the possibility of a detainee seeking relief from the Supreme Court is that the maximum time period for detention under Division 4AA, of 4 hours, is so short. The logic of the Plaintiffs' contention is that the less time that a police officer has to make a decision to do one of the four things in s.133AB(3), and so the less time that a person can be detained, the greater is the compromise of the institutional integrity of the Supreme Court of the Northern Territory. The contention compels the notion that the institutional integrity of the Supreme Court of the Northern Territory can be compromised by denying it power to do something that it could never realistically do. There is nothing in the decisions of this Court, applying or relying upon the *Kable* principle, that would support such an extension of its presently understood operation.

55. Further to this, and in any event; nothing in Division 4AA precludes or limits the power of the Supreme Court of the Northern Territory to make an appropriate declaration as to the lawfulness of detention or determine a civil action (say) for false imprisonment or assault in the event that any detention was found to be unlawful. Although any such action could only realistically be brought, and any such relief granted, after the maximum 4 hour period of detention prescribed by Division 4AA has ended, there is no denial or preclusion of an exercise of judicial power in respect of such detention.

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[33] Although it is unnecessary to resolve for present purposes, the following decisions have raised doubt as to the presence of a proportionality limb in the context of the principle established in *Chu Kheng Lim*; see *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562 at 648 [256] (Hayne J, with Heydon J agreeing at 662-663 [303]); *Re Woolley; Ex parte Applicants M276/2003* [2004] HCA 49; (2004) 225 CLR 1 at 32-33 [77]-[79] (McHugh J); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 384-385 [205]-[207] (Kiefel and Keane JJ).

[34] Relevantly, see Defendant's Submissions at [36]-[41].

56. For this additional reason, in addition to those advanced by the Defendant, this contention should be rejected.

57. Questions 1(a) and 1(b) posed in the Special Case should both be answered no.

PART VI: LENGTH OF ORAL ARGUMENT

58. It is estimated that the oral argument for the Attorney General for Western Australia will take no more than 20 minutes.

10 Dated: 13 August 2015

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